IN THE MATTER OF THE *JUDGES ACT*, R.S.C. 1985, c. J-1

2020 JUDICIAL COMPENSATION AND BENEFITS COMMISSION

JOINT BOOK OF DOCUMENTS
VOLUME I OF II

March 29, 2021

Pierre Bienvenu, Ad. E.
Jean-Simon Schoenholz
Norton Rose Fulbright Canada LLP

Andrew Lokan
Paliare Roland Rosenberg Rothstein LLP

Christopher Rupar
Kirk G. Shannon
Samar Musallam
Attorney General of Canada

Azim Hussain
NOVAlex Law Firm Inc.

Counsel for the Canadian Superior Courts Judges Association and the Canadian Judicial Council

Counsel for the Federal Court Prothonotaries

Counsel for the Government of Canada

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CANADA

A Consolidation of

THE CONSTITUTION ACTS 1867 to 1982

Current to January 1, 2021

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Codification administrative des

LOIS CONSTITUTIONNELLES DE 1867 à 1982

À jour au 1er janvier 2021

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

VII. Judicature

Appointment of Judges

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

Selection of Judges in Ontario, etc.

97 Until the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and the Procedure of the Courts in those Provinces, are made uniform, the Judges of the Courts of those Provinces appointed by the Governor General shall be selected from the respective Bars of those Provinces.

Selection of Judges in Quebec

98 The Judges of the Courts of Quebec shall be selected from the Bar of that Province.

Tenure of office of Judges

99 (1) Subject to subsection (2) of this section, the judges of the superior courts shall hold office during good behaviour, but shall be removable by the Governor General on address of the Senate and House of Commons.

Termination at age 75

(2) A judge of a superior court, whether appointed before or after the coming into force of this section, shall cease to hold office upon attaining the age of seventy-five years, or upon the coming into force of this section if at that time he has already attained that age.(53)

Salaries, etc., of Judges

100 The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada. (54)

General Court of Appeal, etc.

101 The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.(55)

VII. Judicature

Nomination des juges

96 Le gouverneur-général nommera les juges des cours supérieures, de district et de comté dans chaque province, sauf ceux des cours de vérification dans la Nouvelle-Écosse et le Nouveau-Brunswick.

Choix des juges dans Ontario, etc.

97 Jusqu'à ce que les lois relatives à la propriété et aux droits civils dans Ontario, la Nouvelle-Écosse et le Nouveau-Brunswick, et à la procédure dans les cours de ces provinces, soient rendues uniformes, les juges des cours de ces provinces qui seront nommés par le gouverneur-général devront être choisis parmi les membres des barreaux respectifs de ces provinces.

Choix des juges dans Québec

98 Les juges des cours de Québec seront choisis parmi les membres du barreau de cette province.

Durée des fonctions des juges

99 (1) Sous réserve du paragraphe (2) du présent article, les juges des cours supérieures resteront en fonction durant bonne conduite, mais ils pourront être révoqués par le gouverneur général sur une adresse du Sénat et de la Chambre des Communes.

Cessation des fonctions à l'âge de 75 ans

(2) Un juge d'une cour supérieure, nommé avant ou après l'entrée en vigueur du présent article, cessera d'occuper sa charge lorsqu'il aura atteint l'âge de soixante-quinze ans, ou à l'entrée en vigueur du présent article si, à cette époque, il a déjà atteint ledit âge.(53)

Salaires, etc. des juges

100 Les salaires, allocations et pensions des juges des cours supérieures, de district et de comté (sauf les cours de vérification dans la Nouvelle-Écosse et le Nouveau-Brunswick) et des cours de l'Amirauté, lorsque les juges de ces dernières sont alors salariés, seront fixés et payés par le parlement du Canada.(54)

Cour générale d'appel, etc.

101 Le parlement du Canada pourra, nonobstant toute disposition contraire énoncée dans la présente loi, lorsque l'occasion le requerra, adopter des mesures à l'effet de créer, maintenir et organiser une cour générale d'appel pour le Canada, et établir des tribunaux additionnels pour la meilleure administration des lois du Canada. (55)

CONSTITUTION ACT, 1982 [80]

PART I

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

GUARANTEE OF RIGHTS AND FREEDOMS

Rights and freedoms in Canada

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

FUNDAMENTAL FREEDOMS

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

(*a*) freedom of conscience and religion;

(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(*c*) freedom of peaceful assembly; and

(*d*) freedom of association.

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[80] **Enacted as Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.), which came into force on April 17, 1982. The *Canada Act 1982*, other than Schedules A and B thereto, reads as follows:**

An Act to give effect to a request by the Senate and House of Commons of Canada

Whereas Canada has requested and consented to the enactment of an Act of the Parliament of the United Kingdom to give effect to the provisions hereinafter set forth and the Senate and the House of Commons of Canada in Parliament assembled have submitted an address to Her Majesty requesting that Her Majesty may graciously be pleased to cause a Bill to be laid before the Parliament of the United Kingdom for that purpose.

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. The *Constitution Act, 1982* set out in Schedule B to this Act is hereby enacted for and shall have the force of law in Canada and shall come into force as provided in that Act.

2. No Act of the Parliament of the United Kingdom passed after the *Constitution Act, 1982* comes into force shall extend to Canada as part of its law.

3. So far as it is not contained in Schedule B, the French version of this Act is set out in Schedule A to this Act and has the same authority in Canada as the English version thereof.

4. This Act may be cited as the *Canada Act 1982*.

Limitation

(3) The rights specified in subsection (2) are subject to

(*a*) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and

(*b*) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

Affirmative action programs

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

LEGAL RIGHTS

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Search or seizure

8. Everyone has the right to be secure against unreasonable search or seizure.

Detention or imprisonment

9. Everyone has the right not to be arbitrarily detained or imprisoned.

Arrest or detention

10. Everyone has the right on arrest or detention

(*a*) to be informed promptly of the reasons therefor;

(*b*) to retain and instruct counsel without delay and to be informed of that right; and

(*c*) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

Proceedings in criminal and penal matters

11. Any person charged with an offence has the right

(*a*) to be informed without unreasonable delay of the specific offence;

(*b*) to be tried within a reasonable time;

(*c*) not to be compelled to be a witness in proceedings against that person in respect of the offence;

(*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(*e*) not to be denied reasonable bail without just cause;

(*f*) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

(*g*) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

(*h*) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

(*i*) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

Treatment or punishment

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Self-crimination

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

Interpreter

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Equality Rights

Equality before and under law and equal protection and benefit of law

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

LOI CONSTITUTIONNELLE DE 1982 [80]

PARTIE I

CHARTE CANADIENNE DES DROITS ET LIBERTÉS

Attendu que le Canada est fondé sur des principes qui reconnaissent la suprématie de Dieu et la primauté du droit :

GARANTIE DES DROITS ET LIBERTÉS

Droits et libertés au Canada

1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

LIBERTÉS FONDAMENTALES

Libertés fondamentales

2. Chacun a les libertés fondamentales suivantes :

a) liberté de conscience et de religion;

b) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;

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[80] **Édictée comme l'annexe B de la *Loi de 1982 sur le Canada*, 1982, ch. 11 (R.-U.), entrée en vigueur le 17 avril 1982. Texte de la *Loi de 1982 sur le Canada*, à l'exception de l'annexe B :**

ANNEXE A — SCHEDULE A

Loi donnant suite à une demande du Sénat et de la Chambre des communes du Canada

Sa Très Excellente Majesté la Reine, considérant :

qu'à la demande et avec le consentement du Canada, le Parlement du Royaume-Uni est invité à adopter une loi visant à donner effet aux dispositions énoncées ci-après et que le Sénat et la Chambre des communes du Canada réunis en Parlement ont présenté une adresse demandant à Sa Très Gracieuse Majesté de bien vouloir faire déposer devant le Parlement du Royaume-Uni un projet de loi à cette fin,

sur l'avis et du consentement des Lords spirituels et temporels et des Communes réunis en Parlement, et par l'autorité de celui-ci, édicte :

1. La *Loi constitutionnelle de 1982*, énoncée à l'annexe B, est édictée pour le Canada et y a force de loi. Elle entre en vigueur conformément à ses dispositions.

2. Les lois adoptées par le Parlement du Royaume-Uni après l'entrée en vigueur de la *Loi constitutionnelle de 1982* ne font pas partie du droit du Canada.

3. La partie de la version française de la présente loi qui figure à l'annexe A a force de loi au Canada au même titre que la version anglaise correspondante.

4. Titre abrégé de la présente loi : *Loi de 1982 sur le Canada.*

Affaires criminelles et pénales

11. Tout inculpé a le droit :

a) d'être informé sans délai anormal de l'infraction précise qu'on lui reproche;

b) d'être jugé dans un délai raisonnable;

c) de ne pas être contraint de témoigner contre lui-même dans toute poursuite intentée contre lui pour l'infraction qu'on lui reproche;

d) d'être présumé innocent tant qu'il n'est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un procès public et équitable;

e) de ne pas être privé sans juste cause d'une mise en liberté assortie d'un cautionnement raisonnable;

f) sauf s'il s'agit d'une infraction relevant de la justice militaire, de bénéficier d'un procès avec jury lorsque la peine maximale prévue pour l'infraction dont il est accusé est un emprisonnement de cinq ans ou une peine plus grave;

g) de ne pas être déclaré coupable en raison d'une action ou d'une omission qui, au moment où elle est survenue, ne constituait pas une infraction d'après le droit interne du Canada ou le droit international et n'avait pas de caractère criminel d'après les principes généraux de droit reconnus par l'ensemble des nations;

h) d'une part de ne pas être jugé de nouveau pour une infraction dont il a été définitivement acquitté, d'autre part de ne pas être jugé ni puni de nouveau pour une infraction dont il a été définitivement déclaré coupable et puni;

i) de bénéficier de la peine la moins sévère, lorsque la peine qui sanctionne l'infraction dont il est déclaré coupable est modifiée entre le moment de la perpétration de l'infraction et celui de la sentence.

Cruauté

12. Chacun a droit à la protection contre tous traitements ou peines cruels et inusités.

Témoignage incriminant

13. Chacun a droit à ce qu'aucun témoignage incriminant qu'il donne ne soit utilisé pour l'incriminer dans d'autres procédures, sauf lors de poursuites pour parjure ou pour témoignages contradictoires.

Interprète

14. La partie ou le témoin qui ne peuvent suivre les procédures, soit parce qu'ils ne comprennent pas ou ne parlent pas la langue employée, soit parce qu'ils sont atteints de surdité, ont droit à l'assistance d'un interprète.

CANADA

CONSOLIDATION

CODIFICATION

Judges Act

Loi sur les juges

R.S.C., 1985, c. J-1

L.R.C. (1985), ch. J-1

Current to March 10, 2021

Last amended on April 12, 2019

À jour au 10 mars 2021

Dernière modification le 12 avril 2019

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

LAYOUT

The notes that appeared in the left or right margins are now in boldface text directly above the provisions to which they relate. They form no part of the enactment, but are inserted for convenience of reference only.

MISE EN PAGE

Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n'y figurant qu'à titre de repère ou d'information.

NOTE

This consolidation is current to March 10, 2021. The last amendments came into force on April 12, 2019. Any amendments that were not in force as of March 10, 2021 are set out at the end of this document under the heading "Amendments Not in Force".

NOTE

Cette codification est à jour au 10 mars 2021. Les dernières modifications sont entrées en vigueur le 12 avril 2019. Toutes modifications qui n'étaient pas en vigueur au 10 mars 2021 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

TABLE OF PROVISIONS

An Act respecting judges of federal and provincial courts

TABLE ANALYTIQUE

Loi concernant les juges des cours fédérales et provinciales

R.S.C., 1985, c. J-1

L.R.C., 1985, ch. J-1

An Act respecting judges of federal and provincial courts

Loi concernant les juges des cours fédérales et provinciales

Short Title

Short title

1 This Act may be cited as the *Judges Act*.

R.S., c. J-1, s. 1.

Titre abrégé

Titre abrégé

1 *Loi sur les juges*.

S.R., ch. J-1, art. 1.

Interpretation

Definitions

2 In this Act,

age of retirement of a judge or of a prothonotary of the Federal Court means the age, fixed by law, at which the judge or prothonotary ceases to hold office; (*mise à la retraite d'office*)

attorney general of the province, except where otherwise defined, means the minister of the Crown of the province who is responsible for judicial affairs; (*procureur général de la province*)

common-law partner, in relation to an individual, means a person who is cohabiting with the individual in a conjugal relationship, having so cohabited for a period of at least one year; (*conjoint de fait*)

Council means the Canadian Judicial Council established by subsection 59(1); (*Conseil*)

county includes district; (*comté*)

judge includes a chief justice, senior associate chief justice, associate chief justice, supernumerary judge and regional senior judge; (*juge*)

survivor, in relation to a judge or to a prothonotary of the Federal Court, means a person who was married to the judge or prothonotary at the time of the judge's or prothonotary's death or who establishes that he or she

Définitions et interprétation

Définitions

2 Les définitions qui suivent s'appliquent à la présente loi.

comté Y est assimilé le district. (*county*)

conjoint de fait La personne qui vit avec la personne en cause dans une relation conjugale depuis au moins un an. (*common-law partner*)

Conseil Le Conseil canadien de la magistrature constitué par le paragraphe 59(1). (*Council*)

juge Sont compris parmi les juges, les juges en chef, les juges en chef associés, les juges en chef adjoints, les juges surnuméraires et les juges principaux régionaux. (*judge*)

mise à la retraite d'office Mesure intervenant lorsque le juge, ou le protonotaire de la Cour fédérale, a atteint la limite d'âge légale. (*age of retirement*)

procureur général de la province Sauf définition à l'effet contraire, le ministre provincial chargé des affaires judiciaires. (*attorney general of the province*)

survivant La personne qui était unie par les liens du mariage à un juge ou à un protonotaire de la Cour fédérale à son décès ou qui établit qu'elle vivait dans une relation

was cohabiting with the judge or prothonotary in a conjugal relationship at the time of the judge's or prothonotary's death and had so cohabited for a period of at least one year. (*survivant*)

R.S., 1985, c. J-1, s. 2; 1990, c. 17, s. 27; 1992, c. 51, s. 2; 2000, c. 12, s. 159; 2002, c. 8, s. 82(E); 2014, c. 39, s. 316; 2017, c. 33, s. 230.

conjugale depuis au moins un an avec un juge ou un protonotaire de la Cour fédérale à son décès. (*survivor*)

L.R. (1985), ch. J-1, art. 2; 1990, ch. 17, art. 27; 1992, ch. 51, art. 2; 2000, ch. 12, art. 159; 2002, ch. 8, art. 82(A); 2014, ch. 39, art. 316; 2017, ch. 33, art. 230.

Application to prothonotaries

2.1 (1) Subject to subsection (2), sections 26 to 26.3, 34 and 39, paragraphs 40(1)(a) and (b), subsection 40(2), sections 41, 41.2 to 42, 43.1 to 56 and 57, paragraph 60(2)(b), subsections 63(1) and (2) and sections 64 to 66 also apply to a prothonotary of the Federal Court.

Application aux protonotaires

2.1 (1) Sous réserve du paragraphe (2), les articles 26 à 26.3, 34 et 39, les alinéas 40(1)a) et b), le paragraphe 40(2), les articles 41, 41.2 à 42, 43.1 à 56 et 57, l'alinéa 60(2)b), les paragraphes 63(1) et (2) et les articles 64 à 66 s'appliquent également aux protonotaires de la Cour fédérale.

Prothonotary who makes election

(2) Sections 41.2, 41.3, 42 and 43.1 to 52.22 do not apply to a prothonotary of the Federal Court who makes an election under the *Economic Action Plan 2014 Act, No. 2* to continue to be deemed to be employed in the public service for the purposes of the *Public Service Superannuation Act*.

2014, c. 39, s. 317.

Protonotaires ayant fait un choix

(2) Les articles 41.2, 41.3, 42 et 43.1 à 52.22 ne s'appliquent pas aux protonotaires de la Cour fédérale qui font le choix en vertu de la *Loi n^{o} 2 sur le plan d'action économique de 2014* de continuer d'être réputé appartenir à la fonction publique pour l'application de la *Loi sur la pension de la fonction publique*.

2014, ch. 39, art. 317.

PART I

Judges

Eligibility

Eligibility for appointment

3 No person is eligible to be appointed a judge of a superior court in any province unless, in addition to any other requirements prescribed by law, that person

(a) is a barrister or advocate of at least ten years standing at the bar of any province; or

(b) has, for an aggregate of at least ten years,

(i) been a barrister or advocate at the bar of any province, and

(ii) after becoming a barrister or advocate at the bar of any province, exercised powers and performed duties and functions of a judicial nature on a full-time basis in respect of a position held pursuant to a law of Canada or a province.

R.S., 1985, c. J-1, s. 3; 1992, c. 51, s. 3; 1996, c. 22, s. 2.

PARTIE I

Juges

Conditions de nomination

Appartenance au barreau

3 Peuvent seuls être nommés juges d'une juridiction supérieure d'une province s'ils remplissent par ailleurs les conditions légales :

a) les avocats inscrits au barreau d'une province depuis au moins dix ans;

b) les personnes ayant été membres du barreau d'une province et ayant exercé à temps plein des fonctions de nature judiciaire à l'égard d'un poste occupé en vertu d'une loi fédérale ou provinciale après avoir été inscrites au barreau, et ce pour une durée totale d'au moins dix ans.

L.R. (1985), ch. J-1, art. 3; 1992, ch. 51, art. 3; 1996, ch. 22, art. 2.

4 to 6 [Repealed, 1990, c. 17, s. 28]

7 [Repealed, 1992, c. 51, s. 4]

4 à 6 [Abrogés, 1990, ch. 17, art. 28]

7 [Abrogé, 1992, ch. 51, art. 4]

Age of Retirement

Retirement age

8 (1) A judge of the Supreme Court of British Columbia who held the office of a judge of the County Courts of British Columbia on March 1, 1987 and on June 30, 1990 may retire at the age of seventy years.

Retirement age

(2) A judge of the Superior Court of Justice in and for the Province of Ontario who held the office of a judge of the District Court of Ontario on March 1, 1987 and on August 31, 1990 may retire at the age of seventy years.

Idem

(3) A judge of the Supreme Court of Nova Scotia who held the office of a judge of the County Court of Nova Scotia on March 1, 1987 and on the coming into force of this subsection may retire at the age of seventy years.

R.S., 1985, c. J-1, s. 8; R.S., 1985, c. 16 (3rd Supp.), s. 1; 1992, c. 51, s. 4; 1998, c. 30, s. 1.

Salaries

Supreme Court of Canada

9 The yearly salaries of the judges of the Supreme Court of Canada are as follows:

(a) the Chief Justice of Canada, $403,800; and

(b) the eight puisne judges, $373,900 each.

R.S., 1985, c. J-1, s. 9; R.S., 1985, c. 50 (1st Supp.), s. 4, c. 39 (3rd Supp.), s. 1; 2001, c. 7, s. 1; 2006, c. 11, s. 1; 2012, c. 31, s. 210; 2017, c. 20, s. 196.

Federal Courts

10 The yearly salaries of the judges of the Federal Courts are as follows:

(a) the Chief Justice of the Federal Court of Appeal, $344,400;

(b) the other judges of the Federal Court of Appeal, $314,100 each;

(c) the Chief Justice and the Associate Chief Justice of the Federal Court, $344,400 each; and

(d) the other judges of the Federal Court, $314,100 each.

R.S., 1985, c. J-1, s. 10; R.S., 1985, c. 41 (1st Supp.), s. 1, c. 50 (1st Supp.), s. 4, c. 39 (3rd Supp.), s. 1; 2001, c. 7, s. 2; 2002, c. 8, s. 83; 2006, c. 11, s. 1; 2012, c. 31, s. 210; 2017, c. 20, s. 197; 2018, c. 12, s. 297.

Limite d'âge

Limite d'âge

8 (1) Les juges de la Cour suprême de la Colombie-Britannique qui occupaient le poste de juge de cour de comté dans cette province le 1er mars 1987 et le 30 juin 1990 peuvent prendre leur retraite à l'âge de soixante-dix ans.

Limite d'âge

(2) Les juges de la Cour supérieure de justice de l'Ontario qui occupaient le poste de juge de la Cour de district de cette province le 1er mars 1987 et le 31 août 1990 peuvent prendre leur retraite à l'âge de soixante-dix ans.

Idem

(3) Les juges de la Cour suprême de la Nouvelle-Écosse qui occupaient le poste de juge de la cour de comté de cette province le 1er mars 1987 ainsi qu'à l'entrée en vigueur du présent paragraphe peuvent prendre leur retraite à l'âge de soixante-dix ans.

L.R. (1985), ch. J-1, art. 8; L.R. (1985), ch. 16 (3e suppl.), art. 1; 1992, ch. 51, art. 4; 1998, ch. 30, art. 1.

Traitements

Cour suprême du Canada

9 Les juges de la Cour suprême du Canada reçoivent les traitements annuels suivants :

a) s'agissant du juge en chef du Canada : 403 800 $;

b) s'agissant de chacun des huit autres juges : 373 900 $.

L.R. (1985), ch. J-1, art. 9; L.R. (1985), ch. 50 (1er suppl.), art. 4, ch. 39 (3e suppl.), art. 1; 2001, ch. 7, art. 1; 2006, ch. 11, art. 1; 2012, ch. 31, art. 210; 2017, ch. 20, art. 196.

Cours fédérales

10 Les juges des Cours fédérales reçoivent les traitements annuels suivants :

a) s'agissant du juge en chef de la Cour d'appel fédérale : 344 400 $;

b) s'agissant de chacun des autres juges de la Cour d'appel fédérale : 314 100 $;

c) s'agissant du juge en chef et du juge en chef adjoint de la Cour fédérale : 344 400 $;

d) s'agissant de chacun des autres juges de la Cour fédérale : 314 100 $.

L.R. (1985), ch. J-1, art. 10; L.R. (1985), ch. 41 (1er suppl.), art. 1, ch. 50 (1er suppl.), art. 4, ch. 39 (3e suppl.), art. 1; 2001, ch. 7, art. 2; 2002, ch. 8, art. 83; 2006, ch. 11, art. 1; 2012, ch. 31, art. 210; 2017, ch. 20, art. 197; 2018, ch. 12, art. 297.

Federal Court prothonotaries

10.1 The yearly salaries of the prothonotaries of the Federal Court shall be 80% of the yearly salaries, calculated in accordance with section 25, of the judges referred to in paragraph 10(d).

2014, c. 39, s. 318; 2017, c. 20, s. 198.

Court Martial Appeal Court

10.2 The yearly salary of the Chief Justice of the Court Martial Appeal Court of Canada shall be $344,400.

2017, c. 20, s. 198.

Tax Court of Canada

11 The yearly salaries of the judges of the Tax Court of Canada are as follows:

(a) the Chief Justice, $344,400;

(b) the Associate Chief Justice, $344,400; and

(c) the other judges, $314,100 each.

R.S., 1985, c. J-1, s. 11; R.S., 1985, c. 11 (1st Supp.), s. 2, c. 51 (4th Supp.), s. 13; 2001, c. 7, s. 3; 2002, c. 8, s. 84(E); 2006, c. 11, s. 1; 2012, c. 31, s. 210; 2017, c. 20, s. 199.

Court of Appeal for Ontario and Superior Court of Justice

12 The yearly salaries of the judges of the Court of Appeal for Ontario and of the Superior Court of Justice in and for the Province of Ontario are as follows:

(a) the Chief Justice and the Associate Chief Justice of Ontario, $344,400 each;

(b) the 14 Justices of Appeal, $314,100 each;

(c) the Chief Justice and the Associate Chief Justice of the Superior Court of Justice, $344,400 each; and

(d) the 198 other judges of the Superior Court of Justice, $314,100 each.

R.S., 1985, c. J-1, s. 12; R.S., 1985, c. 41 (1st Supp.), s. 2, c. 50 (1st Supp.), s. 4, c. 39 (3rd Supp.), s. 1; 1990, c. 17, s. 29; 1998, c. 30, s. 2; 2001, c. 7, s. 4; 2006, c. 11, s. 1; 2012, c. 31, s. 210; 2017, c. 20, s. 200; 2018, c. 12, s. 298.

Court of Appeal and Superior Court of Quebec

13 The yearly salaries of the judges of the Court of Appeal and of the Superior Court in and for the Province of Quebec are as follows:

(a) the Chief Justice of Quebec, $344,400;

(b) the 18 puisne judges of the Court of Appeal, $314,100 each;

Protonotaires de la Cour fédérale

10.1 Les protonotaires de la Cour fédérale reçoivent un traitement annuel égal à quatre-vingts pour cent du traitement annuel, calculé en conformité avec l'article 25, d'un juge visé à l'alinéa 10d).

2014, ch. 39, art. 318; 2017, ch. 20, art. 198.

Cour d'appel de la cour martiale du Canada

10.2 Le juge en chef de la Cour d'appel de la cour martiale du Canada reçoit un traitement annuel de 344 400 $.

2017, ch. 20, art. 198.

Cour canadienne de l'impôt

11 Les juges de la Cour canadienne de l'impôt reçoivent les traitements annuels suivants :

a) s'agissant du juge en chef : 344 400 $;

b) s'agissant du juge en chef adjoint : 344 400 $;

c) s'agissant de chacun des autres juges : 314 100 $.

L.R. (1985), ch. J-1, art. 11; L.R. (1985), ch. 11 (1er suppl.), art. 2, ch. 51 (4e suppl.), art. 13; 2001, ch. 7, art. 3; 2002, ch. 8, art. 84(A); 2006, ch. 11, art. 1; 2012, ch. 31, art. 210; 2017, ch. 20, art. 199.

Cour d'appel de l'Ontario et Cour supérieure de justice de l'Ontario

12 Les juges de la Cour d'appel de l'Ontario et de la Cour supérieure de justice de l'Ontario reçoivent les traitements annuels suivants :

a) s'agissant du juge en chef et du juge en chef adjoint de l'Ontario : 344 400 $;

b) s'agissant de chacun des quatorze autres juges d'appel : 314 100 $;

c) s'agissant du juge en chef et du juge en chef adjoint de la Cour supérieure de justice : 344 400 $;

d) s'agissant de chacun des cent quatre-vingt-dix-huit autres juges de la Cour supérieure de justice : 314 100 $.

L.R. (1985), ch. J-1, art. 12; L.R. (1985), ch. 41 (1er suppl.), art. 2, ch. 50 (1er suppl.), art. 4, ch. 39 (3e suppl.), art. 1; 1990, ch. 17, art. 29; 1998, ch. 30, art. 2; 2001, ch. 7, art. 4; 2006, ch. 11, art. 1; 2012, ch. 31, art. 210; 2017, ch. 20, art. 200; 2018, ch. 12, art. 298.

Cour d'appel et Cour supérieure du Québec

13 Les juges de la Cour d'appel et de la Cour supérieure du Québec reçoivent les traitements annuels suivants :

a) s'agissant du juge en chef du Québec : 344 400 $;

b) s'agissant de chacun des dix-huit autres juges de la Cour d'appel : 314 100 $;

(c) the Chief Justice, the Senior Associate Chief Justice and the Associate Chief Justice of the Superior Court, $344,400 each; and

(d) the 144 puisne judges of the Superior Court, $314,100 each.

R.S., 1985, c. J-1, s. 13; R.S., 1985, c. 41 (1st Supp.), s. 3, c. 50 (1st Supp.), s. 4, c. 39 (3rd Supp.), s. 1; 1989, c. 8, s. 1; 2001, c. 7, s. 5; 2006, c. 11, s. 1; 2012, c. 31, s. 210; 2014, c. 20, s. 164; 2017, c. 20, s. 201.

c) s'agissant du juge en chef, du juge en chef associé et du juge en chef adjoint de la Cour supérieure : 344 400 $;

d) s'agissant de chacun des cent quarante-quatre autres juges de la Cour supérieure : 314 100 $.

L.R. (1985), ch. J-1, art. 13; L.R. (1985), ch. 41 (1er suppl.), art. 3, ch. 50 (1er suppl.), art. 4, ch. 39 (3e suppl.), art. 1; 1989, ch. 8, art. 1; 2001, ch. 7, art. 5; 2006, ch. 11, art. 1; 2012, ch. 31, art. 210; 2014, ch. 20, art. 164; 2017, ch. 20, art. 201.

Court of Appeal and Supreme Court of Nova Scotia

14 The yearly salaries of the judges of the Nova Scotia Court of Appeal and the Supreme Court of Nova Scotia are as follows:

(a) the Chief Justice of Nova Scotia, $344,400;

(b) the seven other judges of the Court of Appeal, $314,100 each;

(c) the Chief Justice and the Associate Chief Justice of the Supreme Court, $344,400 each; and

(d) the 23 other judges of the Supreme Court, $314,100 each.

R.S., 1985, c. J-1, s. 14; R.S., 1985, c. 50 (1st Supp.), s. 4, c. 39 (3rd Supp.), s. 1; 1989, c. 8, s. 2; 1992, c. 51, s. 5; 2001, c. 7, s. 6; 2006, c. 11, s. 1; 2012, c. 31, s. 210; 2017, c. 20, s. 202.

Cour d'appel et Cour suprême de la Nouvelle-Écosse

14 Les juges de la Cour d'appel et de la Cour suprême de la Nouvelle-Écosse reçoivent les traitements annuels suivants :

a) s'agissant du juge en chef de la Nouvelle-Écosse : 344 400 $;

b) s'agissant de chacun des sept autres juges de la Cour d'appel : 314 100 $;

c) s'agissant du juge en chef et du juge en chef adjoint de la Cour suprême : 344 400 $;

d) s'agissant de chacun des vingt-trois autres juges de la Cour suprême : 314 100 $.

L.R. (1985), ch. J-1, art. 14; L.R. (1985), ch. 50 (1er suppl.), art. 4, ch. 39 (3e suppl.), art. 1; 1989, ch. 8, art. 2; 1992, ch. 51, art. 5; 2001, ch. 7, art. 6; 2006, ch. 11, art. 1; 2012, ch. 31, art. 210; 2017, ch. 20, art. 202.

Court of Appeal and Court of Queen's Bench of New Brunswick

15 The yearly salaries of the judges of the Court of Appeal of New Brunswick and of the Court of Queen's Bench of New Brunswick are as follows:

(a) the Chief Justice of New Brunswick, $344,400;

(b) the five other judges of the Court of Appeal, $314,100 each;

(c) the Chief Justice of the Court of Queen's Bench, $344,400; and

(d) the 21 other judges of the Court of Queen's Bench, $314,100 each.

R.S., 1985, c. J-1, s. 15; R.S., 1985, c. 41 (1st Supp.), s. 4, c. 50 (1st Supp.), s. 4, c. 39 (3rd Supp.), s. 1; 2001, c. 7, s. 7; 2006, c. 11, s. 1; 2012, c. 31, s. 210; 2017, c. 20, s. 203.

Cour d'appel et Cour du Banc de la Reine du Nouveau-Brunswick

15 Les juges de la Cour d'appel et de la Cour du Banc de la Reine du Nouveau-Brunswick reçoivent les traitements annuels suivants :

a) s'agissant du juge en chef du Nouveau-Brunswick : 344 400 $;

b) s'agissant de chacun des cinq autres juges de la Cour d'appel : 314 100 $;

c) s'agissant du juge en chef de la Cour du Banc de la Reine : 344 400 $;

d) s'agissant de chacun des vingt et un autres juges de la Cour du Banc de la Reine : 314 100 $.

L.R. (1985), ch. J-1, art. 15; L.R. (1985), ch. 41 (1er suppl.), art. 4, ch. 50 (1er suppl.), art. 4, ch. 39 (3e suppl.), art. 1; 2001, ch. 7, art. 7; 2006, ch. 11, art. 1; 2012, ch. 31, art. 210; 2017, ch. 20, art. 203.

Court of Appeal and Court of Queen's Bench for Manitoba

16 The yearly salaries of the judges of the Court of Appeal for Manitoba and of Her Majesty's Court of Queen's Bench for Manitoba are as follows:

(a) the Chief Justice of Manitoba, $344,400;

Cour d'appel et Cour du Banc de la Reine du Manitoba

16 Les juges de la Cour d'appel et de la Cour du Banc de la Reine du Manitoba reçoivent les traitements annuels suivants :

a) s'agissant du juge en chef du Manitoba : 344 400 $;

(b) the six Judges of Appeal, $314,100 each;

(c) the Chief Justice, the Senior Associate Chief Justice and the Associate Chief Justice of the Court of Queen's Bench, $344,400 each; and

(d) the 31 puisne judges of the Court of Queen's Bench, $314,100 each.

R.S., 1985, c. J-1, s. 16; R.S., 1985, c. 41 (1st Supp.), s. 5, c. 50 (1st Supp.), s. 4, c. 39 (3rd Supp.), s. 1; 1989, c. 8, s. 3; 2001, c. 7, s. 8; 2006, c. 11, s. 1; 2009, c. 19, s. 1; 2012, c. 31, s. 210; 2017, c. 20, s. 204.

b) s'agissant de chacun des six autres juges d'appel : 314 100 $;

c) s'agissant du juge en chef, du juge en chef associé et du juge en chef adjoint de la Cour du Banc de la Reine : 344 400 $;

d) s'agissant de chacun des trente et un autres juges de la Cour du Banc de la Reine : 314 100 $.

L.R. (1985), ch. J-1, art. 16; L.R. (1985), ch. 41 (1er suppl.), art. 5, ch. 50 (1er suppl.), art. 4, ch. 39 (3e suppl.), art. 1; 1989, ch. 8, art. 3; 2001, ch. 7, art. 8; 2006, ch. 11, art. 1; 2009, ch. 19, art. 1; 2012, ch. 31, art. 210; 2017, ch. 20, art. 204.

Court of Appeal and Supreme Court of British Columbia

17 The yearly salaries of the judges of the Court of Appeal for British Columbia and of the Supreme Court of British Columbia are as follows:

(a) the Chief Justice of British Columbia, $344,400;

(b) the 12 Justices of Appeal, $314,100 each;

(c) the Chief Justice and the Associate Chief Justice of the Supreme Court, $344,400 each; and

(d) the 81 other judges of the Supreme Court, $314,100 each.

R.S., 1985, c. J-1, s. 17; R.S., 1985, c. 41 (1st Supp.), s. 6, c. 50 (1st Supp.), s. 4, c. 39 (3rd Supp.), s. 1; 1989, c. 8, s. 4; 1990, c. 16, s. 15; 2001, c. 7, s. 9; 2006, c. 11, s. 1; 2012, c. 31, s. 210; 2017, c. 20, s. 205.

Cour d'appel et Cour suprême de la Colombie-Britannique

17 Les juges de la Cour d'appel et de la Cour suprême de la Colombie-Britannique reçoivent les traitements annuels suivants :

a) s'agissant du juge en chef de la Colombie-Britannique : 344 400 $;

b) s'agissant de chacun des douze autres juges d'appel : 314 100 $;

c) s'agissant du juge en chef et du juge en chef adjoint de la Cour suprême : 344 400 $;

d) s'agissant de chacun des quatre-vingt-un autres juges de la Cour suprême : 314 100 $.

L.R. (1985), ch. J-1, art. 17; L.R. (1985), ch. 41 (1er suppl.), art. 6, ch. 50 (1er suppl.), art. 4, ch. 39 (3e suppl.), art. 1; 1989, ch. 8, art. 4; 1990, ch. 16, art. 15; 2001, ch. 7, art. 9; 2006, ch. 11, art. 1; 2012, ch. 31, art. 210; 2017, ch. 20, art. 205.

Court of Appeal and Supreme Court of Prince Edward Island

18 The yearly salaries of the judges of the Court of Appeal of Prince Edward Island and of the Supreme Court of Prince Edward Island are as follows:

(a) the Chief Justice of Prince Edward Island, $344,400;

(b) the two other judges of the Court of Appeal, $314,100 each;

(c) the Chief Justice of the Supreme Court, $344,400; and

(d) the three other judges of the Supreme Court, $314,100 each.

R.S., 1985, c. J-1, s. 18; R.S., 1985, c. 50 (1st Supp.), s. 4, c. 27 (2nd Supp.), s. 1, c. 39 (3rd Supp.), s. 1; 2001, c. 7, s. 10; 2006, c. 11, s. 1; 2012, c. 31, s. 210; 2015, c. 3, s. 125; 2017, c. 20, s. 206.

Cour d'appel et Cour suprême de l'Île-du-Prince-Édouard

18 Les juges de la Cour d'appel et de la Cour suprême de l'Île-du-Prince-Édouard reçoivent les traitements annuels suivants :

a) s'agissant du juge en chef de l'Île-du-Prince-Édouard : 344 400 $;

b) s'agissant de chacun des deux autres juges de la Cour d'appel : 314 100 $;

c) s'agissant du juge en chef de la Cour suprême : 344 400 $;

d) s'agissant de chacun des trois autres juges de la Cour suprême : 314 100 $.

L.R. (1985), ch. J-1, art. 18; L.R. (1985), ch. 50 (1er suppl.), art. 4, ch. 27 (2e suppl.), art. 1, ch. 39 (3e suppl.), art. 1; 2001, ch. 7, art. 10; 2006, ch. 11, art. 1; 2012, ch. 31, art. 210; 2015, ch. 3, art. 125; 2017, ch. 20, art. 206.

Court of Appeal and Court of Queen's Bench for Saskatchewan

19 The yearly salaries of the judges of the Court of Appeal for Saskatchewan and of Her Majesty's Court of Queen's Bench for Saskatchewan are as follows:

(a) the Chief Justice of Saskatchewan, $344,400;

(b) the seven Judges of Appeal, $314,100 each;

(c) the Chief Justice of the Court of Queen's Bench, $344,400; and

(d) the 29 other judges of the Court of Queen's Bench, $314,100 each.

R.S., 1985, c. J-1, s. 19; R.S., 1985, c. 50 (1st Supp.), s. 4, c. 39 (3rd Supp.), s. 1; 2001, c. 7, s. 11; 2006, c. 11, s. 1; 2012, c. 31, s. 210; 2017, c. 20, s. 207; 2018, c. 12, s. 299.

Court of Appeal and Court of Queen's Bench of Alberta

20 The yearly salaries of the judges of the Court of Appeal of Alberta and of the Court of Queen's Bench of Alberta are as follows:

(a) the Chief Justice of Alberta, $344,400;

(b) the 10 Justices of Appeal, $314,100 each;

(c) the Chief Justice and the two Associate Chief Justices of the Court of Queen's Bench, $344,400 each; and

(d) the 68 other Justices of the Court of Queen's Bench, $314,100 each.

R.S., 1985, c. J-1, s. 20; R.S., 1985, c. 41 (1st Supp.), s. 7, c. 50 (1st Supp.), s. 4, c. 39 (3rd Supp.), s. 1; 1989, c. 8, s. 5; 2001, c. 7, s. 12; 2006, c. 11, s. 1; 2012, c. 31, s. 210; 2014, c. 20, s. 165; 2017, c. 20, s. 208, c. 33, s. 231.

Supreme Court of Newfoundland and Labrador

21 The yearly salaries of the judges of the Supreme Court of Newfoundland and Labrador are as follows:

(a) the Chief Justice of Newfoundland and Labrador, $344,400;

(b) the five Judges of Appeal, $314,100 each;

(c) the Chief Justice of the Trial Division, $344,400; and

Cour d'appel et Cour du Banc de la Reine de la Saskatchewan

19 Les juges de la Cour d'appel et de la Cour du Banc de la Reine de la Saskatchewan reçoivent les traitements annuels suivants :

a) s'agissant du juge en chef de la Saskatchewan : 344 400 $;

b) s'agissant de chacun des sept autres juges d'appel : 314 100 $;

c) s'agissant du juge en chef de la Cour du Banc de la Reine : 344 400 $;

d) s'agissant de chacun des vingt-neuf autres juges de la Cour du Banc de la Reine : 314 100 $.

L.R. (1985), ch. J-1, art. 19; L.R. (1985), ch. 50 (1er suppl.), art. 4, ch. 39 (3e suppl.), art. 1; 2001, ch. 7, art. 11; 2006, ch. 11, art. 1; 2012, ch. 31, art. 210; 2017, ch. 20, art. 207; 2018, ch. 12, art. 299.

Cour d'appel et Cour du Banc de la Reine de l'Alberta

20 Les juges de la Cour d'appel et de la Cour du Banc de la Reine de l'Alberta reçoivent les traitements annuels suivants :

a) s'agissant du juge en chef de l'Alberta : 344 400 $;

b) s'agissant de chacun des dix autres juges d'appel : 314 100 $;

c) s'agissant du juge en chef et de chacun des deux juges en chef adjoints de la Cour du Banc de la Reine : 344 400 $;

d) s'agissant de chacun des soixante-huit autres juges de la Cour du Banc de la Reine : 314 100 $.

L.R. (1985), ch. J-1, art. 20; L.R. (1985), ch. 41 (1er suppl.), art. 7, ch. 50 (1er suppl.), art. 4, ch. 39 (3e suppl.), art. 1; 1989, ch. 8, art. 5; 2001, ch. 7, art. 12; 2006, ch. 11, art. 1; 2012, ch. 31, art. 210; 2014, ch. 20, art. 165; 2017, ch. 20, art. 208, ch. 33, art. 231.

Cour suprême de Terre-Neuve-et-Labrador

21 Les juges de la Cour suprême de Terre-Neuve-et-Labrador reçoivent les traitements annuels suivants :

a) s'agissant du juge en chef de Terre-Neuve-et-Labrador : 344 400 $;

b) s'agissant de chacun des cinq autres juges d'appel : 314 100 $;

c) s'agissant du juge en chef de la Section de première instance : 344 400 $;

(d) the 18 other judges of the Trial Division, $314,100 each.

R.S., 1985, c. J-1, s. 21; R.S., 1985, c. 41 (1st Supp.), s. 8, c. 50 (1st Supp.), s. 4, c. 27 (2nd Supp.), s. 2, c. 39 (3rd Supp.), s. 1; 1989, c. 8, s. 6; 2001, c. 7, s. 13; 2006, c. 11, s. 1; 2012, c. 31, s. 210; 2017, c. 20, s. 209.

d) s'agissant de chacun des dix-huit autres juges de la Section de première instance : 314 100 $.

L.R. (1985), ch. J-1, art. 21; L.R. (1985), ch. 41 (1er suppl.), art. 8, ch. 50 (1er suppl.), art. 4, ch. 27 (2e suppl.), art. 2, ch. 39 (3e suppl.), art. 1; 1989, ch. 8, art. 6; 2001, ch. 7, art. 13; 2006, ch. 11, art. 1; 2012, ch. 31, art. 210; 2017, ch. 20, art. 209.

Supreme Court of Yukon

22 (1) The yearly salaries of the judges of the Supreme Court of Yukon are as follows:

(a) the Chief Justice, $344,400; and

(b) the two other judges, $314,100 each.

Cour suprême du Yukon

22 (1) Les juges de la Cour suprême du Yukon reçoivent les traitements annuels suivants :

a) s'agissant du juge en chef : 344 400 $;

b) s'agissant de chacun des deux autres juges : 314 100 $.

Supreme Court of the Northwest Territories

(2) The yearly salaries of the judges of the Supreme Court of the Northwest Territories are as follows:

(a) the Chief Justice, $344,400; and

(b) the two other judges, $314,100 each.

Cour suprême des Territoires du Nord-Ouest

(2) Les juges de la Cour suprême des Territoires du Nord-Ouest reçoivent les traitements annuels suivants :

a) s'agissant du juge en chef : 344 400 $;

b) s'agissant de chacun des deux autres juges : 314 100 $.

Nunavut Court of Justice

(2.1) The yearly salaries of the judges of the Nunavut Court of Justice are as follows:

(a) the Chief Justice, $344,400; and

(b) the four other judges, $314,100 each.

Cour de justice du Nunavut

(2.1) Les juges de la Cour de justice du Nunavut reçoivent les traitements annuels suivants :

a) s'agissant du juge en chef : 344 400 $;

b) s'agissant de chacun des quatre autres juges : 314 100 $.

(3) [Repealed, 2017, c. 33, s. 232]

R.S., 1985, c. J-1, s. 22; R.S., 1985, c. 50 (1st Supp.), s. 4, c. 39 (3rd Supp.), s. 1; 1989, c. 8, s. 7; 1999, c. 3, s. 72; 2001, c. 7, s. 14; 2002, c. 7, s. 189; 2006, c. 11, s. 2; 2011, c. 24, s. 170; 2012, c. 31, s. 210; 2017, c. 20, s. 210, c. 33, s. 232.

(3) [Abrogé, 2017, ch. 33, art. 232]

L.R. (1985), ch. J-1, art. 22; L.R. (1985), ch. 50 (1er suppl.), art. 4, ch. 39 (3e suppl.), art. 1; 1989, ch. 8, art. 7; 1999, ch. 3, art. 72; 2001, ch. 7, art. 14; 2002, ch. 7, art. 189; 2006, ch. 11, art. 2; 2011, ch. 24, art. 170; 2012, ch. 31, art. 210; 2017, ch. 20, art. 210, ch. 33, art. 232.

Rounding of amounts

23 A salary referred to in any of sections 9 to 22 that is not a multiple of one hundred dollars shall be rounded down to the next lowest multiple of one hundred dollars.

R.S., 1985, c. J-1, s. 23; R.S., 1985, c. 5 (1st Supp.), s. 2, c. 11 (1st Supp.), s. 2, c. 41 (1st Supp.), s. 9, c. 50 (1st Supp.), s. 4; 1989, c. 8, s. 8; 1990, c. 16, s. 16, c. 17, s. 30; 1992, c. 51, s. 6; 2001, c. 7, s. 15.

Arrondissement des sommes

23 Le montant des traitements prévus aux articles 9 à 22 est arrondi à la centaine inférieure.

L.R. (1985), ch. J-1, art. 23; L.R. (1985), ch. 5 (1er suppl.), art. 2, ch. 11 (1er suppl.), art. 2, ch. 41 (1er suppl.), art. 9, ch. 50 (1er suppl.), art. 4; 1989, ch. 8, art. 8; 1990, ch. 16, art. 16, ch. 17, art. 30; 1992, ch. 51, art. 6; 2001, ch. 7, art. 15.

Additional judges

24 (1) Notwithstanding sections 12 to 22 but subject to subsections (3) and (4), where the number of judges of a superior court in a province has been increased by or pursuant to an Act of the legislature of the province beyond the number of judges of that court whose salaries are provided for by sections 12 to 22, a salary is payable pursuant to this section to each additional judge, appointed to that court in accordance with that Act and in the manner provided by law, from the time that judge's

Juges supplémentaires

24 (1) Sous réserve des paragraphes (3) ou (4), si le nombre des juges d'une juridiction supérieure est augmenté aux termes d'une loi provinciale et dépasse celui pour lequel les traitements ont été prévus aux articles 12 à 22, il peut être versé un traitement aux juges supplémentaires régulièrement nommés en raison de l'adoption de cette loi, dès la prise d'effet de leur nomination, selon les mêmes modalités que s'il était versé aux termes de ces articles.

appointment becomes effective and in the same manner and subject to the same terms and conditions as if the salary were payable under sections 12 to 22.

Salaries fixed

(2) The salary of a judge appointed in the circumstances described in subsection (1) is the salary annexed, pursuant to sections 12 to 22, to the office of judge to which the appointment is made.

Limit

(3) Subject to subsection (4), the number of salaries that may be paid pursuant to this section at any one time shall not be greater than

(a) 16, in the case of judges appointed to appeal courts in the provinces; and

(b) 62, in the case of judges appointed to superior courts in the provinces other than appeal courts.

(c) [Repealed, 1992, c. 51, s. 7]

Unified family courts

(4) For the purposes of assisting the establishment of unified family courts in the provinces, a further number of salaries not greater than 75 at any one time may be paid in the case of judges appointed to courts described in paragraph (3)(b)

(a) where the court has the jurisdiction of a unified family court; or

(b) where a request has been made by a provincial attorney general for the appointment to the court of judges to exercise the jurisdiction of a unified family court.

Salary deemed payable under sections 12 to 22

(5) A salary payable to a judge under this section is deemed, for all purposes of the provisions of this Act, other than this section, and of any other Act of Parliament, to be a salary payable under sections 12 to 22.

Definition of *appeal court*

(6) In this section, ***appeal court*** means, in relation to each of the Provinces of Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, Saskatchewan, Alberta and Newfoundland and Labrador, the Court of Appeal of the Province.

R.S., 1985, c. J-1, s. 24; R.S., 1985, c. 41 (1st Supp.), s. 10, c. 27 (2nd Supp.), s. 3; 1989, c. 8, s. 9; 1992, c. 51, s. 7; 1996, c. 30, s. 1; 1998, c. 30, s. 3; 2006, c. 11, s. 3; 2008, c. 26, s. 1; 2015, c. 3, s. 126; 2017, c. 20, s. 211; 2018, c. 12, s. 300.

Traitements

(2) Les juges supplémentaires reçoivent le traitement qui est, dans le cadre des articles 12 à 22, attaché à la charge à laquelle ils sont nommés.

Restriction quant au nombre

(3) Le nombre maximal de traitements supplémentaires qu'il est possible de verser, à quelque moment que ce soit, en application du présent article est, sauf cas prévu au paragraphe (4) :

a) seize, pour les cours d'appel;

b) soixante-deux, pour les autres juridictions supérieures.

c) [Abrogé, 1992, ch. 51, art. 7]

Tribunaux de la famille

(4) Afin de favoriser la constitution de tribunaux provinciaux de la famille, il peut être versé, à quelque moment que ce soit, un maximum de soixante-quinze autres traitements aux juges nommés aux tribunaux visés à l'alinéa (3)b) :

a) soit pour constituer en leur sein un tribunal de la famille;

b) soit, à la suite d'une demande adressée par le procureur général d'une province, afin que soient faites à ces tribunaux des nominations de juges exerçant la compétence dévolue aux tribunaux de la famille.

Présomption

(5) Les traitements supplémentaires visés au présent article sont, pour l'application des autres dispositions de la présente loi et de tout autre texte législatif fédéral, réputés versés au titre des articles 12 à 22.

Définition de *cour d'appel*

(6) Au présent article, ***cour d'appel*** s'entend, pour les provinces d'Ontario, de Québec, de la Nouvelle-Écosse, du Nouveau-Brunswick, du Manitoba, de la Colombie-Britannique, de l'Île-du-Prince-Édouard, de la Saskatchewan, d'Alberta et de Terre-Neuve-et-Labrador, de la Cour d'appel.

L.R. (1985), ch. J-1, art. 24; L.R. (1985), ch. 41 (1er suppl.), art. 10, ch. 27 (2e suppl.), art. 3; 1989, ch. 8, art. 9; 1992, ch. 51, art. 7; 1996, ch. 30, art. 1; 1998, ch. 30, art. 3; 2006, ch. 11, art. 3; 2008, ch. 26, art. 1; 2015, ch. 3, art. 126; 2017, ch. 20, art. 211; 2018, ch. 12, art. 300.

Periodic Adjustment and Revision of Salaries

Annual adjustment of salary

25 (1) The yearly salaries referred to in sections 9 to 22 apply in respect of the twelve-month period beginning on April 1, 2016.

Annual adjustment of salary

(2) The salary annexed to an office of judge referred to in sections 9, 10 and 10.2 to 22 for the twelve-month period beginning on April 1, 2017, and for each subsequent twelve-month period, shall be the amount obtained by multiplying

(a) the salary annexed to that office for the twelve month period immediately preceding the twelve month period in respect of which the salary is to be determined

by

(b) the percentage that the Industrial Aggregate for the first adjustment year is of the Industrial Aggregate for the second adjustment year, or one hundred and seven per cent, whichever is less.

Meaning of certain expressions

(3) For the purposes of this section,

(a) in relation to any twelve month period in respect of which the salary is to be determined, the ***first adjustment year*** is the most recent twelve month period for which the Industrial Aggregate is available on the first day of the period in respect of which the salary is to be determined, and the ***second adjustment year*** is the twelve month period immediately preceding the first adjustment year; and

(b) the ***Industrial Aggregate*** for an adjustment year is the average weekly wages and salaries of the Industrial Aggregate in Canada for that year as published by Statistics Canada under the authority of the *Statistics Act*.

R.S., 1985, c. J-1, s. 25; R.S., 1985, c. 16 (3rd Supp.), s. 2; 1993, c. 13, s. 10; 1994, c. 18, s. 9; 1998, c. 30, s. 4; 2001, c. 7, s. 16; 2006, c. 11, s. 4; 2012, c. 31, s. 211; 2014, c. 39, s. 319; 2017, c. 20, s. 212.

Commission

26 (1) The Judicial Compensation and Benefits Commission is hereby established to inquire into the adequacy of the salaries and other amounts payable under this Act and into the adequacy of judges' benefits generally.

Rajustement et examen périodiques des traitements

Rajustement annuel

25 (1) Les traitements annuels mentionnés aux articles 9 à 22 s'appliquent pour la période de douze mois commençant le 1er avril 2016.

Rajustement annuel

(2) Le traitement des juges visés aux articles 9, 10 et 10.2 à 22, pour chaque période de douze mois commençant le 1er avril 2017, est égal au produit des facteurs suivants :

a) le traitement payable pour la période précédente;

b) le pourcentage — au maximum cent sept pour cent — que représente le rapport de l'indice de l'ensemble des activités économiques de la première année de rajustement sur celui de la seconde.

Sens de certaines expressions

(3) Pour l'application du présent article :

a) aux fins de calcul du traitement à verser au cours d'une période donnée, la première année de rajustement correspond à la période de douze mois à laquelle s'applique l'indice de l'ensemble des activités économiques dont la publication est la plus récente au moment où s'effectue le calcul, la seconde année de rajustement étant la période de douze mois qui précède la première;

b) l'indice de l'ensemble des activités économiques est la moyenne des traitements et salaires hebdomadaires pour l'ensemble des activités économiques du Canada au cours de l'année de rajustement considérée, dans la version publiée par Statistique Canada en vertu de la *Loi sur la statistique*.

L.R. (1985), ch. J-1, art. 25; L.R. (1985), ch. 16 (3e suppl.), art. 2; 1993, ch. 13, art. 10; 1994, ch. 18, art. 9; 1998, ch. 30, art. 4; 2001, ch. 7, art. 16; 2006, ch. 11, art. 4; 2012, ch. 31, art. 211; 2014, ch. 39, art. 319; 2017, ch. 20, art. 212.

Commission d'examen de la rémunération des juges fédéraux

26 (1) Est établie la Commission d'examen de la rémunération des juges chargée d'examiner la question de savoir si les traitements et autres prestations prévues par la

présente loi, ainsi que, de façon générale, les avantages pécuniaires consentis aux juges sont satisfaisants.

Factors to be considered

(1.1) In conducting its inquiry, the Commission shall consider

(a) the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government;

(b) the role of financial security of the judiciary in ensuring judicial independence;

(c) the need to attract outstanding candidates to the judiciary; and

(d) any other objective criteria that the Commission considers relevant.

Facteurs à prendre en considération

(1.1) La Commission fait son examen en tenant compte des facteurs suivants :

a) l'état de l'économie au Canada, y compris le coût de la vie ainsi que la situation économique et financière globale du gouvernement;

b) le rôle de la sécurité financière des juges dans la préservation de l'indépendance judiciaire;

c) le besoin de recruter les meilleurs candidats pour la magistrature;

d) tout autre facteur objectif qu'elle considère pertinent.

Quadrennial inquiry

(2) The Commission shall commence an inquiry on June 1, 2020, and on June 1 of every fourth year after 2020, and shall submit a report containing its recommendations to the Minister of Justice of Canada within nine months after the date of commencement.

Examen quadriennal

(2) La Commission commence ses travaux le 1er juin 2020 et remet un rapport faisant état de ses recommandations au ministre de la Justice du Canada dans les neuf mois qui suivent. Elle refait le même exercice, dans le même délai, à partir du 1er juin tous les quatre ans par la suite.

Postponement

(3) The Commission may, with the consent of the Minister of Justice and the judiciary, postpone the date of commencement of a quadrennial inquiry.

Report

(3) La Commission peut, avec le consentement du ministre et de la magistrature, reporter le début de ses travaux.

Other reports

(4) In addition to its quadrennial inquiry, the Minister of Justice may at any time refer to the Commission for its inquiry a matter mentioned in subsection (1). The Commission shall submit to that Minister a report containing its recommendations within a period fixed by the Minister after consultation with the Commission.

Initiative du ministre

(4) Le ministre peut, sans égard à l'examen quadriennal, demander à la Commission d'examiner la question visée au paragraphe (1) ou un aspect de celle-ci. La Commission lui remet, dans le délai qu'il fixe après l'avoir consultée, un rapport faisant état de ses recommandations.

Extension of time

(5) The Governor in Council may, on the request of the Commission, extend the time for submission of a report under subsection (2) or (4).

Prolongation

(5) Le gouverneur en conseil peut, à la demande de la Commission, permettre à celle-ci de remettre le rapport visé aux paragraphes (2) ou (4) à une date ultérieure.

Report of Commission

(6) The Minister of Justice shall table a copy of the report in each House of Parliament on any of the first ten days on which that House is sitting after the Minister receives the report.

Dépôt

(6) Le ministre dépose un exemplaire du rapport devant chaque chambre du Parlement dans les dix premiers jours de séance de celle-ci suivant sa réception.

Referral to Committee

(6.1) A report that is tabled in each House of Parliament under subsection (6) shall, on the day it is tabled or, if the House is not sitting on that day, on the day that House next sits, be referred by that House to a committee of that House that is designated or established by that House for the purpose of considering matters relating to justice.

Report by Committee

(6.2) A committee referred to in subsection (6.1) may conduct inquiries or public hearings in respect of a report referred to it under that subsection, and if it does so, the committee shall, not later than ninety sitting days after the report is referred to it, report its findings to the House that designated or established the committee.

Definition of *sitting day*

(6.3) For the purpose of subsection (6.2), ***sitting day*** means a day on which the House of Commons or the Senate, as the case may be, sits.

Response to report

(7) The Minister of Justice shall respond to a report of the Commission within four months after receiving it. Following that response, if applicable, he or she shall, within a reasonable period, cause to be prepared and introduced a bill to implement the response.

R.S., 1985, c. J-1, s. 26; 1996, c. 2, s. 1; 1998, c. 30, s. 5; 2001, c. 7, s. 17(F); 2012, c. 31, s. 212; 2017, c. 20, s. 213.

Nomination

26.1 (1) The Judicial Compensation and Benefits Commission consists of three members appointed by the Governor in Council as follows:

(a) one person nominated by the judiciary;

(b) one person nominated by the Minister of Justice of Canada; and

(c) one person, who shall act as chairperson, nominated by the members who are nominated under paragraphs (a) and (b).

Tenure and removal

(2) Each member holds office during good behaviour, and may be removed for cause at any time by the Governor in Council.

Renvoi au comité

(6.1) Le rapport déposé devant chaque chambre du Parlement en vertu du paragraphe (6) est déféré par cette chambre, dès son dépôt ou, si la chambre ne siège pas ce jour-là, dès le jour de la séance suivante de cette chambre, à un comité de celle-ci, désigné ou établi pour examiner les questions relatives à la justice.

Étude en comité et rapport

(6.2) Le comité mentionné au paragraphe (6.1) peut effectuer une enquête ou tenir des audiences publiques au sujet du rapport qui lui a été déféré en vertu de ce paragraphe; s'il le fait, le comité fait rapport, au plus tard quatre-vingt-dix jours de séance après le renvoi, de ses conclusions à la chambre qui l'a établi ou désigné.

Définition de *jour de séance*

(6.3) Pour l'application du paragraphe (6.2) ***jour de séance*** s'entend d'un jour où la Chambre des communes ou le Sénat, selon le cas, siège.

Suivi

(7) Le ministre donne suite au rapport de la Commission au plus tard quatre mois après l'avoir reçu. S'il y a lieu, il fait par la suite, dans un délai raisonnable, établir et déposer un projet de loi qui met en œuvre sa réponse au rapport.

L.R. (1985), ch. J-1, art. 26; 1996, ch. 2, art. 1; 1998, ch. 30, art. 5; 2001, ch. 7, art. 17(F); 2012, ch. 31, art. 212; 2017, ch. 20, art. 213.

Nominations

26.1 (1) La Commission est composée de trois personnes nommées par décret du gouverneur en conseil. Deux des nominations sont faites sur proposition, dans un cas, de la magistrature, dans l'autre, du ministre de la Justice du Canada. Les deux personnes ainsi nommées proposent pour le poste de président le nom d'une troisième disposée à agir en cette qualité.

Durée du mandat

(2) Les commissaires sont nommés à titre inamovible, sous réserve de la révocation motivée que prononce le gouverneur en conseil.

Term of office

(3) The term of office for the initial members appointed to the Commission ends on August 31, 2003. The members subsequently appointed hold office for a term of four years.

Continuance of duties

(4) Where the term of a member ends, other than in the case of removal for cause, the member may carry out and complete any duties of the members in respect of a matter that was referred to the Commission under subsection 26(4) while he or she was a member.

Reappointment

(5) A member is eligible to be reappointed for one further term if re-nominated in accordance with subsection (1).

Absence or incapacity

(6) In the event of the absence or incapacity of a member, the Governor in Council may appoint as a substitute temporary member a person nominated in accordance with subsection (1) to hold office during the absence or incapacity.

Vacancy

(7) If the office of a member becomes vacant during the term of the member, the Governor in Council shall appoint a person nominated in accordance with subsection (1) to hold office as a member for the remainder of the term.

Quorum

(8) A quorum of the Commission consists of all three members.

Remuneration

(9) The members of the Commission and persons carrying out duties under subsection (4) shall be paid

(a) the fees fixed by the Governor in Council; and

(b) such travel and living expenses incurred in the course of their duties while away from their ordinary place of residence as are fixed by the Governor in Council.

Compensation

(10) The members of the Commission and persons carrying out duties under subsection (4) are deemed to be employed in the federal public administration for the purposes of the *Government Employees Compensation*

Mandat de 4 ans

(3) Le mandat des trois premiers commissaires prend fin le 31 août 2003; celui des autres est de quatre ans.

Examen non interrompu

(4) Le commissaire dont le mandat se termine, pour tout motif autre que la révocation motivée, peut continuer d'exercer ses fonctions à l'égard de toute question dont l'examen, demandé au titre du paragraphe 26(4), a commencé avant la fin de son mandat.

Nouveau mandat

(5) Le mandat du commissaire est renouvelable une fois si sa nomination est proposée suivant la procédure prévue au paragraphe (1).

Remplacement

(6) En cas d'absence ou d'empêchement d'un commissaire, le gouverneur en conseil peut lui nommer un remplaçant suivant la procédure prévue au paragraphe (1).

Poste à combler

(7) Le gouverneur en conseil comble tout poste vacant suivant la procédure prévue au paragraphe (1). Le mandat du nouveau commissaire prend fin à la date prévue pour la fin du mandat de l'ancien.

Quorum

(8) Le quorum est de trois commissaires.

Rémunération des membres

(9) Les commissaires ont droit à une indemnité quotidienne et aux frais de déplacement et de séjour entraînés par l'accomplissement de leurs fonctions, hors du lieu de leur résidence habituelle, selon ce que fixe le gouverneur en conseil. Les anciens commissaires qui continuent d'exercer leurs fonctions au titre du paragraphe (4) y ont également droit.

Agents de l'État

(10) Les commissaires et les anciens commissaires qui continuent d'exercer leurs fonctions au titre du paragraphe (4) sont réputés être des agents de l'État pour l'application de la *Loi sur l'indemnisation des agents de l'État* et appartenir à l'administration publique fédérale

Act and any regulations made under section 9 of the *Aeronautics Act*.

1998, c. 30, s. 5; 2003, c. 22, s. 224(E).

pour l'application des règlements pris en vertu de l'article 9 de la *Loi sur l'aéronautique*.

1998, ch. 30, art. 5; 2003, ch. 22, art. 224(A).

Definition of *judiciary*

26.11 In sections 26 and 26.1, ***judiciary*** includes the prothonotaries of the Federal Court.

2017, c. 20, s. 214.

Définition de *magistrature*

26.11 Aux articles 26 et 26.1, sont assimilés à la ***magistrature*** les protonotaires de la Cour fédérale.

2017, ch. 20, art. 214.

Personnel

26.2 (1) The Commission may engage the services of any persons necessary for the proper conduct of the Commission.

Personnel de la Commission

26.2 (1) La Commission peut engager le personnel nécessaire à l'accomplissement de ses fonctions.

Presumption

(2) No person engaged under subsection (1) shall, as a result, be considered to be employed in the federal public administration.

1998, c. 30, s. 5; 2003, c. 22, s. 224(E).

Présomption

(2) Le personnel ne fait pas partie de l'administration publique fédérale.

1998, ch. 30, art. 5; 2003, ch. 22, art. 224(A).

Costs payable

26.3 (1) The Commission may identify those representatives of the judiciary participating in an inquiry of the Commission to whom costs shall be paid in accordance with this section.

Détermination par la Commission

26.3 (1) La Commission identifie les représentants de la magistrature qui participent à une enquête devant elle et auxquels des dépens peuvent être versés en vertu du présent article.

Entitlement to payment of costs

(2) A representative of the judiciary identified under subsection (1) who participates in an inquiry of the Commission is entitled to be paid, out of the Consolidated Revenue Fund, two thirds of the costs determined under subsection (3) in respect of his or her participation.

Droit au paiement des dépens

(2) Sous réserve du paragraphe (1), le représentant de la magistrature qui participe à une enquête de la Commission a droit au paiement sur le Trésor des deux tiers des dépens liés à sa participation, déterminés en conformité avec le paragraphe (3).

Determination of costs

(3) An assessment officer of the Federal Court, other than a judge or a prothonotary, shall determine the amount of costs, on a solicitor-and-client basis, in accordance with the *Federal Courts Rules*.

Détermination des dépens

(3) Un officier taxateur de la Cour fédérale, exception faite d'un juge ou d'un protonotaire, détermine le montant des dépens, sur une base avocat-client, en conformité avec les *Règles des Cours fédérales*.

Application

(4) This section applies to costs incurred in relation to participation in any inquiry of the Commission conducted after September 1, 1999.

2001, c. 7, s. 18; 2002, c. 8, s. 85; 2006, c. 11, s. 5; 2014, c. 39, s. 320.

Application

(4) Le présent article s'applique à la détermination des dépens liés aux enquêtes de la Commission effectuées après le 1er septembre 1999.

2001, ch. 7, art. 18; 2002, ch. 8, art. 85; 2006, ch. 11, art. 5; 2014, ch. 39, art. 320.

Costs payable to representative of prothonotaries

26.4 (1) The Commission may identify one representative of the prothonotaries of the Federal Court participating in an inquiry of the Commission to whom costs shall be paid in accordance with this section.

Détermination par la Commission : représentant des protonotaires

26.4 (1) La Commission identifie le représentant des protonotaires de la Cour fédérale qui participe à une enquête devant elle et auquel des dépens peuvent être versés en vertu du présent article.

Entitlement to payment of costs

(2) The representative identified under subsection (1) is entitled to be paid, out of the Consolidated Revenue Fund, 95% of the costs determined under subsection (3) in respect of his or her participation.

Determination of costs

(3) An assessment officer of the Federal Court, other than a judge or a prothonotary, shall determine the amount of costs, on a solicitor-and-client basis, in accordance with the *Federal Courts Rules*.

Application

(4) This section applies to costs incurred as of April 1, 2015 in relation to participation in any inquiry of the Commission.

2014, c. 39, s. 321; 2017, c. 20, s. 215.

Allowances for Incidental, Non-accountable and Representational Expenses

Allowance for incidental expenditures actually incurred

27 (1) On and after April 1, 2000, every judge in receipt of a salary under this Act is entitled to be paid, up to a maximum of $5,000 for each year, for reasonable incidental expenditures that the fit and proper execution of the office of judge may require, to the extent that the judge has actually incurred the expenditures and is not entitled to be reimbursed for them under any other provision of this Act.

Allowance for incidental expenditures by prothonotaries

(1.1) On and after April 1, 2016, every prothonotary in receipt of a salary under this Act is entitled to be paid, up to a maximum of $3,000 for each year, for reasonable incidental expenditures that the fit and proper execution of the office of prothonotary may require, to the extent that the prothonotary has actually incurred the expenditures and is not entitled to be reimbursed for them under any other provision of this Act.

Additional allowance for northern judges

(2) On and after April 1, 2004, there shall be paid to each judge of the Supreme Court of Newfoundland and Labrador resident in Labrador and each judge of the Supreme Court of Yukon, the Supreme Court of the

Droit au paiement des dépens

(2) Sous réserve du paragraphe (1), le représentant des protonotaires de la Cour fédérale qui participe à une enquête de la Commission a droit au paiement sur le Trésor de quatre-vingt-quinze pour cent des dépens liés à sa participation, déterminés en conformité avec le paragraphe (3).

Détermination des dépens

(3) Un officier taxateur de la Cour fédérale, exception faite d'un juge ou d'un protonotaire, détermine le montant des dépens, sur une base avocat-client, en conformité avec les *Règles des Cours fédérales*.

Application

(4) Le présent article s'applique à la détermination des dépens exposés à compter du 1er avril 2015 et liés aux enquêtes effectuées par la Commission.

2014, ch. 39, art. 321; 2017, ch. 20, art. 215.

Indemnités spéciales et de représentation

Indemnisation des faux frais

27 (1) À compter du 1er avril 2000, les juges rémunérés aux termes de la présente loi ont droit à une indemnité annuelle maximale de 5 000 $ pour les faux frais non remboursables en vertu d'une autre disposition de la présente loi, qu'ils exposent dans l'accomplissement de leurs fonctions.

Indemnisation des faux frais : protonotaires de la Cour fédérale

(1.1) À compter du 1er avril 2016, les protonotaires de la Cour fédérale ont droit à une indemnité annuelle maximale de 3 000 $ pour les faux frais non remboursables en vertu d'une autre disposition de la présente loi, qu'ils exposent dans l'accomplissement de leurs fonctions.

Indemnité supplémentaire de vie chère pour le Nord canadien

(2) À compter du 1er avril 2004, les juges de la Cour suprême de Terre-Neuve-et-Labrador qui résident au Labrador, les juges des cours suprêmes du Yukon et des Territoires du Nord-Ouest et de la Cour de justice du

Northwest Territories and the Nunavut Court of Justice who is in receipt of a salary under this Act, in addition to the allowance provided by subsection (1), a non-accountable yearly allowance of $12,000 as compensation for the higher cost of living in Labrador and in the territories.

Nunavut rémunérés au titre de la présente loi reçoivent en outre, sans avoir à en rendre compte, une indemnité de vie chère de 12 000 $ par an pour les territoires et le Labrador.

Additional allowance — Federal Courts and Tax Court of Canada

(3) There shall be paid to every judge of the Federal Court of Appeal, the Federal Court and the Tax Court of Canada who is in receipt of a salary under this Act, in addition to the allowance provided by subsection (1), a non-accountable yearly allowance of $2,000 as compensation for special incidental expenditures inherent in the exercise of their office as judge.

Indemnité supplémentaire — Cour d'appel fédérale, Cour fédérale et Cour canadienne de l'impôt

(3) Les juges de la Cour d'appel fédérale, de la Cour fédérale et de la Cour canadienne de l'impôt rémunérés au titre de la présente loi reçoivent, outre l'indemnité visée au paragraphe (1) et sans avoir à en rendre compte, une indemnité annuelle spéciale de 2 000 $ pour les faux frais inhérents à l'accomplissement de leurs fonctions.

(3.1) [Repealed, 2002, c. 8, s. 86]

(3.1) [Abrogé, 2002, ch. 8, art. 86]

Continuance in force of subsection (3)

(4) Subsection (3) shall continue in force for so long as subsection 57(2) continues in force in relation to judges of superior courts in the provinces.

Durée d'application

(4) Le paragraphe (3) demeure en vigueur tant que le paragraphe 57(2), applicable aux juges des juridictions supérieures des provinces, le demeure.

Idem

(5) The additional allowances described in subsections (2) and (3) are deemed not to be travel or personal or living expense allowances expressly fixed by this Act.

Idem

(5) Les indemnités visées aux paragraphes (2) et (3) ne peuvent compter au titre des indemnités de déplacement, de séjour ou de dépenses personnelles prévues.

Representational allowance

(6) On and after April 1, 2004, each of the following judges is entitled to be paid, as a representational allowance, reasonable travel and other expenses actually incurred by the judge or the spouse or common-law partner of the judge in discharging the special extra-judicial obligations and responsibilities that devolve on the judge, to the extent that those expenses may not be reimbursed under any other provision of this Act and their aggregate amount does not exceed in any year the maximum amount indicated below in respect of the judge:

(a) the Chief Justice of Canada, $18,750;

(b) each puisne judge of the Supreme Court of Canada, $10,000;

(c) the Chief Justice of the Federal Court of Appeal and each chief justice described in sections 12 to 21 as the chief justice of a province, $12,500;

(d) each other chief justice referred to in sections 10 to 21, $10,000;

(e) the Chief Justices of the Court of Appeal of Yukon, the Court of Appeal of the Northwest Territories, the Court of Appeal of Nunavut, the Supreme Court of

Frais de représentation

(6) À compter du 1er avril 2004, les juges ci-après ont droit, à titre de frais de représentation et pour les dépenses de déplacement ou autres entraînées, pour eux ou leur époux ou conjoint de fait, par l'accomplissement de leurs fonctions extrajudiciaires et qui ne sont pas remboursables aux termes d'une autre disposition de la présente loi, aux indemnités maximales annuelles suivantes :

a) le juge en chef du Canada : 18 750 $;

b) les autres juges de la Cour suprême du Canada : 10 000 $;

c) le juge en chef de la Cour d'appel fédérale et les juges en chef des provinces, mentionnés aux articles 12 à 21 : 12 500 $;

d) les autres juges en chef mentionnés aux articles 10 à 21 : 10 000 $;

e) les juges en chef des cours d'appel du Yukon, des Territoires du Nord-Ouest et du Nunavut et le juge en chef de la Cour suprême du Yukon, celui de la Cour suprême des Territoires du Nord-Ouest et celui de la Cour de justice du Nunavut : 10 000 $;

Yukon, the Supreme Court of the Northwest Territories and the Nunavut Court of Justice, $10,000 each;

(f) the Chief Justice of the Court Martial Appeal Court of Canada, $10,000; and

(g) the Senior Judge of the Family Court, and each regional senior judge, of the Superior Court of Justice in and for the Province of Ontario, $5,000.

f) le juge en chef de la Cour d'appel de la cour martiale du Canada : 10 000 $;

g) les juges principaux régionaux de la Cour supérieure de justice de l'Ontario, ainsi que le juge principal de la Cour de la famille de la Cour supérieure de justice de l'Ontario : 5 000 $.

(7) [Repealed, 2006, c. 11, s. 6]

(7) [Abrogé, 2006, ch. 11, art. 6]

Judge acting in place of recipient

(8) Where any justice or judge mentioned in subsection (6), other than a puisne judge of the Supreme Court of Canada, is unable to discharge the obligations and responsibilities referred to in that subsection or the office of that justice or judge is vacant, the judge who acts in the place of that justice or judge is entitled to be paid the representational allowance provided for that justice or judge.

Cas d'absence ou d'empêchement

(8) En cas d'empêchement du titulaire de l'un ou l'autre des postes énumérés au paragraphe (6) — à l'exception de ceux mentionnés à l'alinéa (7)b) —, ou de vacance du poste, le juge qui agit à titre de remplaçant a droit à l'indemnité correspondante.

Definition of *chief justice*

(9) In this section, except in paragraphs (6)(a) and (c), ***chief justice*** includes a senior associate chief justice and an associate chief justice.

R.S., 1985, c. J-1, s. 27; R.S., 1985, c. 50 (1st Supp.), s. 5, c. 27 (2nd Supp.), s. 4, c. 51 (4th Supp.), s. 14; 1989, c. 8, s. 10; 1990, c. 17, s. 31; 1992, c. 51, s. 8; 1993, c. 28, s. 78; 1996, c. 30, s. 2; 1998, c. 15, s. 29; 1999, c. 3, s. 73; 2000, c. 12, s. 168; 2001, c. 7, s. 19; 2002, c. 7, ss. 190, 277(E), c. 8, s. 86; 2006, c. 11, s. 6; 2012, c. 31, s. 213; 2017, c. 20, s. 216, c. 33, s. 233.

Définition de *juge en chef*

(9) Au présent article, sauf aux alinéas (6)a) et c), sont assimilés au ***juge en chef*** le juge en chef associé et le juge en chef adjoint.

L.R. (1985), ch. J-1, art. 27; L.R. (1985), ch. 50 (1er suppl.), art. 5, ch. 27 (2e suppl.), art. 4, ch. 51 (4e suppl.), art. 14; 1989, ch. 8, art. 10; 1990, ch. 17, art. 31; 1992, ch. 51, art. 8; 1993, ch. 28, art. 78; 1996, ch. 30, art. 2; 1998, ch. 15, art. 29; 1999, ch. 3, art. 73; 2000, ch. 12, art. 168; 2001, ch. 7, art. 19; 2002, ch. 7, art. 190 et 277(A), ch. 8, art. 86; 2006, ch. 11, art. 6; 2012, ch. 31, art. 213; 2017, ch. 20, art. 216, ch. 33, art. 233.

Supernumerary Judges

Federal Courts and Tax Court

28 (1) If a judge of the Federal Court of Appeal, the Federal Court or the Tax Court of Canada notifies the Minister of Justice of Canada of his or her election to give up regular judicial duties and hold office only as a supernumerary judge, the judge shall hold the office of supernumerary judge of that Court from the time notice is given until he or she reaches the age of retirement, resigns or is removed from or otherwise ceases to hold office, or until the expiry of 10 years from the date of the election, whichever occurs earlier, and shall be paid the salary annexed to that office.

Restriction on election

(2) An election may be made under subsection (1) only by a judge

(a) who has continued in judicial office for at least 15 years and whose combined age and number of years in judicial office is not less than 80; or

Juges surnuméraires

Cours fédérales et Cour canadienne de l'impôt

28 (1) Les juges de la Cour d'appel fédérale, de la Cour fédérale et de la Cour canadienne de l'impôt peuvent, en avisant le ministre de la Justice du Canada de leur décision, abandonner leurs fonctions judiciaires normales pour n'exercer leur charge qu'à titre de juge surnuméraire; le cas échéant, ils occupent ce poste, à compter de la date de l'avis, et touchent le traitement correspondant jusqu'à la cessation de leurs fonctions, notamment par mise à la retraite d'office, démission ou révocation, et ce, pour une période d'au plus dix ans.

Décision restreinte

(2) La faculté visée au paragraphe (1) ne peut être exercée par l'intéressé que dans l'un ou l'autre des cas suivants :

a) il a exercé des fonctions judiciaires pendant au moins quinze ans et le chiffre obtenu par l'addition de son âge et du nombre d'années d'exercice est d'au moins quatre-vingts;

(b) who has attained the age of 70 years and has continued in judicial office for at least 10 years.

b) il a atteint l'âge de soixante-dix ans et justifie d'au moins dix ans d'ancienneté dans la magistrature.

Duties of judge

(3) A judge who has made the election referred to in subsection (1) shall hold himself or herself available to perform such special judicial duties as may be assigned to the judge

(a) by the Chief Justice of the Federal Court of Appeal, if the judge is a judge of that Court;

(b) by the Chief Justice or the Associate Chief Justice of the Federal Court, if the judge is a judge of that Court; or

(c) by the Chief Justice or the Associate Chief Justice of the Tax Court of Canada, if the judge is a judge of that Court.

Fonctions

(3) Le juge qui a choisi d'exercer les fonctions de juge surnuméraire doit être prêt à exercer les fonctions judiciaires spéciales que peuvent lui assigner :

a) s'il appartient à la Cour d'appel fédérale, le juge en chef;

b) s'il appartient à la Cour fédérale, le juge en chef ou le juge en chef adjoint;

c) s'il appartient à la Cour canadienne de l'impôt, le juge en chef ou le juge en chef adjoint.

Salary of supernumerary judge

(4) The salary of each supernumerary judge of the Federal Court of Appeal, the Federal Court or the Tax Court of Canada is the salary annexed to the office of a judge of that Court, other than the office of a Chief Justice or Associate Chief Justice.

R.S., 1985, c. J-1, s. 28; R.S., 1985, c. 16 (3rd Supp.), s. 3; 2002, c. 8, s. 87; 2006, c. 11, s. 7; 2018, c. 12, s. 301.

Traitement

(4) Les juges surnuméraires reçoivent le même traitement que les simples juges du tribunal auquel ils appartiennent.

L.R. (1985), ch. J-1, art. 28; L.R. (1985), ch. 16 (3e suppl.), art. 3; 2002, ch. 8, art. 87; 2006, ch. 11, art. 7; 2018, ch. 12, art. 301.

Provincial superior courts

29 (1) If the legislature of a province has enacted legislation establishing for each office of judge of a superior court of the province the additional office of supernumerary judge of the court, and a judge of that court notifies the Minister of Justice of Canada and the attorney general of the province of the judge's election to give up regular judicial duties and hold office only as a supernumerary judge, the judge shall hold the office of supernumerary judge from the time notice is given until he or she reaches the age of retirement, resigns or is removed from or otherwise ceases to hold office, or until the expiry of 10 years from the date of the election, whichever occurs earlier, and shall be paid the salary annexed to that office.

Autres juridictions supérieures

29 (1) Dans les provinces où une loi a créé, pour chaque charge de juge de juridiction supérieure, le poste de juge surnuméraire, les juges de la juridiction peuvent, en avisant de leur décision le ministre de la Justice du Canada et le procureur général de la province, abandonner leurs fonctions judiciaires normales pour n'exercer leur charge qu'à titre de juge surnuméraire; le cas échéant, ils occupent ce poste, à compter de la date de l'avis, et touchent le traitement correspondant jusqu'à la cessation de leurs fonctions, notamment par mise à la retraite d'office, démission ou révocation, et ce, pour une période d'au plus dix ans.

Conditions

(2) An election under subsection (1) may only be made by a judge

(a) who has continued in judicial office for at least 15 years and whose combined age and number of years in judicial office is not less than 80; or

(b) who has attained the age of 70 years and has continued in judicial office for at least 10 years.

Conditions

(2) La faculté visée au paragraphe (1) ne peut être exercée par l'intéressé que dans l'un ou l'autre des cas suivants :

a) il a exercé des fonctions judiciaires pendant au moins quinze ans et le chiffre obtenu par l'addition de son âge et du nombre d'années d'exercice est d'au moins quatre-vingts;

b) il a atteint l'âge de soixante-dix ans et justifie d'au moins dix ans d'ancienneté dans la magistrature.

Duties of judge

(3) A judge who has made the election referred to in subsection (1) shall hold himself or herself available to perform such special judicial duties as may be assigned to the judge

(a) by the chief justice, senior associate chief justice or associate chief justice, as the case may be, of the court of which the judge is a member or, where that court is constituted with divisions, of the division of which the judge is a member; or

(b) in the case of a supernumerary judge of the Supreme Court of Yukon, the Supreme Court of the Northwest Territories or the Nunavut Court of Justice, by the Chief Justice of that Court.

Fonctions

(3) Le juge qui a choisi d'exercer les fonctions de juge surnuméraire doit être prêt à exercer les fonctions judiciaires spéciales que peuvent lui assigner :

a) le juge en chef, le juge en chef associé ou le juge en chef adjoint du tribunal, ou de la section de celui-ci, auquel il appartient;

b) s'il appartient à la Cour suprême du Yukon ou des Territoires du Nord-Ouest ou à la Cour de justice du Nunavut, le juge en chef de celle-ci.

Salary of supernumerary judge

(4) The salary of each supernumerary judge of a superior court is the salary annexed to the office of a judge of that court other than a chief justice, senior associate chief justice or associate chief justice.

Traitement

(4) Les juges surnuméraires d'une juridiction supérieure reçoivent le même traitement que les simples juges de celle-ci.

Reference to attorney general of a province

(5) In this section, a reference to the attorney general of a province shall be construed in relation to Yukon, the Northwest Territories and Nunavut as a reference to the Commissioner of that territory.

Destinataire de l'avis dans les territoires

(5) Au Yukon, dans les Territoires du Nord-Ouest et dans le territoire du Nunavut, le commissaire est, pour l'application du présent article, assimilé au procureur général d'une province.

(6) [Repealed, 2017, c. 33, s. 234]

R.S., 1985, c. J-1, s. 29; 1993, c. 28, s. 78; 1999, c. 3, s. 74; 2002, c. 7, s. 191, c. 8, s. 88(E); 2006, c. 11, s. 8; 2012, c. 31, s. 214; 2017, c. 33, s. 234.

(6) [Abrogé, 2017, ch. 33, art. 234]

L.R. (1985), ch. J-1, art. 29; 1993, ch. 28, art. 78; 1999, ch. 3, art. 74; 2002, ch. 7, art. 191, ch. 8, art. 88(A); 2006, ch. 11, art. 8; 2012, ch. 31, art. 214; 2017, ch. 33, art. 234.

30 [Repealed, 1992, c. 51, s. 9]

30 [Abrogé, 1992, ch. 51, art. 9]

Chief Justice Continuing as Judge

Election of Chief or Associate Chief to change to duties of judge only

31 (1) If the Chief Justice of the Federal Court of Appeal or the Chief Justice or Associate Chief Justice of the Federal Court or the Tax Court of Canada has notified the Minister of Justice of Canada of his or her election to cease to perform the duties of that office and to perform only the duties of a judge, he or she shall then hold only the office of a judge of the Federal Court of Appeal, the Federal Court or the Tax Court of Canada, as the case may be, and shall be paid the salary annexed to the office of a judge of that Court, until he or she reaches the age of retirement, resigns or is removed from or otherwise ceases to hold office.

Faculté accordée aux juges en chef

Cours fédérales et Cour canadienne de l'impôt

31 (1) Le juge en chef de la Cour d'appel fédérale ou les juges en chef ou juges en chef adjoints de la Cour fédérale ou de la Cour canadienne de l'impôt peuvent, en avisant le ministre de la Justice du Canada de leur décision, devenir simples juges du tribunal auquel ils appartiennent; le cas échéant, ils exercent cette charge et touchent le traitement correspondant jusqu'à la cessation de leurs fonctions, notamment par mise à la retraite d'office, démission ou révocation.

Restriction on election

(2) The Chief Justice of the Federal Court of Appeal or the Chief Justice or Associate Chief Justice of the Federal Court or the Tax Court of Canada may make the election referred to in subsection (1) only if he or she has continued in the office for at least five years or has continued in the office and another office referred to in this subsection for a total of at least five years.

Conditions

(2) La faculté visée au paragraphe (1) est réservée aux juges en chef ou aux juges en chef adjoints qui occupent leur poste depuis au moins cinq ans ou qui ont occupé l'un et l'autre poste pendant au moins cinq ans au total.

Duties of judge

(3) The Chief Justice of the Federal Court of Appeal or the Chief Justice or Associate Chief Justice of the Federal Court or the Tax Court of Canada who has made the election referred to in subsection (1) shall perform all of the judicial duties normally performed by a judge of the Federal Court of Appeal, the Federal Court or the Tax Court of Canada, as the case may be.

Fonctions

(3) Le juge en chef ou le juge en chef adjoint qui exerce la faculté visée au paragraphe (1) exerce les fonctions normales d'un juge du tribunal auquel il appartient.

Salary of judge

(4) The salary of the Chief Justice of the Federal Court of Appeal or the Chief Justice or Associate Chief Justice of the Federal Court or the Tax Court of Canada who has made the election referred to in subsection (1) is the salary annexed to the office of a judge (other than the Chief Justice) of the Federal Court of Appeal, a judge (other than the Chief Justice or the Associate Chief Justice) of the Federal Court or a judge (other than the Chief Justice or the Associate Chief Justice) of the Tax Court of Canada, as the case may be.

R.S., 1985, c. J-1, s. 31; 2002, c. 8, s. 90; 2017, c. 20, s. 217(F); 2018, c. 12, s. 302.

Traitement

(4) Le juge en chef ou le juge en chef adjoint qui exerce la faculté visée au paragraphe (1) reçoit le traitement attaché au poste de simple juge du tribunal auquel il appartient.

L.R. (1985), ch. J-1, art. 31; 2002, ch. 8, art. 90; 2017, ch. 20, art. 217(F); 2018, ch. 12, art. 302.

Election of Chief Justice of the Court Martial Appeal Court of Canada

31.1 If the Chief Justice of the Court Martial Appeal Court of Canada notifies the Minister of Justice of Canada of their election to cease to perform the duties of that office and to perform only the duties of a judge of the court on which they serve, they shall, after giving that notice, hold only the office of a judge and shall be paid the salary annexed to the office of a judge, until they reach the age of retirement, resign or are removed from or otherwise cease to hold office.

2017, c. 20, s. 218.

Cour d'appel de la cour martiale du Canada

31.1 Le juge en chef de la Cour d'appel de la cour martiale du Canada peut, en avisant le ministre de la Justice du Canada de sa décision, abandonner sa charge de juge en chef pour exercer celle de simple juge du tribunal auquel il appartient; le cas échéant, il occupe cette charge et touche le traitement correspondant jusqu'à la cessation de ses fonctions, notamment par mise à la retraite d'office, démission ou révocation.

2017, ch. 20, art. 218.

Election to cease to perform duties of chief justice of provincial superior court

32 (1) Where the legislature of a province has enacted legislation establishing for each office of chief justice of a superior court of the province such additional offices of judge of that court as are required for the purposes of this section, and a chief justice of that court has notified the Minister of Justice of Canada and the attorney general of the province of his or her election to cease to perform the duties of chief justice and to perform only the

Juridiction supérieure

32 (1) Dans les provinces où une loi a créé pour les postes de juge en chef d'une juridiction supérieure de la province les postes supplémentaires de simple juge nécessaires à l'application du présent article, un juge en chef d'une juridiction supérieure peut, en avisant de sa décision le ministre de la Justice du Canada et le procureur général de la province, abandonner sa charge de juge en chef pour exercer celle de simple juge; le cas

duties of a judge, the chief justice shall thereupon hold only the office of a judge, other than a chief justice, of that court and shall be paid the salary annexed to the office of a judge, other than a chief justice, of that court until he or she reaches the age of retirement, resigns or is removed from or otherwise ceases to hold office.

échéant, il occupe cette charge et touche le traitement correspondant jusqu'à la cessation de ses fonctions, notamment par mise à la retraite d'office, démission ou révocation.

Restriction on election

(2) A chief justice of a superior court of a province may make the election referred to in subsection (1) only if the chief justice has continued in the office of chief justice, senior associate chief justice or associate chief justice of a superior court of the province or a division thereof, or in two or more such offices, for at least five years.

Conditions

(2) La faculté visée au paragraphe (1) est réservée aux juges en chef, juges en chef associés ou juges en chef adjoints d'une juridiction supérieure ou de l'une de ses sections qui exercent leur charge depuis au moins cinq ans ou qui ont exercé au moins deux de ces charges pendant au moins la même période au total.

Duties of judge

(3) A chief justice of a superior court of a province who has made the election referred to in subsection (1) shall perform all of the judicial duties normally performed by a judge, other than the chief justice, of that court.

Fonctions

(3) Les juges en chef qui exercent la faculté visée au paragraphe (1) exercent les fonctions normales d'un juge du tribunal auquel ils appartiennent.

Salary of judge

(4) The salary of each chief justice of a superior court of a province who has made the election referred to in subsection (1) is the salary annexed to the office of a judge of that court, other than a chief justice.

Traitement

(4) Les juges en chef des juridictions supérieures des provinces qui exercent la faculté visée au paragraphe (1) reçoivent le traitement attaché au poste de simple juge du tribunal auquel ils appartiennent.

Definition of *chief justice* and *chief justice of a superior court of a province*

(5) In this section, ***chief justice*** or ***chief justice of a superior court of a province*** means a chief justice, senior associate chief justice or associate chief justice of such a court or, where the court is constituted with divisions, of a division thereof.

Définition de *juge en chef*

(5) Au présent article, sont assimilés au juge en chef d'une juridiction supérieure d'une province le juge en chef associé ou le juge en chef adjoint de la juridiction ou d'une section de celle-ci.

(6) [Repealed, 1992, c. 51, s. 10]

R.S., 1985, c. J-1, s. 32; 1992, c. 51, s. 10; 2002, c. 8, s. 91(E).

(6) [Abrogé, 1992, ch. 51, art. 10]

L.R. (1985), ch. J-1, art. 32; 1992, ch. 51, art. 10; 2002, ch. 8, art. 91(A).

Chief Justice

32.1 (1) If the Chief Justice of the Supreme Court of Yukon, the Supreme Court of the Northwest Territories or the Nunavut Court of Justice has notified the Minister of Justice of Canada and the attorney general of the territory of his or her election to cease to perform the duties of chief justice and to perform only the duties of a judge, he or she shall then hold only the office of a judge, other than the chief justice, of that court and shall be paid the salary annexed to the office of a judge, other than the chief justice, of that court until he or she reaches the age of retirement, resigns or is removed from or otherwise ceases to hold office.

Juge en chef

32.1 (1) Le juge en chef de la Cour suprême du Yukon ou des Territoires du Nord-Ouest ou de la Cour de justice du Nunavut peut, en avisant de sa décision le ministre de la Justice du Canada et le procureur général du territoire, abandonner sa charge de juge en chef pour exercer celle de simple juge; le cas échéant, il occupe cette charge et touche le traitement correspondant jusqu'à la cessation de ses fonctions, notamment par mise à la retraite d'office, démission ou révocation.

Restriction on election

(2) A chief justice may make the election referred to in subsection (1) only if he or she has continued in that office for at least five years.

Duties

(3) A chief justice who has made the election referred to in subsection (1) shall perform all of the judicial duties normally performed by a judge, other than the chief justice, of the applicable court.

Salary

(4) The salary of a chief justice who has made the election referred to in subsection (1) is the salary annexed to the office of a judge, other than the chief justice, of the applicable court.

2012, c. 31, s. 216; 2017, c. 33, s. 236.

Conditions

(2) La faculté visée au paragraphe (1) est réservée au juge en chef qui exerce sa charge depuis au moins cinq ans.

Fonctions

(3) Le juge en chef qui exerce la faculté visée au paragraphe (1) exerce les fonctions normales d'un juge du tribunal auquel il appartient.

Traitement

(4) Il reçoit le traitement attaché au poste de simple juge du tribunal auquel il appartient.

2012, ch. 31, art. 216; 2017, ch. 33, art. 236.

Early Notice

Deemed election and notice

33 (1) If a judge gives notice to the Minister of Justice of Canada and, if appropriate, to the attorney general of the province concerned of the judge's election as provided in section 28, 29, 31, 31.1, 32 or 32.1 to be effective on a future day specified in the notice, being a day on which the judge will be eligible to so elect, the judge is, effective on that day, deemed to have elected and given notice of the election on that day under section 28, 29, 31, 31.1, 32 or 32.1, as the case may be.

Reference to attorney general of a province

(2) In this section, a reference to the attorney general of a province shall be construed in relation to Yukon, the Northwest Territories and Nunavut as a reference to the Commissioner of that territory.

R.S., 1985, c. J-1, s. 33; 1992, c. 51, s. 11; 1993, c. 28, s. 78; 2002, c. 7, s. 192; 2017, c. 20, s. 219.

Date de l'avis

Présomption

33 (1) Si l'intéressé, dans les cas visés aux articles 28, 29, 31, 31.1, 32 ou 32.1, avise le ministre de la Justice du Canada et, le cas échéant, le procureur général de la province de sa décision avant de pouvoir la mettre à exécution mais précise la date ultérieure où elle prendra effet, date qui est celle où lui-même sera en mesure d'exercer sa faculté de choix, c'est cette dernière qui est réputée être la date de l'avis.

Destinataire de l'avis dans les territoires

(2) Au Yukon, dans les Territoires du Nord-Ouest et dans le territoire du Nunavut, le commissaire est, pour l'application du présent article, assimilé au procureur général d'une province.

L.R. (1985), ch. J-1, art. 33; 1992, ch. 51, art. 11; 1993, ch. 28, art. 78; 2002, ch. 7, art. 192; 2017, ch. 20, art. 219.

Travel and Other Allowances

Superior courts

34 (1) Subject to this section and sections 36 to 39, a judge of a superior court who, for the purposes of performing any function or duty in that capacity, attends at any place other than that at which or in the immediate vicinity of which the judge is by law obliged to reside is entitled to be paid, as a travel allowance, moving or transportation expenses and the reasonable travel and other expenses incurred by the judge in so attending.

Indemnités de déplacement et autres

Juridictions supérieures

34 (1) Sous réserve des autres dispositions du présent article et des articles 36 à 39, les juges d'une juridiction supérieure qui, dans le cadre de leurs fonctions judiciaires, doivent siéger en dehors des limites où la loi les oblige à résider ont droit à une indemnité de déplacement pour leurs frais de transport et les frais de séjour et autres entraînés par la vacation.

Where no allowance

(2) No judge is entitled to be paid a travel allowance for attending at or in the immediate vicinity of the place where the judge resides.

R.S., 1985, c. J-1, s. 34; 1992, c. 51, s. 12; 2002, c. 8, s. 92.

35 [Repealed, 1992, c. 51, s. 13]

Certain superior courts, where no allowance

36 (1) No travel allowance shall be paid

(a) to a judge of the Nova Scotia Court of Appeal or of the Supreme Court of Nova Scotia for attending at the judicial centre at which or in the immediate vicinity of which the judge maintains his or her principal office;

(b) to a judge of the Court of Appeal of Prince Edward Island or the Supreme Court of Prince Edward Island for attending at the city of Charlottetown; or

(c) to a judge of the Court of Appeal for British Columbia for attending at either of the cities of Victoria or Vancouver, unless the judge resides at the other of those cities or in the immediate vicinity thereof.

Where place of residence approved by order in council

(2) Nothing in subsection (1) affects the right of a judge to be paid a travel allowance under subsection 34(1) if the judge resides at a place approved by the Governor in Council.

R.S., 1985, c. J-1, s. 36; 1992, c. 51, s. 14; 2015, c. 3, s. 127.

Judges of Supreme Court of Nova Scotia

37 A judge of the Supreme Court of Nova Scotia who, for the purposes of performing any function or duty in that capacity, attends at any judicial centre within the judicial district for which the judge is designated as a resident judge, other than the judicial centre at which or in the immediate vicinity of which the judge resides or maintains his or her principal office, is entitled to be paid, as a travel allowance, moving or transportation expenses and the reasonable travel and other expenses incurred by the judge in so attending.

R.S., 1985, c. J-1, s. 37; 1992, c. 51, s. 15.

Judges of the Superior Court of Justice of Ontario

38 A judge of the Superior Court of Justice in and for the Province of Ontario who, for the purpose of performing any function or duty in that capacity, attends at any judicial centre within the region for which the judge was appointed or assigned, other than the judicial centre at which or in the immediate vicinity of which the judge resides, is entitled to be paid, as a travel allowance, moving

Absence d'indemnité

(2) Les juges n'ont droit à aucune indemnité de déplacement pour vacation dans leur lieu de résidence ou à proximité de celui-ci.

L.R. (1985), ch. J-1, art. 34; 1992, ch. 51, art. 12; 2002, ch. 8, art. 92.

35 [Abrogé, 1992, ch. 51, art. 13]

Absence d'indemnité : cas de certaines juridictions supérieures

36 (1) Il n'est versé aucune indemnité de déplacement :

a) aux juges de la Cour d'appel ou de la Cour suprême de la Nouvelle-Écosse pour vacation au centre judiciaire dans lequel ou près duquel ils ont installé leur bureau principal;

b) aux juges de la Cour d'appel ou de la Cour suprême de l'Île-du-Prince-Édouard pour vacation dans la ville de Charlottetown;

c) aux juges de la Cour d'appel de la Colombie-Britannique pour vacation dans la ville de Victoria ou de Vancouver, sauf s'ils résident dans l'autre de ces villes ou à proximité de celle-ci.

Cas d'approbation du lieu de résidence par décret

(2) Le paragraphe (1) n'a pas pour effet d'empêcher les juges qui résident dans une localité approuvée par le gouverneur en conseil de toucher une indemnité de déplacement.

L.R. (1985), ch. J-1, art. 36; 1992, ch. 51, art. 14; 2015, ch. 3, art. 127.

Juges de la Cour suprême de la Nouvelle-Écosse

37 Le juge de la Cour suprême de la Nouvelle-Écosse qui, dans le cadre de ses fonctions judiciaires, siège dans un centre judiciaire situé dans les limites de la circonscription pour laquelle il est désigné comme juge résident mais qui n'est pas le centre dans lequel ou près duquel il réside ou a installé son bureau principal a droit à une indemnité de déplacement pour ses frais de transport et les frais de séjour et autres entraînés par la vacation.

L.R. (1985), ch. J-1, art. 37; 1992, ch. 51, art. 15.

Cour supérieure de justice de l'Ontario

38 Le juge de la Cour supérieure de justice de l'Ontario qui, dans l'exercice de ses fonctions, siège dans un autre centre judiciaire de sa région de nomination ou d'affectation que celui dans lequel ou près duquel il réside a droit

or transportation expenses and the reasonable travel and other expenses incurred by the judge in so attending.

R.S., 1985, c. J-1, s. 38; R.S., 1985, c. 11 (1st Supp.), s. 2; 1990, c. 17, s. 33; 1998, c. 30, s. 6.

à une indemnité de déplacement pour ses frais de transport et les frais de séjour et autres entraînés par la vacation.

L.R. (1985), ch. J-1, art. 38; L.R. (1985), ch. 11 (1er suppl.), art. 2; 1990, ch. 17, art. 33; 1998, ch. 30, art. 6.

Certificate of judge

39 Every application for payment of a travel allowance shall be accompanied by a certificate of the judge applying for it showing the number of days for which a travel allowance is claimed and the amount of the actual expenses incurred.

R.S., c. J-1, s. 21.

Certificat du juge

39 Les demandes d'indemnité de déplacement doivent être accompagnées d'un état des dépenses exposées certifié par l'intéressé et précisant le nombre de jours de déplacement.

S.R., ch. J-1, art. 21.

Removal allowance

40 (1) A removal allowance shall be paid to

(a) a person who is appointed a judge of a superior court and who, for the purposes of assuming the functions and duties of that office, is required to move from his or her place of residence to a place outside the immediate vicinity of the place where the person resided at the time of the appointment;

(b) a judge of a superior court who, during tenure and for the purposes of performing the functions and duties of that office, is required to change the place of residence of the judge to a place other than that at which or in the immediate vicinity of which the judge was required to reside immediately before being required to change the place of residence of that judge;

(c) a judge of the Supreme Court of Newfoundland and Labrador resident in Labrador, the Supreme Court of Yukon, the Supreme Court of the Northwest Territories or the Nunavut Court of Justice who moves to a place of residence in one of the 10 provinces or in another territory during the period of two years

(i) beginning two years before the judge's date of eligibility to retire, or

(ii) if no removal allowance is paid in respect of a move made during the period described in subparagraph (i), beginning on the judge's date of retirement or resignation from office;

(d) a survivor or *child*, as defined in subsection 47(1), of a judge of the Supreme Court of Newfoundland and Labrador resident in Labrador, the Supreme Court of Yukon, the Supreme Court of the Northwest Territories or the Nunavut Court of Justice who dies while holding office as such, if the survivor or child lives with the judge at the time of the judge's death and, within two years after the death, moves to a place of

Allocation de déménagement

40 (1) Il est versé une allocation de déménagement :

a) à la personne nommée juge d'une juridiction supérieure qui, pour prendre ses nouvelles fonctions, est obligée de quitter le voisinage immédiat du lieu où elle réside au moment de sa nomination;

b) au juge d'une juridiction supérieure qui, durant son mandat et dans l'exercice de ses fonctions, est obligé de quitter le voisinage immédiat du lieu de résidence qui lui était auparavant imposé;

c) au juge de la Cour suprême de Terre-Neuve-et-Labrador qui réside au Labrador, de la Cour suprême du Yukon, de la Cour suprême des Territoires du Nord-Ouest ou de la Cour de justice du Nunavut qui s'établit dans l'une des dix provinces ou un autre territoire au cours de la période de deux ans qui commence :

(i) deux ans avant la date à laquelle il est admissible à la retraite,

(ii) le jour où il prend sa retraite ou démissionne, si aucune allocation de déménagement au titre du sous-alinéa (i) n'a été versée;

d) au survivant ou à l'*enfant*, au sens du paragraphe 47(1), du juge de la Cour suprême de Terre-Neuve-et-Labrador qui réside au Labrador, de la Cour suprême du Yukon, de la Cour suprême des Territoires du Nord-Ouest ou de la Cour de justice du Nunavut décédé en exercice qui vit avec lui au moment de son décès et qui, dans les deux ans suivant le jour du décès, s'établit dans l'une des dix provinces ou un autre territoire;

e) au juge de la Cour suprême du Canada, de la Cour d'appel fédérale, de la Cour fédérale ou de la Cour canadienne de l'impôt qui s'établit, ailleurs au Canada, à l'extérieur de la zone de résidence obligatoire prévue par la loi constitutive du tribunal auquel il

residence in one of the 10 provinces or in another territory;

(e) a judge of the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court or the Tax Court of Canada who moves to a place of residence in Canada outside the area within which the judge was required to reside by the Act establishing that Court, during the period of two years

(i) beginning two years before the judge's date of eligibility to retire, or

(ii) if no removal allowance is paid in respect of a move made during the period described in subparagraph (i), beginning on the judge's date of retirement or resignation from office; and

(f) a survivor or child, as defined in subsection 47(1), of a judge of the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court or the Tax Court of Canada who dies while holding office as such, if the survivor or child lives with the judge at the time of the judge's death and, within two years after the death, moves to a place of residence in Canada outside the area within which the judge was required to reside by the Act establishing that Court.

Limitation

(1.1) Paragraphs (1)(c) and (d) apply only in respect of

(a) a judge who resided in one of the 10 provinces or in another territory at the time of appointment to the Supreme Court of Yukon, the Supreme Court of the Northwest Territories or the Nunavut Court of Justice, as the case may be; or

(b) a judge of the Supreme Court of Newfoundland and Labrador resident in Labrador who at the time of appointment did not reside there.

Limitation

(1.2) Paragraphs (1)(e) and (f) apply only in respect of a judge who, at the time of appointment to the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court or the Tax Court of Canada, as the case may be, resided outside the area within which the judge was required to reside by the Act establishing that Court.

Idem

(2) A removal allowance referred to in subsection (1) shall be paid for moving and other expenses of such kinds as are prescribed by or under the authority of the Governor in Council and on such terms and conditions as are so prescribed.

appartenait, au cours de la période de deux ans qui commence :

(i) deux ans avant la date à laquelle il est admissible à la retraite,

(ii) le jour où il prend sa retraite ou démissionne, si aucune allocation de déménagement au titre du sous-alinéa (i) n'a été versée;

f) au survivant ou à l'enfant, au sens du paragraphe 47(1), du juge de la Cour suprême du Canada, de la Cour d'appel fédérale, de la Cour fédérale ou de la Cour canadienne de l'impôt décédé en exercice qui vit avec lui au moment de son décès et qui, dans les deux ans suivant le jour du décès, s'établit, ailleurs au Canada, à l'extérieur de la zone de résidence obligatoire prévue par la loi constitutive du tribunal auquel le juge appartenait.

Restriction

(1.1) Les alinéas (1)c) et d) s'appliquent uniquement :

a) aux juges qui, au moment de leur nomination à la Cour suprême du Yukon, à la Cour suprême des Territoires du Nord-Ouest ou à la Cour de justice du Nunavut, selon le cas, résidaient dans l'une des dix provinces ou dans un autre territoire;

b) aux juges qui résident au Labarador et qui, au moment de leur nomination à la Cour suprême de Terre-Neuve-et-Labrador, ne résidaient pas au Labrador.

Restriction

(1.2) Les alinéas (1)e) et f) ne s'appliquent que dans le cas des juges qui résidaient à l'extérieur de la zone de résidence obligatoire au moment de leur nomination à la Cour suprême du Canada, à la Cour d'appel fédérale, à la Cour fédérale ou à la Cour canadienne de l'impôt, selon le cas.

Barème et conditions

(2) L'allocation de déménagement couvre les frais de déménagement et certaines autres dépenses selon le barème et les modalités fixés par le gouverneur en conseil ou sous son autorité.

Expenses of spouse or common-law partner

(2.1) Where a removal allowance is payable to a judge of the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court or the Tax Court of Canada under paragraph (1)(a), an employment assistance allowance shall be paid to the judge's spouse or common-law partner up to a maximum of $5,000 for expenses actually incurred by the spouse or common-law partner in pursuing employment in the judge's new place of residence.

R.S., 1985, c. J-1, s. 40; R.S., 1985, c. 50 (1st Supp.), s. 6; 1989, c. 8, s. 11; 1992, c. 51, s. 16; 1999, c. 3, s. 75; 2000, c. 12, s. 160; 2002, c. 7, s. 193, c. 8, s. 93; 2006, c. 11, s. 9; 2017, c. 20, s. 220.

Dépenses de l'époux ou du conjoint de fait

(2.1) Il est versé à l'époux ou au conjoint de fait d'un juge de la Cour suprême du Canada, de la Cour d'appel fédérale, de la Cour fédérale ou de la Cour canadienne de l'impôt, en vertu de l'alinéa (1)a), une allocation d'aide à l'emploi d'au plus 5 000 $ pour couvrir les dépenses réelles liées à sa recherche d'emploi au nouveau lieu de résidence qui découlent du déménagement du juge.

L.R. (1985), ch. J-1, art. 40; L.R. (1985), ch. 50 (1er suppl.), art. 6; 1989, ch. 8, art. 11; 1992, ch. 51, art. 16; 1999, ch. 3, art. 75; 2000, ch. 12, art. 160; 2002, ch. 7, art. 193, ch. 8, art. 93; 2006, ch. 11, art. 9; 2017, ch. 20, art. 220.

Meeting, conference and seminar expenses

41 (1) A judge of a superior court who attends a meeting, conference or seminar that is held for a purpose relating to the administration of justice and that the judge in the capacity of a judge is required by law to attend, or who, with the approval of the chief justice of that court, attends any such meeting, conference or seminar that the judge in that capacity is expressly authorized by law to attend, is entitled to be paid, as a conference allowance, reasonable travel and other expenses actually incurred by the judge in so attending.

Dépenses entraînées par les colloques

41 (1) Le juge d'une juridiction supérieure qui participe, en cette qualité, parce qu'il y est soit astreint par la loi, soit expressément autorisé par la loi et par le juge en chef, à une réunion, une conférence ou un colloque ayant un rapport avec l'administration de la justice a droit, à titre d'indemnité de conférence, aux frais de déplacement et autres entraînés par sa participation.

Expenses for other meetings, conferences or seminars

(2) Subject to subsection (3), a judge of a superior court who, with the approval of the chief justice of that court,

(a) attends a meeting, conference or seminar that the judge in the capacity of a judge is not expressly authorized by law or is not required by law to attend but that is certified by the chief justice to be a meeting, conference or seminar having as its object or as one of its objects the promotion of efficiency or uniformity in the superior courts, or the improvement of the quality of judicial service in those courts, or

(b) in lieu of attending a meeting, conference or seminar referred to in paragraph (a) that is certified as provided in that paragraph, acquires written or recorded materials distributed for the purpose of, or written or recorded proceedings of, any such meeting, conference or seminar,

is entitled to be paid, as a conference allowance, reasonable travel and other expenses actually incurred by the judge in so attending or the cost of acquiring the materials or proceedings, as the case may be.

Frais de déplacement ou d'achat de documentation

(2) Sous réserve du paragraphe (3), ont droit, à titre d'indemnité de conférence, au remboursement soit des frais de déplacement et autres exposés pour leur participation, soit de l'achat de la documentation ou des comptes rendus, les juges d'une juridiction supérieure qui, avec l'autorisation du juge en chef du tribunal :

a) soit assistent à une réunion, une conférence ou un colloque auxquels, en cette qualité, ils ne sont de par la loi ni expressément autorisés ni tenus de participer, mais dont l'objet, au moins en partie, est certifié par leur juge en chef être l'amélioration du fonctionnement des juridictions supérieures ou de la qualité de leurs services judiciaires, ou encore l'uniformisation au sein de ces tribunaux;

b) soit, quand ils n'y assistent pas, en achètent, sous forme écrite ou enregistrée, les comptes rendus ou encore la documentation s'y rapportant.

Limitation

(3) Where the aggregate amount of conference allowances that have been paid under subsection (2) in any year

Plafond

(3) Le plafond des indemnités annuelles payables au titre du paragraphe (2) est :

a) pour la Cour suprême du Canada, le produit de mille dollars par le nombre de juges du tribunal;

(a) to the judges of the Supreme Court of Canada exceeds the product obtained by multiplying the number of judges of that Court by one thousand dollars, or

(b) to the judges of any other particular superior court exceeds the greater of $5,000 and the product obtained by multiplying the number of judges of that court by $500,

no additional amount may be paid under that subsection in that year as a conference allowance to any judge of that court except with the approval of the Minister of Justice of Canada.

Definitions

(4) For the purposes of this section,

chief justice of any court of which a particular judge is a member means the chief justice or other person recognized by law as having rank or status senior to all other members of, or having the supervision of, that court, but if that court is constituted with divisions, then it means the person having that rank or status in relation to all other members of the division of which the particular judge is a member; (*juge en chef*)

superior court, in the case of a superior court constituted with divisions, means a division thereof. (*juridiction supérieure*)

R.S., 1985, c. J-1, s. 41; R.S., 1985, c. 50 (1st Supp.), s. 7; 1992, c. 51, s. 17; 2002, c. 8, s. 94.

b) pour toute autre juridiction supérieure, le produit de cinq cents dollars par le nombre de juges du tribunal, pour un minimum de cinq mille dollars.

Le versement de toute indemnité supplémentaire est subordonné à l'approbation du ministre de la Justice du Canada.

Définitions

(4) Les définitions qui suivent s'appliquent au présent article.

juge en chef Le juge qui, au sein d'un tribunal ou d'une section de celui-ci, a de par la loi un rang ou un statut supérieur aux autres juges ou des pouvoirs de direction. (*chief justice*)

juridiction supérieure Est assimilée à une juridiction supérieure une section de celle-ci. (*superior court*)

L.R. (1985), ch. J-1, art. 41; L.R. (1985), ch. 50 (1er suppl.), art. 7; 1992, ch. 51, art. 17; 2002, ch. 8, art. 94.

Special Retirement Provision — Supreme Court of Canada Judges

Retired judge may continue to hold office

41.1 (1) A judge of the Supreme Court of Canada who has retired may, with the approval of the Chief Justice of Canada, continue to participate in judgments in which he or she participated before retiring, for a period not greater than six months after the date of the retirement.

Salary, etc.

(2) A retired judge participating in judgments shall receive

(a) the salary annexed to the office during that period less any amount otherwise payable to him or her under this Act in respect of the period, other than those amounts described in paragraphs (b) and (c);

(b) an amount that bears the same ratio to the allowance for incidental expenditures actually incurred

Disposition particulière concernant la retraite des juges de la Cour suprême du Canada

Juge retraité continuant à exercer ses fonctions

41.1 (1) Tout juge de la Cour suprême du Canada qui prend sa retraite peut, avec l'autorisation du juge en chef du Canada, continuer de participer aux jugements auxquels il participait avant sa retraite pendant une période maximale de six mois après celle-ci.

Traitement, etc.

(2) Le cas échéant, il reçoit :

a) le traitement attaché à la charge de juge pour cette période diminué des montants, compte non tenu de l'indemnité et des frais mentionnés aux alinéas b) et c), qui lui sont par ailleurs payables aux termes de la présente loi pendant cette période;

referred to in subsection 27(1) that the number of months in the period bears to twelve; and

(c) the representational allowance referred to in subsection 27(6) for the period, as though the appropriate maximum referred to in that subsection were an amount that bears the same ratio to that allowance that the number of months in the period bears to twelve.

No extra remuneration

(3) Section 57 applies with respect to a judge to whom this section applies.

2001, c. 7, s. 20; 2006, c. 11, s. 10.

Benefits

Life insurance

41.2 (1) The Treasury Board shall establish, or enter into a contract to acquire, an insurance program for judges covering the following, on terms and conditions similar to those contained in the Public Service Management Insurance Plan and the public service management insurance directives that apply to executives:

(a) basic life insurance;

(b) supplementary life insurance;

(c) post-retirement life insurance;

(d) dependants' insurance; and

(e) accidental death and dismemberment insurance.

Administration

(2) The Treasury Board may

(a) set terms and conditions in respect of the program, including those respecting premiums or contributions payable, benefits, and management and control of the program;

(b) make contributions and pay premiums or benefits, as required, out of the Consolidated Revenue Fund; and

(c) undertake and do all things it considers appropriate for the purpose of administering or supervising the program.

b) l'indemnité de faux frais visée au paragraphe 27(1), calculée au prorata du nombre de mois au cours desquels il exerce ses fonctions;

c) les frais de représentation visés au paragraphe 27(6), calculés, en fonction du montant pertinent visé à ce paragraphe, au prorata du nombre de mois au cours desquels il exerce ses fonctions.

Absence de rémunération supplémentaire

(3) L'article 57 s'applique au juge visé au présent article.

2001, ch. 7, art. 20; 2006, ch. 11, art. 10.

Assurances et autres avantages

Assurance-vie

41.2 (1) Le Conseil du Trésor doit établir pour les juges un programme d'assurance — selon des conditions et modalités semblables à celles qui sont applicables aux cadres de gestion en vertu du Régime d'assurance pour les cadres de gestion de la fonction publique et des directives relatives au régime d'assurance pour les cadres de gestion de la fonction publique — portant sur les points suivants ou conclure des marchés à cette fin :

a) assurance-vie de base;

b) assurance-vie supplémentaire;

c) assurance-vie après la retraite;

d) assurance des personnes à charge;

e) assurance en cas de décès ou de mutilation par accident.

Administration

(2) Le Conseil du Trésor peut :

a) fixer les conditions et modalités du programme d'assurance, notamment en ce qui concerne les primes et les cotisations à verser, les prestations ainsi que la gestion et le contrôle du programme;

b) payer sur le Trésor les primes, les cotisations et les prestations;

c) prendre toute autre mesure qu'il juge indiquée pour la gestion et la mise en œuvre du programme.

Non-application of certain regulations

(3) A contract entered into under this section is not subject to any regulation with respect to contracts made by the Treasury Board under the *Financial Administration Act*.

Compulsory participation

(4) Participation in basic life insurance under paragraph (1)(a) is compulsory for all judges.

Transitional

(5) A judge who holds office on the day on which this section comes into force may, despite subsection (4), elect, at any time within ninety days after that day,

(a) to participate in basic life insurance under paragraph (1)(a) but have his or her coverage under it limited to 100 per cent of salary at the time of his or her death; or

(b) not to participate in basic life insurance.

Transitional

(6) Subject to subsection (7), on the coming into force of this section, judges shall no longer be eligible for coverage under any other life insurance program established by the Treasury Board.

Supplementary life insurance

(7) Those judges covered by supplementary life insurance on the coming into force of this section may have their coverage continued under the insurance program for judges, unless they have made an election under paragraph (5)(b).

2001, c. 7, s. 20.

Health and dental care benefits

41.3 (1) Judges shall be eligible to participate in the Public Service Health Care Plan and the Public Service Dental Care Plan established by the Treasury Board, on the same terms and conditions as apply to employees in the executive group.

Health and dental care benefits for retired judges

(2) Judges who are in receipt of an annuity under this Act shall be eligible to participate in the Public Service Health Care Plan and the Pensioners' Dental Services Plan established by the Treasury Board, on the same terms and conditions as apply to pensioners.

Non-application de certains règlements

(3) La conclusion d'un marché en vertu du présent article n'est pas soumise aux règlements en matière de marchés de l'État pris en vertu de la *Loi sur la gestion des finances publiques* par le Conseil du Trésor.

Participation obligatoire

(4) La participation des juges à l'assurance-vie de base visée à l'alinéa (1)a) est obligatoire.

Disposition transitoire

(5) Le juge en exercice à la date d'entrée en vigueur de la présente loi peut, malgré le paragraphe (4), choisir, dans les quatre-vingt-dix jours suivant cette date :

a) soit de participer à l'assurance-vie de base visée à l'alinéa (1)a) à la condition de n'avoir qu'une couverture équivalant à cent pour cent de son traitement au moment de son décès;

b) soit de ne pas y participer.

Disposition transitoire

(6) Sous réserve du paragraphe (7), à l'entrée en vigueur du présent article, les juges ne sont plus admissibles à tout autre programme d'assurance-vie établi par le Conseil du Trésor.

Assurance-vie supplémentaire

(7) Les juges couverts par l'assurance-vie supplémentaire à l'entrée en vigueur du présent article peuvent continuer de l'être sous le régime du programme d'assurance pour les juges, sauf s'ils se sont prévalus du choix visé à l'alinéa (5)b).

2001, ch. 7, art. 20.

Admissibilité des juges : soins de santé et soins dentaires

41.3 (1) Les juges sont admissibles au Régime de soins de santé de la fonction publique et au Régime de soins dentaires de la fonction publique créés par le Conseil du Trésor, selon les mêmes conditions et modalités qui sont applicables aux cadres de gestion de la fonction publique.

Admissibilité des juges prestataires d'une pension : soins de santé et services dentaires

(2) Les juges prestataires d'une pension au titre de la présente loi sont admissibles au Régime de soins de santé de la fonction publique et au Régime de services dentaires pour les pensionnés créés par le Conseil du Trésor, selon les mêmes conditions et modalités qui sont applicables aux pensionnés de la fonction publique.

Administration

(3) Subject to subsections (1) and (2), the Treasury Board may

(a) set any terms and conditions in respect of those plans, including those respecting premiums or contributions payable, benefits, and management and control of the plans;

(b) make contributions and pay premiums or benefits, as required, out of the Consolidated Revenue Fund; and

(c) undertake and do all things it considers appropriate for the purpose of administering or supervising the plans.

2001, c. 7, s. 20.

Administration

(3) Sous réserve des autres dispositions du présent article, le Conseil du Trésor peut :

a) fixer les conditions et modalités de ces régimes, notamment en ce qui concerne les primes et les cotisations à verser, les prestations ainsi que la gestion et le contrôle des régimes;

b) payer sur le Trésor les primes, les cotisations et les prestations;

c) prendre toute autre mesure qu'il juge indiquée pour la gestion et la mise en œuvre des régimes.

2001, ch. 7, art. 20.

Accidental death in the exercise of duties

41.4 (1) Compensation, within the meaning of the *Government Employees Compensation Act*, shall be paid to the dependants of a judge whose death results from an accident arising out of or in the performance of judicial duties, on the same basis as that paid to dependants eligible for compensation under that Act.

Décès accidentel

41.4 (1) Il est versé aux personnes à charge d'un juge décédé des suites d'un accident survenu par le fait ou à l'occasion de l'exercice de ses fonctions judiciaires une indemnité, au sens de la *Loi sur l'indemnisation des agents de l'État*, calculée de la même façon que l'indemnité qui serait versée aux personnes à charge d'un agent de l'État sous le régime de cette loi.

Flying accidents causing death

(2) Regulations made under section 9 of the *Aeronautics Act* apply with respect to a judge whose death results from an accident arising out of or in the performance of judicial duties.

Loi sur l'aéronautique

(2) Les règlements pris en vertu de l'article 9 de la *Loi sur l'aéronautique* s'appliquent dans le cas d'un juge décédé des suites d'un accident survenu par le fait ou à l'occasion de l'exercice de ses fonctions judiciaires.

Death resulting from act of violence

(3) Compensation shall be paid to the survivors of a judge whose death results from an act of violence unlawfully committed by another person or persons that occurs while the judge is performing judicial duties, on the same basis as that paid to the survivors of employees slain on duty within the meaning of the Public Service Income Benefit Plan for Survivors of Employees Slain on Duty, with any modifications that the circumstances require.

Décès par acte de violence

(3) Il est versé une indemnité aux survivants d'un juge qui décède à la suite d'un acte de violence illégal commis par une ou plusieurs personnes survenu à l'occasion de l'exercice de ses fonctions judiciaires, calculée de la même façon que celle qui serait versée dans le cas d'un employé ayant été tué dans l'exercice de ses fonctions, au sens du Régime de prestations de revenus versées aux survivants des employés de la fonction publique tués dans l'exercice de leurs fonctions, compte tenu des adaptations nécessaires.

Application

(4) Subsections (1) to (3) apply to deaths that occur on or after April 1, 2000.

2001, c. 7, s. 20.

Application

(4) Les paragraphes (1) à (3) s'appliquent aux décès qui surviennent le 1er avril 2000 ou après cette date.

2001, ch. 7, art. 20.

Delegation

41.5 (1) The Treasury Board may authorize the President or Secretary of the Treasury Board to exercise and perform, in such manner and subject to such terms and

Délégation

41.5 (1) Le Conseil du Trésor peut, aux conditions et selon les modalités qu'il fixe, déléguer tel de ses pouvoirs visés aux articles 41.2 et 41.3 au président ou au

conditions as the Treasury Board directs, any of the powers and functions of the Treasury Board under sections 41.2 and 41.3 and may, from time to time as it sees fit, revise or rescind and reinstate the authority so granted.

Subdelegation

(2) The President or Secretary of the Treasury Board may, subject to and in accordance with the authorization, authorize one or more persons under his or her jurisdiction or any other person to exercise or perform any of those powers or functions.

2001, c. 7, s. 20.

secrétaire du Conseil du Trésor; cette délégation peut être annulée, modifiée ou rétablie à discrétion.

Subdélégation

(2) Le président ou le secrétaire du Conseil du Trésor peut, compte tenu des conditions et modalités de la délégation, subdéléguer les pouvoirs qu'il a reçus à ses subordonnés ou à toute autre personne.

2001, ch. 7, art. 20.

Annuities for Judges

Payment of annuities

42 (1) A judge shall be paid an annuity equal to two thirds of the salary annexed to the office held by the judge at the time of his or her resignation, removal or attaining the age of retirement, as the case may be, if the judge

(a) has continued in judicial office for at least 15 years, has a combined age and number of years in judicial office that is not less than 80 and resigns from office;

(b) has attained the age of retirement and has held judicial office for at least 10 years; or

(c) has continued in judicial office on the Supreme Court of Canada for at least 10 years and resigns from office.

Grant of annuities

(1.1) The Governor in Council shall grant to a judge an annuity equal to two thirds of the salary annexed to the office held by the judge at the time of his or her resignation, removal or attaining the age of retirement, as the case may be, if the judge

(a) has continued in judicial office for at least 15 years and resigns his or her office, if in the opinion of the Governor in Council the resignation is conducive to the better administration of justice or is in the national interest; or

(b) has become afflicted with a permanent infirmity disabling him or her from the due execution of the office of judge and resigns his or her office or by reason of that infirmity is removed from office.

Pensions des juges

Versement de la pension

42 (1) Une pension égale aux deux tiers de leur dernier traitement est versée aux juges qui :

a) démissionnent après avoir exercé des fonctions judiciaires pendant au moins quinze ans dans le cas où le chiffre obtenu par l'addition de l'âge et du nombre d'années d'exercice est d'au moins quatre-vingt;

b) ont exercé des fonctions judiciaires pendant au moins dix ans et sont mis à la retraite d'office;

c) démissionnent après avoir exercé des fonctions judiciaires à la Cour suprême du Canada pendant au moins dix ans.

Octroi par le gouverneur en conseil

(1.1) Le gouverneur en conseil accorde une pension égale aux deux tiers de leur dernier traitement aux juges qui :

a) démissionnent après avoir exercé des fonctions judiciaires pendant au moins quinze ans et dont la démission sert, de l'avis du gouverneur en conseil, l'administration de la justice ou l'intérêt national;

b) démissionnent ou sont révoqués pour incapacité par suite d'une infirmité permanente.

Prorated annuity

(2) If a judge who has attained the age of retirement has held judicial office for less than 10 years, an annuity shall be paid to that judge that bears the same ratio to the annuity described in subsection (1) as the number of years the judge has held judicial office, to the nearest one tenth of a year, bears to 10 years.

Duration of annuities

(3) An annuity granted or paid to a judge under this section shall commence on the day of his or her resignation, removal or attaining the age of retirement and shall continue during the life of the judge.

Definition of *judicial office*

(4) In this section, ***judicial office*** means the office of a judge of a superior or county court or the office of a prothonotary of the Federal Court.

R.S., 1985, c. J-1, s. 42; 1998, c. 30, s. 7; 2002, c. 8, ss. 95, 111(E); 2006, c. 11, s. 11; 2014, c. 39, s. 322; 2017, c. 33, s. 238.

Pension proportionnelle

(2) La pension du juge qui est mis à la retraite d'office après avoir exercé des fonctions judiciaires pendant un nombre d'années inférieur à dix est calculée au prorata de ce nombre d'années, au dixième près.

Durée des pensions

(3) Le juge touche la pension à compter de la date à laquelle il cesse d'occuper son poste, et ce, jusqu'à son décès.

Définition de *fonctions judiciaires*

(4) Au présent article, ***fonctions judiciaires*** s'entend des fonctions de juge d'une juridiction supérieure ou d'une cour de comté ou des fonctions de protonotaire de la Cour fédérale.

L.R. (1985), ch. J-1, art. 42; 1998, ch. 30, art. 7; 2002, ch. 8, art. 95 et 111(A); 2006, ch. 11, art. 11; 2014, ch. 39, art. 322; 2017, ch. 33, art. 238.

Annuity payable to supernumerary judge

43 (1) If a supernumerary judge, before becoming one, held the office of chief justice, senior associate chief justice or associate chief justice, the annuity payable to the judge under section 42 is an annuity equal to two thirds of the salary annexed, at the time of his or her resignation, removal or attaining the age of retirement, to the office of chief justice, senior associate chief justice or associate chief justice previously held by him or her.

Annuity for former supernumerary judge

(1.1) If a supernumerary judge to whom subsection (1) applies is appointed to a different court to perform only the duties of a judge, the annuity payable to the judge under section 42 is an annuity equal to two thirds of the salary annexed, at the time of his or her resignation, removal or attaining the age of retirement, to the office of chief justice, senior associate chief justice or associate chief justice previously held by him or her.

Annuity — election under section 31, 32 or 32.1

(2) If the Chief Justice of the Federal Court of Appeal or the Chief Justice or Associate Chief Justice of the Federal Court or the Tax Court of Canada, in accordance with section 31, or a chief justice of a superior court of a province, in accordance with section 32, or the Chief Justice of the Supreme Court of Yukon, the Supreme Court of the Northwest Territories or the Nunavut Court of Justice, in accordance with section 32.1, has elected to cease to perform his or her duties and to perform only the

Pension du juge surnuméraire

43 (1) Le juge surnuméraire qui exerçait, avant d'être nommé à ce poste, la charge de juge en chef, de juge en chef associé ou de juge en chef adjoint a droit, au titre de l'article 42, à une pension égale aux deux tiers du traitement attaché, au moment de la cessation de ses fonctions de juge surnuméraire par mise à la retraite d'office, démission ou révocation, à la charge qu'il occupait avant sa nomination dans ce poste.

Pension du juge surnuméraire auquel s'applique le paragraphe (1)

(1.1) Le juge surnuméraire auquel s'applique le paragraphe (1) qui est nommé simple juge à une autre cour, a droit, au titre de l'article 42, à une pension égale aux deux tiers du traitement attaché, au moment de la cessation de ses fonctions de simple juge par mise à la retraite d'office, démission ou révocation, à la charge qu'il occupait avant d'être juge surnuméraire.

Pension – exercice de la faculté visée à l'article 31, 32 ou 32.1

(2) Le juge en chef de la Cour d'appel fédérale ou le juge en chef ou juge en chef adjoint de la Cour fédérale ou de la Cour canadienne de l'impôt, ou le juge en chef d'une juridiction supérieure d'une province, qui exerce la faculté visée à l'article 31 ou 32, selon le cas, pour devenir simple juge — ou le juge en chef de la Cour suprême du Yukon ou des Territoires du Nord-Ouest ou de la Cour de justice du Nunavut qui exerce la faculté visée à l'article 32.1 pour devenir simple juge — a droit, au titre de

duties of a judge, the annuity payable to him or her under section 42 is an annuity equal to two thirds of the salary annexed, at the time of his or her resignation, removal or attainment of the age of retirement, to the office held by him or her immediately before his or her election.

Annuity — election under section 31.1

(2.1) If the Chief Justice of the Court Martial Appeal Court of Canada, in accordance with section 31.1, has elected to cease to perform his or her duties as such and to perform only the duties of a judge, the annuity payable to him or her under section 42 is an annuity equal to two thirds of the salary annexed, at the time of his or her resignation, removal or attaining the age of retirement, to the office held by him or her immediately before his or her election, if he or she had continued in that office for at least five years or had continued in that office and any other office of chief justice for a total of at least five years.

Annuity payable to chief justice

(2.2) If a chief justice is appointed to a different court to perform only the duties of a judge, the annuity payable to him or her under section 42 is an annuity equal to two thirds of the salary annexed, at the time of his or her resignation, removal or attaining the age of retirement, to the office of chief justice, if he or she had continued in that office for at least five years or had continued in that office and any other office of chief justice for at least five years.

Definition of *chief justice* and *chief justice of a superior court of a province*

(3) In subsections (2) to (2.2), ***chief justice*** or ***chief justice of a superior court of a province*** means a chief justice, senior associate chief justice or associate chief justice of that court, or, if that court is constituted with divisions, of a division of that court.

Application of subsections (1) and (2)

(4) Subsections (1) and (2) are deemed to have come into force on April 1, 2012.

R.S., 1985, c. J-1, s. 43; 1992, c. 51, s. 19; 2002, c. 8, s. 96; 2012, c. 31, s. 217; 2017, c. 20, s. 221, c. 33, s. 239; 2018, c. 12, ss. 303, 308.

l'article 42, à une pension égale aux deux tiers du traitement attaché, au moment de la cessation de ses fonctions de simple juge par mise à la retraite d'office, démission ou révocation, à la charge qu'il occupait avant d'exercer cette faculté.

Pension : juge en chef de la Cour d'appel de la cour martiale du Canada

(2.1) Le juge en chef de la Cour d'appel de la cour martiale du Canada qui, conformément à l'article 31.1, abandonne sa charge de juge en chef pour exercer celle de simple juge reçoit une pension en fonction du traitement de juge en chef de la Cour d'appel de la cour martiale du Canada, s'il a occupé ce poste pendant au moins cinq ans ou a occupé ce poste et tout autre poste de juge en chef d'une autre cour pendant au moins cinq ans au total; il a droit, au titre de l'article 42, à une pension égale aux deux tiers du traitement attaché, au moment de la cessation de ses fonctions de simple juge par mise à la retraite d'office, démission ou révocation, à la charge qu'il occupait comme juge en chef de la Cour d'appel de la cour martiale du Canada.

Pension : juge en chef

(2.2) Le juge en chef qui est nommé simple juge à une autre cour reçoit une pension en fonction du traitement de juge en chef s'il a occupé un poste de juge en chef pendant au moins cinq ans; il a droit, au titre de l'article 42, à une pension égale aux deux tiers du traitement attaché, au moment de la cessation de ses fonctions de simple juge par mise à la retraite d'office, démission ou révocation, à la charge qu'il occupait comme juge en chef.

Définition de *juge en chef* et *juge en chef d'une juridiction supérieure d'une province*

(3) Aux paragraphes (2) à (2.2), sont assimilés au ***juge en chef*** ou au ***juge en chef d'une juridiction supérieure d'une province*** le juge en chef associé ou le juge en chef adjoint de la juridiction ou d'une section de celle-ci.

Application des paragraphes (1) et (2)

(4) Les paragraphes (1) et (2) sont réputés être entrés en vigueur le 1er avril 2012.

L.R. (1985), ch. J-1, art. 43; 1992, ch. 51, art. 19; 2002, ch. 8, art. 96; 2012, ch. 31, art. 217; 2017, ch. 20, art. 221, ch. 33, art. 239; 2018, ch. 12, art. 303 et 308.

Prorated Annuities — Early Retirement

55 years of age and 10 years in office

43.1 (1) A judge who has attained the age of 55 years, has continued in judicial office for at least 10 years and elects early retirement shall be paid an immediate annuity or a deferred annuity, at the option of the judge, calculated in accordance with this section.

Calculation of amount of deferred annuity

(2) The amount of the deferred annuity shall be two thirds of the amount of the salary annexed to the judge's office at the time of the election multiplied by a fraction of which

(a) the numerator is the number of years, to the nearest one tenth of a year, during which the judge has continued in judicial office, and

(b) the denominator is the number of years, to the nearest one tenth of a year, during which the judge would have been required to continue in judicial office in order to be eligible to be paid an annuity under paragraph 42(1)(a) or (b).

Immediate annuity

(3) If a judge exercises the option to receive an immediate annuity, the amount of that annuity is equal to the amount of the deferred annuity, reduced by the product obtained by multiplying

(a) five per cent of the amount of the deferred annuity

by

(b) the difference between sixty and his or her age in years, to the nearest one-tenth of a year, at the time he or she exercises the option.

Second exercise of option

(4) A judge whose option was to receive a deferred annuity may, between the date of that option and the date on which the deferred annuity would be payable, opt for an immediate annuity. An immediate annuity shall be paid to the judge from the date of the second option.

Survivor's annuity

(5) On the death of a judge who has been paid an immediate annuity or a deferred annuity under subsection (1) or (4), the annuity paid to a survivor under subsection

Pension proportionnelle — retraite anticipée

Juges âgés de cinquante-cinq ans et ayant dix ans d'ancienneté

43.1 (1) Une pension immédiate ou différée, selon le choix effectué par le juge, calculée conformément au présent article est versée au juge ayant atteint l'âge de cinquante-cinq ans, ayant au moins dix ans d'ancienneté dans la magistrature et ayant choisi une retraite anticipée.

Calcul de la pension différée

(2) La pension différée correspond aux deux tiers du traitement attaché à la charge du juge au moment où il exerce son choix, multiplié par la fraction dont le numérateur est son nombre d'années d'ancienneté, au dixième près, au sein de la magistrature et dont le dénominateur est le nombre d'années d'ancienneté, au dixième près, qui lui aurait été nécessaire pour avoir droit à une pension en vertu de l'alinéa 42(1)a) ou b), selon le cas.

Pension immédiate

(3) Si le juge choisit une pension immédiate, celle-ci est égale à la pension différée diminuée du produit obtenu par la multiplication de cinq pour cent du montant de cette pension par la différence entre soixante et son âge en années, au dixième près, au moment où il exerce son choix.

Modification du choix

(4) S'il choisit une pension différée, le juge peut changer son choix entre la date où il l'a exercé et la date à laquelle la pension différée lui serait à verser. Une pension immédiate lui est alors versée à compter de la date de modification du choix.

Pension

(5) Au décès d'un juge à qui une pension immédiate ou différée était versée, en vertu des paragraphes (1) ou (4), la pension de réversion à verser au survivant en vertu du

44(2) shall be determined as if the judge were in receipt of a deferred annuity.

Definitions

(6) The definitions in this subsection apply in this section.

deferred annuity means an annuity that becomes payable to a judge at the time that he or she reaches sixty years of age and that continues to be paid during the life of the judge. (*pension différée*)

immediate annuity means an annuity that becomes payable to a judge at the time that he or she exercises an option to receive the annuity and that continues to be paid during the life of the judge. (*pension immédiate*)

judicial office includes the office of a prothonotary of the Federal Court. (*magistrature*)

2001, c. 7, s. 21; 2006, c. 11, s. 12; 2014, c. 39, s. 323; 2017, c. 33, s. 240.

paragraphe 44(2) est calculée comme si le juge était prestataire d'une pension différée.

Définitions

(6) Les définitions qui suivent s'appliquent au présent article.

magistrature Sont assimilés à la magistrature les protonotaires de la Cour fédérale. (*judicial office*)

pension différée Pension qui devient payable au juge lorsqu'il atteint l'âge de soixante ans et lui est payable sa vie durant. (*deferred annuity*)

pension immédiate Pension qui devient payable au juge au moment où il choisit une pension immédiate et lui est payable sa vie durant. (*immediate annuity*)

2001, ch. 7, art. 21; 2006, ch. 11, art. 12; 2014, ch. 39, art. 323; 2017, ch. 33, art. 240.

Annuities for Survivors

Annuity for surviving spouse

44 (1) Subject to this section, if a judge of a superior court while holding office died or dies after July 10, 1955, the survivor of the judge shall be paid, commencing on July 18, 1983 or immediately after the death of the judge, whichever is later, and continuing during the life of the survivor, an annuity equal to one third of

(a) the salary of the judge at the date of the death of the judge, or

(b) the salary annexed, at the date of death, to the office previously held by the judge of chief justice, senior associate chief justice or associate chief justice, if one of subsections 43(1), (1.1), (2), (2.1) or (2.2) would have applied to the judge if he or she had resigned, been removed or attained the age of retirement, on the day of death.

Judge receiving annuity

(2) Subject to this section, if a judge who, before, on or after July 11, 1955, was granted or paid a pension or annuity under this Act or any other Act of Parliament providing for pensions or annuities to be granted or paid to judges, died or dies after July 10, 1955, the survivor of the judge shall be paid

(a) an annuity equal to one half of the pension or annuity granted or paid to the judge, commencing on July 18, 1983 or immediately after the death of the judge, whichever is later, and continuing during the life of the survivor; or

Pensions de réversion

Pension de réversion

44 (1) Sous réserve des autres dispositions du présent article, il est versé, à compter du 18 juillet 1983 ou du décès du juge, si celui-ci est postérieur à cette date, au survivant d'un juge en exercice d'une juridiction supérieure décédé après le 10 juillet 1955 une pension viagère égale au tiers :

a) soit du traitement du juge au moment de son décès;

b) soit, dans les cas où le juge se serait trouvé dans la situation prévue au paragraphe 43(1), (1.1), (2), (2.1) ou (2.2) si la cessation de ses fonctions avait eu une autre cause que le décès, du traitement attaché à la date de celui-ci, au poste de juge en chef, de juge en chef associé ou de juge en chef adjoint que le juge occupait antérieurement.

Juge prestataire d'une pension

(2) Sous réserve des autres dispositions du présent article, la pension ci-après est versée au survivant du juge décédé après le 10 juillet 1955 et prestataire d'une pension accordée ou versée, à quelque date que ce soit, aux termes de la présente loi ou d'une autre loi fédérale prévoyant l'octroi ou le versement de pensions aux juges :

a) une pension viagère égale à la moitié de la pension du juge, à compter du 18 juillet 1983 ou du décès du juge, si celui-ci est postérieur à cette date;

(b) if a division of the judge's annuity benefits has been made under section 52.14, an annuity equal to one half of the annuity that would have been granted or paid to the judge had the annuity benefits not been divided, commencing immediately after the death of the judge and continuing during the life of the survivor.

b) lorsque les prestations de pension du juge ont été partagées en application de l'article 52.14, une pension viagère égale à la moitié de la pension qui aurait été accordée ou versée au juge en l'absence de partage, à compter du décès du juge.

Prothonotaries

(3) No annuity shall be paid under this section to the survivor of a prothonotary of the Federal Court if the prothonotary ceased to hold the office of prothonotary before the day on which this subsection comes into force.

Protonotaire

(3) Le survivant d'un protonotaire de la Cour fédérale n'a pas droit à la pension prévue au présent article si celui-ci a cessé d'exercer ses fonctions avant la date d'entrée en vigueur du présent paragraphe.

Limitation on annuity for survivor

(4) No annuity shall be paid under this section to the survivor of a judge if the survivor became the spouse or began to cohabit with the judge in a conjugal relationship after the judge ceased to hold office.

Restriction

(4) Le survivant n'a pas droit à la pension prévue au présent article s'il a épousé le juge ou a commencé à vivre avec lui dans une relation conjugale après la cessation de fonctions de celui-ci.

(5) and (6) [Repealed, R.S., 1985, c. 39 (3rd Supp.), s. 2]

R.S., 1985, c. J-1, s. 44; R.S., 1985, c. 39 (3rd Supp.), s. 2; 1992, c. 51, s. 20; 1996, c. 30, s. 3; 2000, c. 12, ss. 162, 169; 2001, c. 7, s. 22; 2002, c. 8, s. 97; 2006, c. 11, s. 13; 2014, c. 39, s. 324; 2017, c. 20, s. 222; 2017, c. 33, s. 242.

(5) et (6) [Abrogés, L.R. (1985), ch. 39 (3e suppl.), art. 2]

L.R. (1985), ch. J-1, art. 44; L.R. (1985), ch. 39 (3e suppl.), art. 2; 1992, ch. 51, art. 20; 1996, ch. 30, art. 3; 2000, ch. 12, art. 162 et 169; 2001, ch. 7, art. 22; 2002, ch. 8, art. 97; 2006, ch. 11, art. 13; 2014, ch. 39, art. 324; 2017, ch. 20, art. 222; 2017, ch. 33, art. 242.

Election for enhanced annuity for survivor

44.01 (1) Subject to the regulations, a judge may elect to have the annuity to be paid to his or her survivor increased so that it is calculated as if the reference to "one half" in subsection 44(2) were read as a reference to "60%" or "75%".

Choix pour augmenter la pension de réversion

44.01 (1) Sous réserve des règlements, le juge peut choisir d'augmenter la pension viagère visée au paragraphe 44(2) en la calculant comme si « la moitié » était remplacé par « soixante pour cent » ou « soixante-quinze pour cent ».

Reduction of annuity

(2) If a judge makes the election, the amount of the annuity granted or paid to the judge shall be reduced in accordance with the regulations as of the date the election takes effect, but the combined actuarial present value of the reduced annuity and the annuity that would be paid to the survivor must not be less than the combined actuarial present value of the annuity granted or paid to the judge and the annuity that would be paid to the survivor, immediately before the reduction is made.

Réduction de la pension

(2) La réduction se fait conformément aux règlements à compter de la date de prise d'effet du choix, mais la valeur actuarielle actualisée globale du montant réduit de la pension et de la pension à laquelle aurait droit le survivant ne peut être inférieure à la valeur actuarielle actualisée globale de la pension accordée ou versée au juge et de la pension à laquelle aurait droit le survivant avant la réduction.

Election to take effect at time of retirement

(3) Subject to subsection (6), an election under this section takes effect on the date that the judge ceases to hold office.

Prise d'effet du choix

(3) Sous réserve du paragraphe (6), le choix effectué en vertu du présent article prend effet à la date où le juge cesse d'exercer ses fonctions.

Death within one year after election

(4) Despite anything in this section, when a judge dies within one year after the election takes effect, the annuity payable to the survivor remains that payable under subsection 44(2) and the amount representing the reduction that was made in the amount of the judge's annuity under subsection (2) shall be repaid to the judge's estate or

Décès dans un délai d'un an après le choix

(4) Malgré les autres dispositions du présent article, lorsqu'un juge décède dans l'année suivant la prise d'effet de son choix, la pension à laquelle a droit son survivant est celle prévue au paragraphe 44(2), et le montant correspondant à la réduction de la pension visée au paragraphe (2) est remboursé à sa succession, accompagné

succession, together with interest at the rate prescribed under the *Income Tax Act* for amounts payable by the Minister of National Revenue as refunds of overpayments of tax under that Act.

Regulations

(5) The Governor in Council may make regulations respecting

(a) the time, manner and circumstances in which an election is made, is deemed to have been made or is deemed not to have been made, is revoked or is deemed to have been revoked, or ceases to have effect, and the retroactive application of that making, revocation or cessation;

(b) the reduction to be made in the amount of a judge's annuity when the election is made;

(c) the calculation of the amount of the annuity to be paid to the judge and the survivor under subsection (2);

(d) the time, manner and circumstances in which a reduction of a judge's annuity may be returned and interest may be paid; and

(e) any other matter that the Governor in Council considers necessary for carrying out the purposes and provisions of this section.

Transitional

(6) A judge who is in receipt of an annuity on the day on which this section comes into force may make his or her election in accordance with the regulations, and the election takes effect on the day this section comes into force.

Limitation on annuity to survivor

(7) Despite anything in this section, no election may be made under this section for the benefit of a spouse or common-law partner of a judge unless that person was the spouse or common-law partner at the date the judge ceased to hold office.

2001, c. 7, s. 23; 2017, c. 33, s. 243.

Annuity to be prorated between the two survivors

44.1 (1) Notwithstanding section 44, if there are two persons who are entitled to an annuity under that section, each survivor shall receive a share of the annuity prorated in accordance with subsection (2) for his or her life.

Determination of prorated share

(2) The prorated share of each survivor is equal to the product obtained by multiplying the annuity by a fraction

des intérêts calculés au taux déterminé en vertu de la *Loi de l'impôt sur le revenu* sur les sommes payables par le ministre du Revenu national à titre de remboursement de paiements en trop d'impôt en vertu de cette loi.

Règlements

(5) Le gouverneur en conseil peut prendre des règlements concernant :

a) la question de savoir à quel moment, de quelle manière et dans quelles circonstances le choix peut être effectué, être réputé avoir été fait ou réputé ne pas l'avoir été, révoqué ou réputé révoqué ou cesse d'avoir effet, ainsi que l'application rétroactive du choix qui a été fait, de sa révocation et de sa cessation d'effet;

b) la réduction de la pension du juge lorsqu'un choix a été effectué;

c) le mode de calcul de la pension à verser au juge et au survivant au titre du paragraphe (2);

d) la question de savoir à quel moment, de quelle manière et dans quelles circonstances la réduction de la pension du juge peut être remboursée et les intérêts payés;

e) toute autre mesure qu'il estime nécessaire à l'application du présent article.

Disposition transitoire

(6) Le juge prestataire d'une pension à la date d'entrée en vigueur du présent article peut effectuer son choix en vertu des règlements, le choix prenant effet à la date d'entrée en vigueur du présent article.

Restriction

(7) Par dérogation aux autres dispositions du présent article, un choix ne peut être effectué sous le régime du présent article en faveur d'un époux ou conjoint de fait que si cette personne avait cette qualité au moment où le juge cesse d'exercer ses fonctions.

2001, ch. 7, art. 23; 2017, ch. 33, art. 243.

Pension partagée entre les deux survivants

44.1 (1) Par dérogation à l'article 44, si deux personnes ont droit à une pension au titre de cet article, chacune reçoit, sa vie durant, la partie de la pension qui lui revient en application du paragraphe (2).

Calcul

(2) Chaque survivant ayant droit à la pension reçoit le montant égal au produit de la pension et de la fraction

of which the numerator is the number of years that the survivor cohabited with the judge, whether before or after his or her appointment as a judge, and the denominator is the total obtained by adding the number of years that each of the survivors so cohabited with the judge.

dont le numérateur est le nombre d'années qu'il a vécu avec le juge — avant ou après sa nomination — et le dénominateur est le total des années que les deux survivants ont effectivement vécu avec lui.

Years

(3) In determining a number of years for the purpose of subsection (2), a part of a year shall be counted as a full year if the part is six or more months and shall be ignored if it is less.

Arrondissement

(3) Pour le calcul d'une année au titre du paragraphe (2), une partie d'année est comptée comme une année si elle est égale ou supérieure à six mois; elle n'est pas prise en compte dans le cas contraire.

Waiver

(4) A survivor is not entitled to receive an annuity under section 44 or this section if the survivor has waived his or her entitlement to the annuity under an agreement entered into in accordance with applicable provincial law.

2000, c. 12, s. 163.

Renonciation

(4) Un survivant n'a pas droit à une pension au titre de l'article 44 ou du présent article s'il y a renoncé dans un accord conclu en conformité avec le droit provincial applicable.

2000, ch. 12, art. 163.

Election for former judges

44.2 (1) Subject to the regulations, a judge to whom an annuity has been granted or paid may elect to reduce his or her annuity so that an annuity may be paid to a person who, at the time of the election, is the spouse or common-law partner of the judge but to whom an annuity under section 44 must not be paid.

Choix pour les juges prestataires d'une pension

44.2 (1) Le juge à qui une pension a été accordée ou versée en vertu de la présente loi peut choisir, sous réserve des règlements, de réduire le montant de sa pension afin que soit versée une pension à la personne qui, au moment du choix, est son époux ou conjoint de fait et n'a pas droit à une pension au titre de l'article 44.

Reduction of annuity

(2) If a judge makes the election, the amount of the annuity granted or paid to the judge shall be reduced in accordance with the regulations, but the combined actuarial present value of the reduced annuity and the annuity that would be paid to the spouse or common-law partner under subsection (3) must not be less than the actuarial present value of the annuity granted or paid to the judge immediately before the reduction is made.

Réduction de la pension

(2) La réduction se fait conformément aux règlements, mais la valeur actuarielle actualisée globale du montant réduit de la pension et de la pension à laquelle aurait droit l'époux ou le conjoint de fait en vertu du paragraphe (3) ne peut être inférieure à la valeur actuarielle actualisée de la pension accordée ou versée au juge avant la réduction.

Payment to person in respect of whom election is made

(3) When the judge dies, the spouse or common-law partner in respect of whom an election was made shall be paid an annuity in an amount determined in accordance with the election, subsection (2) and the regulations.

Paiement

(3) Au décès du juge, une pension d'un montant déterminé conformément au choix, au paragraphe (2) et aux règlements est versée à la personne visée au paragraphe (1).

Death within one year after election

(3.1) Despite anything in this section, when a judge dies within one year after making the election, the election is deemed not to have been made and the amount representing the reduction that was made in the amount of the judge's annuity under subsection (2) shall be repaid to the judge's estate or succession, together with interest at the rate prescribed under the *Income Tax Act* for amounts payable by the Minister of National Revenue as refunds of overpayments of tax under that Act.

Décès dans un délai d'un an après le choix

(3.1) Malgré les autres dispositions du présent article, lorsqu'un juge décède dans l'année suivant son choix, le choix est réputé ne pas avoir été fait et le montant correspondant à la réduction de la pension visée au paragraphe (2) est remboursé à sa succession, accompagné des intérêts calculés au taux déterminé en vertu de la *Loi de l'impôt sur le revenu* sur les sommes payables par le ministre du Revenu national à titre de remboursement de paiements en trop d'impôt en vertu de cette loi.

Regulations

(4) The Governor in Council may make regulations respecting

(a) the time, manner and circumstances in which an election is made, is deemed to have been made or is deemed not to have been made, is revoked or is deemed to have been revoked, or ceases to have effect, and the retroactive application of that making, revocation or cessation;

(b) the reduction to be made in the amount of a judge's annuity when an election is made;

(c) the amount of the annuity to be paid under subsection (3);

(d) the time, manner and circumstances in which a reduction of a judge's annuity may be returned and interest may be paid; and

(e) any other matter that the Governor in Council considers necessary for carrying out the purposes and provisions of this section.

2000, c. 12, s. 163; 2001, c. 7, s. 24; 2017, c. 33, s. 244.

45 and 46 [Repealed, 1992, c. 51, s. 21]

Lump Sum Payment

Lump sum payment

46.1 Where a judge dies while holding office, a lump sum equal to one sixth of the yearly salary of the judge at the time of death shall be paid to the survivor of the judge or, if there are two survivors, to the survivor who was cohabiting with the judge at the time of death, and if there is no survivor, to the estate or succession of the judge.

1989, c. 8, s. 12; 2000, c. 12, s. 164.

Annuities for Surviving Children

Definition of *child*

47 (1) For the purposes of this section and sections 48 and 49, ***child*** means a child of a judge, including a child adopted legally or in fact, who

(a) is less than eighteen years of age; or

(b) is eighteen or more years of age but less than twenty-five years of age and is in full-time attendance at a school or university, having been in such attendance substantially without interruption since the

Règlements

(4) Le gouverneur en conseil peut prendre des règlements concernant :

a) la question de savoir à quel moment, de quelle manière et dans quelles circonstances le choix peut être effectué, être réputé avoir été fait ou réputé ne pas l'avoir été, révoqué ou réputé révoqué ou cesse d'avoir effet, ainsi que l'application rétroactive du choix qui a été fait, de sa révocation et de sa cessation d'effet;

b) la réduction de la pension du juge lorsqu'un choix a été effectué;

c) le montant de la pension à verser en vertu du paragraphe (3);

d) la question de savoir à quel moment, de quelle manière et dans quelles circonstances la réduction de la pension du juge peut être remboursée et les intérêts payés;

e) toute autre mesure qu'il estime nécessaire à l'application du présent article.

2000, ch. 12, art. 163; 2001, ch. 7, art. 24; 2017, ch. 33, art. 244.

45 et 46 [Abrogés, 1992, ch. 51, art. 21]

Montant forfaitaire

Montant forfaitaire

46.1 Est versé au survivant du juge décédé en exercice un montant forfaitaire égal au sixième du traitement annuel que le juge recevait au moment de son décès. S'il y a deux survivants, le montant est versé à celui qui vivait avec le juge le jour du décès et s'il n'y en a aucun, à la succession de celui-ci.

1989, ch. 8, art. 12; 2000, ch. 12, art. 164.

Pension aux enfants

Définition de *enfant*

47 (1) Pour l'application du présent article et des articles 48 et 49, ***enfant*** s'entend de tout enfant d'un juge, y compris un enfant adopté légalement ou de fait, qui :

a) soit a moins de dix-huit ans;

b) soit a au moins dix-huit ans mais moins de vingt-cinq ans et fréquente à temps plein une école ou une université sans interruption appréciable depuis son dix-huitième anniversaire de naissance ou depuis le décès du juge s'il avait alors déjà plus de dix-huit ans.

child of the judge reached eighteen years of age or the judge died, whichever occurred later.

Regulations respecting school attendance

(2) The Governor in Council may make regulations

(a) defining, for the purposes of this Act, the expression "full-time attendance at a school or university" as applied to a child of a judge; and

(b) specifying, for the purposes of this Act, the circumstances under which attendance at a school or university shall be determined to be substantially without interruption.

Annuity for surviving children

(3) If a judge of a superior or county court dies while holding office, or a judge who was granted or paid an annuity after October 5, 1971 dies, an annuity shall be paid to each surviving child of that judge as provided in subsections (4) and (5).

Annuity for children if survivor

(4) Each child of a judge described in subsection (3) shall be paid

(a) if the judge leaves a survivor, an annuity equal to one-fifth of the annuity that is provided for a survivor under subsection 44(1) or (2); and

(b) if there is no survivor or the survivor dies, an annuity equal to two-fifths of the annuity that is provided for a survivor under subsection 44(1) or (2).

Maximum of annuities to children

(5) The total amount of the annuities paid under subsection (4) shall not exceed four-fifths, in the case described in paragraph (4)(a), and eight-fifths, in the case described in paragraph (4)(b), of the annuity that is provided for a survivor under subsection 44(1) or (2).

(6) [Repealed, 2000, c. 12, s. 165]

R.S., 1985, c. J-1, s. 47; R.S., 1985, c. 39 (3rd Supp.), s. 3; 1998, c. 30, s. 8(F); 2000, c. 12, s. 165; 2002, c. 8, s. 98; 2017, c. 33, s. 246.

Apportionment of annuities among surviving children

48 (1) If, in computing the annuities to be paid under subsection 47(3) to the children of a judge referred to in that subsection, it is determined that there are more than four children of the judge to whom an annuity shall be paid, the total amount of the annuities paid shall be apportioned among the children in the shares that the Minister of Justice of Canada considers just and proper under the circumstances.

Règlements concernant la fréquentation scolaire

(2) Pour l'application de la présente loi, le gouverneur en conseil peut, par règlement :

a) définir en quoi consiste, dans le cas d'un enfant de juge, la fréquentation à temps plein d'une école ou d'une université;

b) préciser ce qu'il faut entendre par « sans interruption appréciable ».

Pension à verser aux enfants

(3) Le montant de la pension à verser à chacun des enfants d'un juge d'une juridiction supérieure ou d'une cour de comté décédé en exercice après le 5 octobre 1971 ou décédé après avoir été prestataire d'une pension accordée ou versée après cette date est déterminé conformément aux paragraphes (4) et (5).

Pension aux enfants

(4) Est versée à chacun des enfants du juge visé au paragraphe (3) une pension égale :

a) s'il laisse un survivant, au cinquième de la pension prévue aux paragraphes 44(1) ou (2);

b) en l'absence de survivant ou après le décès de celui-ci, aux deux cinquièmes de la pension prévue aux paragraphes 44(1) ou (2).

Plafond

(5) Le montant total des pensions versées au titre du paragraphe (4) ne peut excéder les quatre cinquièmes, dans le cas visé à l'alinéa (4)a), et les huit cinquièmes, dans le cas visé à l'alinéa (4)b), de la pension prévue aux paragraphes 44(1) ou (2).

(6) [Abrogé, 2000, ch. 12, art. 165]

L.R. (1985), ch. J-1, art. 47; L.R. (1985), ch. 39 (3e suppl.), art. 3; 1998, ch. 30, art. 8(F); 2000, ch. 12, art. 165; 2002, ch. 8, art. 98; 2017, ch. 33, art. 246.

Répartition des pensions entre les enfants

48 (1) Si plus de quatre enfants ont droit à une pension au titre du paragraphe 47(3), le ministre de la Justice du Canada répartit le montant total à verser dans les proportions qu'il estime équitables en l'espèce.

Children's annuities, to whom paid

(2) If an annuity under this Act is paid to a child of a judge, payment shall, if the child is less than 18 years of age, be made to the person having the custody and control of the child or, if there is no person having the custody and control of the child, to any person that the Minister of Justice of Canada directs and, for the purposes of this subsection, the survivor of the judge, except if the child is living apart from the survivor, shall be presumed, in the absence of evidence to the contrary, to be the person having the custody and control of the child.

R.S., 1985, c. J-1, s. 48; 2000, c. 12, s. 166; 2017, c. 33, s. 247.

Versement des pensions aux enfants

(2) La pension à laquelle a droit au titre de la présente loi l'enfant d'un juge qui a moins de dix-huit ans est versée à la personne qui en a la garde, ou, à défaut, à la personne que le ministre de la Justice du Canada désigne, le survivant étant présumé avoir la garde de l'enfant jusqu'à preuve du contraire, sauf si l'enfant ne vit pas sous son toit.

L.R. (1985), ch. J-1, art. 48; 2000, ch. 12, art. 166; 2017, ch. 33, art. 247.

Regulations concerning Inheritance Taxes

Payment of certain taxes out of C.R.F.

49 The Governor in Council may make regulations providing for the payment out of the Consolidated Revenue Fund, on the payment of an annuity under this Act to the survivor or children of a judge or a retired judge, of the whole or any part of the portion of any estate, legacy, succession or inheritance duties or taxes that are payable by the survivor or children with respect to the annuity, as is determined in accordance with the regulations to be attributable to that annuity, and prescribing the amount by which and the manner in which the annuity in that case shall be reduced.

R.S., 1985, c. J-1, s. 49; 2000, c. 12, s. 169; 2017, c. 33, s. 248(E).

Règlements sur le paiement de droits successoraux

Versements sur le Trésor

49 Le gouverneur en conseil peut, par règlement, prévoir, d'une part, le paiement sur le Trésor, lorsque s'ouvre le droit à pension du survivant ou des enfants d'un juge en exercice ou en retraite, de tout ou partie de la fraction des droits ou impôts successoraux attribuables, aux termes du règlement, à cette pension et, d'autre part, les modalités et le quantum de la réduction dont cette pension doit, en pareil cas, être l'objet.

L.R. (1985), ch. J-1, art. 49; 2000, ch. 12, art. 169; 2017, ch. 33, art. 248(A).

Judges' Contributions toward Annuities

Judges appointed before February 17, 1975

50 (1) Every judge appointed before February 17, 1975 to hold office as a judge of a superior or county court shall, by reservation from the judge's salary under this Act, contribute to the Consolidated Revenue Fund one and one-half per cent of that salary.

Judges appointed after February 16, 1975

(2) Every judge appointed after February 16, 1975 to whom subsection (1) does not apply, shall, by reservation from the judge's salary under this Act, contribute

(a) to the Consolidated Revenue Fund an amount equal to six per cent of that salary; and

(b) to the Supplementary Retirement Benefits Account established in the accounts of Canada pursuant to the *Supplementary Retirement Benefits Act*,

Cotisations

Juges nommés avant le 17 février 1975

50 (1) Les juges nommés à une juridiction supérieure ou à une cour de comté avant le 17 février 1975 versent au Trésor, par retenue sur leur traitement, une cotisation égale à un et demi pour cent de celui-ci.

Juges nommés après le 16 février 1975

(2) Par retenue sur leur traitement, les juges nommés après le 16 février 1975 et à qui le paragraphe (1) ne s'applique pas versent :

a) au Trésor, une cotisation de six pour cent de leur traitement;

b) au compte de prestations de retraite supplémentaires, ouvert parmi les comptes du Canada conformément à la *Loi sur les prestations de retraite supplémentaires* :

(i) prior to 1977, an amount equal to one-half of one per cent of that salary, and

(ii) commencing with the month of January 1977, an amount equal to one per cent of that salary.

(i) avant 1977, une cotisation égale à un demi de un pour cent de leur traitement,

(ii) à compter de 1977, une cotisation égale à un pour cent de leur traitement.

Adjustment of contributions

(2.1) A supernumerary judge, a judge who continues in judicial office after having been in judicial office for at least 15 years and whose combined age and number of years in judicial office is not less than 80, a judge of the Supreme Court of Canada who has continued in judicial office on that Court for at least 10 years, or a judge referred to in section 41.1 is not required to contribute under subsections (1) and (2) but is required to contribute, by reservation from salary, to the Supplementary Retirement Benefits Account at a rate of one per cent of his or her salary.

Diminution de la cotisation

(2.1) Le juge surnuméraire, le juge qui continue à exercer ses fonctions judiciaires après les avoir exercées pendant au moins quinze ans et pour qui le chiffre obtenu par l'addition de l'âge et du nombre d'années d'exercice est d'au moins quatre-vingts, le juge de la Cour suprême du Canada qui continue à exercer ses fonctions judiciaires après les avoir exercées pendant au moins dix ans à titre de juge de cette juridiction ou le juge visé à l'article 41.1 n'est pas tenu de verser la cotisation visée aux paragraphes (1) ou (2), mais est tenu de verser au compte de prestations de retraite supplémentaires, par retenue sur son traitement, une cotisation égale à un pour cent de celui-ci.

Interest

(2.2) Interest is payable on all contributions refunded as a result of the application of subsection (2.1) at the rate prescribed under the *Income Tax Act* for amounts payable by the Minister of National Revenue as refunds of overpayments of tax under that Act.

Intérêts

(2.2) Tout remboursement de cotisation qui découle de l'application du paragraphe (2.1) est accompagné des intérêts calculés au taux déterminé en vertu de la *Loi de l'impôt sur le revenu* sur les sommes payables par le ministre du Revenu national à titre de remboursement de paiements en trop d'impôt en vertu de cette loi.

Income Tax Act

(3) For the purposes of the *Income Tax Act*, the amounts contributed by a judge pursuant to subsection (1), (2) or (2.1) are deemed to be contributed to or under a registered pension plan.

Loi de l'impôt sur le revenu

(3) Pour l'application de la *Loi de l'impôt sur le revenu*, les cotisations prévues aux paragraphes (1), (2) ou (2.1) sont réputées faites dans le cadre d'un régime de pension agréé.

Amounts to be credited to S.R.B. Account

(4) Where any amount is paid into the Supplementary Retirement Benefits Account pursuant to paragraph (2)(b), an amount equal to the amount so paid shall be credited to that Account.

Sommes à porter au crédit du CPRS

(4) Les sommes versées au compte de prestations de retraite supplémentaires conformément à l'alinéa (2)b) sont portées au crédit de ce compte.

Definition of *judicial office*

(5) In this section, ***judicial office*** includes the office of a prothonotary of the Federal Court.

R.S., 1985, c. J-1, s. 50; 1992, c. 51, s. 23; 1999, c. 31, s. 240; 2001, c. 7, s. 25; 2002, c. 8, s. 99; 2006, c. 11, s. 14; 2014, c. 39, s. 325.

Définition de *fonctions judiciaires*

(5) Au présent article, ***fonctions judiciaires*** s'entend également des fonctions de protonotaire de la Cour fédérale.

L.R. (1985), ch. J-1, art. 50; 1992, ch. 51, art. 23; 1999, ch. 31, art. 240; 2001, ch. 7, art. 25; 2002, ch. 8, art. 99; 2006, ch. 11, art. 14; 2014, ch. 39, art. 325.

Return of contributions if no annuity

51 (1) If a judge has ceased to hold office otherwise than by reason of death and, at the time he or she ceased to hold office, no annuity under this Act was granted or could be paid to that judge, there shall be paid to the

Remboursement de cotisations en l'absence de pension

51 (1) Les juges qui, à la cessation de leurs fonctions, ne reçoivent pas la pension prévue par la présente loi, notamment parce qu'ils n'y sont pas admissibles, ont droit au remboursement intégral des cotisations qu'ils ont

judge, in respect of his or her having ceased to hold that office, an amount equal to the total contributions made by him or her under subsection 50(1) or paragraph 50(2)(a), together with interest, if any, calculated in accordance with subsection (4).

Return of contributions if annuity

(2) If a judge to whom subsection 50(1) applies has ceased to hold office otherwise than by reason of death and that judge is granted or paid an annuity under this Act, there shall be paid to the judge in respect of his or her having ceased to hold that office an amount equal to the total contributions made by the judge under subsection 50(1), together with interest, if any, calculated in accordance with subsection (4), if,

(a) at the time the judge ceased to hold office, there is no person to whom an annuity under this Act could be paid in respect of the judge on his or her death; or

(b) at any time after the judge ceased to hold office but before his or her death, all persons to whom an annuity under this Act could be paid in respect of the judge on his or her death have died or ceased to be eligible to be paid an annuity.

Death benefit

(3) Where, on or at any time after the death of a judge who died while holding office, or the death of a judge who died after ceasing to hold office but to whom no amount has been paid under subsection (1) or (2), there is no person or there is no longer any person to whom an annuity under this Act may be paid in respect of the judge, any amount by which

(a) the total contributions made by the judge under subsection 50(1) or paragraph 50(2)(a), together with interest, if any, calculated pursuant to subsection (4),

exceeds

(b) the total amount, if any, paid to or in respect of the judge as annuity payments under this Act,

shall thereupon be paid as a death benefit to the estate of the judge or, if less than one thousand dollars, as the Minister of Justice may direct.

Interest on payments and amounts of contributions

(4) Where an amount becomes payable under subsection (1), (2) or (3) in respect of contributions made by a judge under subsection 50(1) or paragraph 50(2)(a), the Minister of Justice shall

(a) determine the total amount of contributions that have been made under that provision by the judge in

versées aux termes du paragraphe 50(1) ou de l'alinéa 50(2)a) ainsi qu'aux intérêts calculés conformément au paragraphe (4).

Remboursement de cotisations en cas d'octroi de pension

(2) Les juges visés par le paragraphe 50(1) et qui reçoivent la pension prévue par la présente loi lors de la cessation de leurs fonctions ont droit au remboursement intégral des cotisations qu'ils ont versées aux termes de ce paragraphe ainsi qu'aux intérêts calculés conformément au paragraphe (4) dans les cas où, après leur décès, il n'existera, aux termes de la présente loi, aucun ayant droit à pension. Le remboursement se fait :

a) à la date de cessation de fonctions, s'il n'existe aucun ayant droit dès ce moment;

b) sinon, à la date où il n'en reste plus du tout.

Prestation de décès

(3) Dès qu'il n'y a plus d'ayant droit à la pension d'un juge décédé en exercice, ou décédé en retraite sans avoir reçu l'une ou l'autre des sommes visées aux paragraphes (1) ou (2), est payé, à titre de prestation de décès, aux héritiers du juge, l'excédent du montant visé à l'alinéa a) sur celui visé à l'alinéa b) :

a) la somme de l'ensemble des cotisations versées par ce juge en application du paragraphe 50(1) ou de l'alinéa 50(2)a) et des intérêts calculés conformément au paragraphe (4);

b) le total des sommes payées, aux termes de la présente loi, à ce juge ou à son égard à titre de pension.

Toutefois, si cet excédent est inférieur à mille dollars, le ministre de la Justice du Canada décide des modalités de versement.

Intérêts

(4) Pour le calcul des intérêts mentionnés aux paragraphes (1), (2) ou (3), le ministre de la Justice du Canada doit procéder ainsi :

a) d'une part, pour chacune des années de cotisation, il détermine le montant global des cotisations versées par le juge au cours de l'année;

respect of each year, in this subsection called a "contribution year", in which contributions were made by the judge; and

(b) calculate interest on the amount determined under paragraph (a) in respect of each contribution year, compounded annually,

(i) in respect of each contribution year before 1997,

(A) at the rate of four per cent from December 31 of the contribution year to December 31, 1996, and

(B) at the rate prescribed under the *Income Tax Act* for amounts payable by the Minister of National Revenue as refunds of overpayments of tax under that Act in effect from time to time, from December 31, 1996 to December 31 of the year immediately before the year in which the amount in respect of contributions made by the judge becomes payable, and

(ii) in respect of the 1997 contribution year and each contribution year after 1997, at the rate mentioned in clause (i)(B) from December 31 of the contribution year to December 31 of the year immediately before the year in which the amount in respect of contributions made by the judge becomes payable.

R.S., 1985, c. J-1, s. 51; 1998, c. 30, s. 9; 2002, c. 8, ss. 100(E), 111(E); 2017, c. 33, s. 249(E).

b) d'autre part, il calcule les intérêts composés annuellement sur chacun des chiffres déterminés conformément à l'alinéa a) :

(i) à l'égard de chacune des années de cotisation antérieures à 1997, au taux de quatre pour cent du 31 décembre de l'année de cotisation correspondante au 31 décembre 1996 et au taux déterminé en vertu de la *Loi de l'impôt sur le revenu* sur les sommes payables par le ministre du Revenu national à titre de remboursement de paiements en trop d'impôt en vertu de cette loi, du 31 décembre 1996 au 31 décembre précédant l'année d'exigibilité des sommes en question,

(ii) à l'égard de l'année de cotisation 1997 et de chacune des années de cotisation postérieures à 1997, au taux déterminé en vertu de la *Loi de l'impôt sur le revenu* sur les sommes payables par le ministre du Revenu national à titre de remboursement de paiements en trop d'impôt en vertu de cette loi du 31 décembre de l'année de cotisation correspondante au 31 décembre précédant l'année d'exigibilité des sommes en question.

L.R. (1985), ch. J-1, art. 51; 1998, ch. 30, art. 9; 2002, ch. 8, art. 100(A) et 111(A); 2017, ch. 33, art. 249(A).

Diversion Under Financial Support Order

Diversion of payments to satisfy financial support order

52 (1) If a court in Canada of competent jurisdiction has made an order requiring a recipient of an annuity or other amount payable under section 42, 43, 43.1, 44, 44.1 or 44.2 or subsection 51(1) to pay financial support, amounts so payable to the recipient are subject to being diverted to the person named in the order in accordance with Part II of the *Garnishment, Attachment and Pension Diversion Act*.

Payment deemed to be to former judge

(2) For the purposes of this Part, any payment made pursuant to subsection (1) shall be deemed to have been made to the former judge in respect of whom the payment was made.

R.S., 1985, c. J-1, s. 52; 2000, c. 12, s. 167; 2017, c. 20, s. 224.

Saisie-arrêt relative à un soutien financier

Distraction de versements pour exécution d'une ordonnance de soutien financier

52 (1) Lorsqu'un tribunal compétent au Canada a rendu une ordonnance enjoignant au bénéficiaire d'une pension ou d'une autre somme visées aux articles 42, 43, 43.1, 44, 44.1 ou 44.2 ou au paragraphe 51(1) de fournir un soutien financier, les sommes qui sont dues à celui-ci, peuvent être distraites pour versement à la personne désignée dans l'ordonnance en conformité avec la partie II de la *Loi sur la saisie-arrêt et la distraction de pensions*.

Versements réputés avoir été faits à un ancien juge

(2) Pour l'application de la présente partie, tout versement fait en vertu du paragraphe (1) est réputé avoir été fait à l'ancien juge.

L.R. (1985), ch. J-1, art. 52; 2000, ch. 12, art. 167; 2017, ch. 20, art. 224.

Division of Judge's Annuity Benefits on Conjugal Breakdown

Definitions

52.1 The following definitions apply in this section and in sections 52.11 to 52.22.

agreement means an agreement referred to in subparagraph 52.11(2)(b)(ii). (*accord*)

annuity means an annuity payable under section 42, 43 or 43.1. (*pension*)

annuity benefit means an annuity or a return of contributions payable under section 51, and includes amounts payable to a judge under the *Supplementary Retirement Benefits Act*. (*prestation de pension*)

application means an application made under subsection 52.11(1). (*demande*)

court order means an order referred to in paragraph 52.11(2)(a) or subparagraph 52.11(2)(b)(i). (*ordonnance*)

interested party, in relation to an application for division of a judge's annuity benefits, means the judge or the spouse, former spouse or former common-law partner with whom those benefits would be divided under the application. (*intéressé*)

judge includes a former judge who has been granted or paid an annuity. (*juge*)

Minister means the Minister of Justice of Canada. (*ministre*)

prescribed means prescribed by regulation. (*Version anglaise seulement*)

spouse, in relation to a judge, includes a person who is a party to a void marriage with the judge. (*époux*)

2006, c. 11, s. 15; 2017, c. 33, s. 250(E).

Application for division

52.11 (1) A judge or a spouse, former spouse or former common-law partner of a judge may, in the circumstances described in subsection (2), apply in accordance with the regulations for the division of the judge's annuity benefits between the judge and the spouse, former spouse or former common-law partner.

Partage des prestations de pension du juge en cas d'échec de la relation conjugale

Définitions

52.1 Les définitions qui suivent s'appliquent au présent article et aux articles 52.11 à 52.22.

accord Accord visé au sous-alinéa 52.11(2)b)(ii). (*agreement*)

demande Demande prévue au paragraphe 52.11(1). (*application*)

époux Est assimilée à l'époux du juge la personne qui est partie avec lui à un mariage nul. (*spouse*)

intéressé S'entend, relativement à une demande de partage des prestations de pension d'un juge, du juge ou de l'époux, ex-époux ou ancien conjoint de fait avec lequel les prestations de pension seraient partagées aux termes de la demande. (*interested party*)

juge S'entend notamment d'un ancien juge qui a droit à une pension. (*judge*)

ministre Le ministre de la Justice du Canada. (*Minister*)

ordonnance Ordonnance visée à l'alinéa 52.11(2)a) ou au sous-alinéa 52.11(2)b)(i). (*court order*)

pension Pension à payer en vertu des articles 42, 43 ou 43.1. (*annuity*)

prestation de pension Pension ou remboursement des cotisations à verser au titre de l'article 51, notamment les montants à verser au juge en vertu de la *Loi sur les prestations de retraite supplémentaires*. (*annuity benefit*)

2006, ch. 11, art. 15; 2017, ch. 33, art. 250(A).

Demande de partage

52.11 (1) Le juge ou son époux, ex-époux ou ancien conjoint de fait peut, dans les circonstances prévues au paragraphe (2), demander, conformément aux règlements, le partage des prestations de pension du juge entre le juge et son époux, ex-époux ou ancien conjoint de fait.

When application may be made

(2) An application may be made under the following circumstances:

(a) where a court of competent jurisdiction in Canada, in proceedings in relation to divorce, annulment of marriage or separation, has made an order that provides for the annuity benefits to be divided between the interested parties; or

(b) where the interested parties have been living separate and apart for a period of one year or more and, either before or after they began to live separate and apart,

(i) a court of competent jurisdiction in Canada has made an order that provides for the annuity benefits to be divided between them, or

(ii) the interested parties have entered into a written agreement that provides for the annuity benefits to be divided between them.

Circonstances

(2) La demande peut se faire dans l'une des circonstances suivantes :

a) un tribunal canadien compétent a rendu, dans une procédure de divorce, d'annulation de mariage ou de séparation, une ordonnance prévoyant le partage des prestations de pension entre les intéressés;

b) les intéressés vivent séparément depuis un an au moins et, avant ou après la cessation de leur cohabitation, selon le cas :

(i) un tribunal canadien compétent a rendu une ordonnance prévoyant le partage des prestations de pension entre eux,

(ii) eux-mêmes sont, par accord écrit, convenus d'un tel partage.

Notice to interested parties

(3) The Minister shall send to each interested party in accordance with the regulations a notice of the receipt of an application.

2006, c. 11, s. 15.

Avis de réception aux intéressés

(3) Le ministre avise, conformément aux règlements, chacun des intéressés de la réception de la demande.

2006, ch. 11, art. 15.

Objections by interested parties

52.12 (1) An interested party who objects to the division of annuity benefits on any of the grounds described in subsection (2) may submit a notice of objection in writing in accordance with the regulations within 90 days after the day on which notice of the receipt of the application is sent to the interested party under subsection 52.11(3).

Opposition à la demande

52.12 (1) Tout intéressé qui s'oppose, pour l'un des motifs visés au paragraphe (2), au partage des prestations de pension peut, dans les quatre-vingt-dix jours suivant la date où l'avis de réception de la demande lui a été envoyé en vertu du paragraphe 52.11(3), adresser un avis d'opposition écrit conformément aux règlements.

Grounds for objection

(2) The grounds for objection are as follows:

(a) the court order or agreement on which the application is based has been varied or is of no force or effect;

(b) the terms of the court order or agreement have been or are being satisfied by other means; or

(c) proceedings have been commenced in a court of competent jurisdiction in Canada to appeal or review the court order or challenge the terms of the agreement.

Motifs

(2) Les motifs d'opposition sont les suivants :

a) l'ordonnance ou l'accord a été modifié ou est sans effet;

b) d'autres moyens ont servi ou servent à satisfaire aux conditions de l'ordonnance ou de l'accord;

c) une procédure d'appel ou de révision de l'ordonnance ou de contestation de l'accord a été engagée devant un tribunal canadien compétent.

Documentary evidence

(3) An interested party who submits a notice of objection shall include with that notice documentary evidence to establish the grounds for objection.

2006, c. 11, s. 15.

Documents

(3) L'avis est accompagné de preuves documentaires à l'appui de l'opposition.

2006, ch. 11, art. 15.

Approval of division

52.13 (1) Subject to subsections (2) and (3), the Minister shall, as soon as is practicable after the Minister is satisfied that an application meets the requirements of this Act, approve the division of annuity benefits in respect of which the application is made.

Approbation du partage

52.13 (1) Sous réserve des paragraphes (2) et (3), le ministre, dès que possible après s'être assuré que la demande est conforme à la présente loi, donne son approbation au partage des prestations de pension objet de la demande.

When decision to be deferred

(2) When an interested party submits a notice of objection in accordance with section 52.12, the Minister shall

(a) if the objection is made on the grounds referred to in paragraph 52.12(2)(a) or (b), defer a decision on the application until the Minister is able to ascertain to his or her satisfaction whether those grounds have been established; and

(b) if the objection is made on the grounds referred to in paragraph 52.12(2)(c), defer a decision on the application until the final disposition of the proceedings on which those grounds are based.

Avis d'opposition

(2) Lorsqu'il est saisi d'un avis d'opposition, le ministre diffère toute décision relative à la demande jusqu'à ce qu'il puisse constater le bien-fondé du motif visé aux alinéas 52.12(2)a) ou b) ou jusqu'à l'achèvement de la procédure visée à l'alinéa 52.12(2)c).

Refusal of division

(3) The Minister shall refuse to approve the division of annuity benefits if

(a) the application is withdrawn in accordance with the regulations;

(b) a notice of objection has been submitted on grounds referred to in paragraph 52.12(2)(a) or (b) and the Minister is satisfied that those grounds have been established and constitute sufficient reason to refuse the division;

(c) a notice of objection has been submitted on grounds referred to in paragraph 52.12(2)(c) and the court order or agreement is of no force or effect as a result of the proceedings referred to in that paragraph;

(d) the period of cohabitation of the judge and the spouse, former spouse or former common-law partner cannot be determined under subsection 52.14(6); or

(e) the Minister is satisfied, based on evidence submitted by any person, that it would not be just to approve the division.

Refus du ministre

(3) Le ministre refuse de donner son approbation dans les cas suivants :

a) la demande est retirée conformément aux règlements;

b) dans le cas de l'opposition fondée sur le motif visé aux alinéas 52.12(2)a) ou b), il constate son bien-fondé et est convaincu qu'il est suffisant pour justifier le refus;

c) l'ordonnance ou l'accord est sans effet à l'issue de la procédure visée à l'alinéa 52.12(2)c);

d) l'application du paragraphe 52.14(6) ne permet pas de déterminer la période pendant laquelle le juge et son époux, ex-époux ou ancien conjoint de fait ont cohabité;

e) il est convaincu, d'après les éléments de preuve qui lui sont présentés, du caractère injuste du partage.

Exception

(4) Notwithstanding subsection (3), the Minister may approve the division of annuity benefits on the basis of an order of a court issued pursuant to any proceedings referred to in paragraph 52.12(2)(c).

Transitional

(5) The Minister may approve the division of the annuity benefits even though the court order or agreement on which the application is based was made or entered into before the day on which subsection 52.11(1) comes into force.

2006, c. 11, s. 15.

Division of annuity benefits

52.14 (1) Subject to subsections (3) and (3.1), where the Minister approves the division of the annuity benefits of a judge, the spouse, former spouse or former common-law partner shall be accorded a share of the annuity benefits consisting of

(a) an amount representing 50% of a proportion, determined in accordance with subsection (2), of the value of the annuity that is attributed, in accordance with the regulations, to the period subject to division; or

(b) if the terms of the court order or agreement on which the application for division is based provide for the payment to the spouse, former spouse or former common-law partner of a share of annuity benefits that is less than the amount determined under paragraph (a), that lesser share.

Proportion of annuity value

(2) The proportion of the value of an annuity referred to in paragraph (1)(a) is

(a) subject to paragraph (b), the period subject to division divided by the judge's number of years of service until the judge's actual date of retirement or, in the case of a judge who has not yet retired, until the judge's expected date of retirement determined in accordance with the regulations; or

(b) in the case of a judge who had resigned or been removed from office by reason of an infirmity, the quotient obtained by dividing

(i) the period, measured to the nearest one tenth of a year, from the beginning of the period subject to division to the earlier of the end of the period of cohabitation and the judge's expected date of retirement if the infirmity had not occurred, determined in accordance with the regulations,

Exception

(4) Malgré le paragraphe (3), le ministre peut approuver le partage en se fondant sur l'ordonnance rendue à l'issue de la procédure visée à l'alinéa 52.12(2)c).

Disposition transitoire

(5) Le ministre peut approuver le partage même si l'ordonnance ou l'accord sur lequel la demande est fondée est antérieur à la date d'entrée en vigueur du paragraphe 52.11(1).

2006, ch. 11, art. 15.

Approbation du partage

52.14 (1) Sous réserve des paragraphes (3) et (3.1), l'approbation par le ministre du partage des prestations de pension entraîne l'attribution à l'époux, ex-époux ou ancien conjoint de fait du juge d'une part des prestations de pension, constituée de l'une des sommes suivantes :

a) une somme égale à cinquante pour cent d'une proportion — déterminée conformément au paragraphe (2) — de la valeur de la pension attribuée, selon les règlements, pour la période visée par le partage;

b) si l'ordonnance ou l'accord sur lequel la demande est fondée prévoit le paiement à l'époux, ex-époux ou ancien conjoint de fait d'une somme qui est inférieure à la somme prévue à l'alinéa a), cette somme inférieure.

Proportion

(2) La proportion de la valeur de la pension visée à l'alinéa (1)a) est :

a) sous réserve de l'alinéa b), le rapport entre la période visée par le partage et le nombre total d'années de service du juge jusqu'au jour de sa retraite ou, s'il est encore en exercice, le nombre total d'années de service que le juge aura accumulées à la date prévue pour sa retraite, déterminée conformément aux règlements;

b) dans le cas d'un juge qui a démissionné ou a été révoqué par suite d'une infirmité, le quotient obtenu par division de la période visée au sous-alinéa (i) par celle visée au sous-alinéa (ii) :

(i) la période, au dixième d'année près, qui commence au début de la période visée par le partage et qui se termine à la date prévue de sa retraite s'il n'y avait pas eu infirmité ou, si elle est antérieure, celle de la fin de la période de cohabitation,

by

(ii) the judge's number of years of service up to the judge's expected date of retirement if the infirmity had not occurred, determined in accordance with the regulations.

(ii) le nombre total de ses années de service jusqu'à la date prévue de sa retraite s'il n'y avait pas eu infirmité, cette date étant déterminée conformément aux règlements.

Return of contributions

(3) Subject to subsections (3.1) and (4), if the Minister approves the division of the annuity benefits of a judge who was not eligible to be paid an annuity at the end of the period subject to division, the spouse, former spouse or former common-law partner shall be accorded a share of the annuity benefits consisting of

(a) an amount equal to 50% of the contributions made by the judge under section 50 during the period subject to division plus 50% of any interest payable on those contributions; or

(b) if the terms of the court order or agreement on which the application for division is based provide for the payment to the spouse, former spouse or former common-law partner of a share of annuity benefits that is less than the amount determined under paragraph (a), that lesser share.

Partage des contributions

(3) Sous réserve des paragraphes (3.1) et (4), dans le cas où le juge n'est pas admissible à une pension à la fin de la période visée par le partage, l'approbation par le ministre du partage des prestations de pension entraîne l'attribution à l'époux, ex-époux ou ancien conjoint de fait du juge d'une part des prestations de pension, constituée de l'une des sommes suivantes :

a) une somme égale à cinquante pour cent des cotisations versées par le juge en vertu de l'article 50 pendant la période visée par le partage, y compris les intérêts afférents,

b) si l'ordonnance ou l'accord sur lequel la demande est fondée prévoit le paiement à l'époux, ex-époux ou ancien conjoint de fait d'une somme qui est inférieure à la somme prévue à l'alinéa a), cette somme inférieure.

Return of contributions — infirm annuitant

(3.1) Subject to subsection (4), if the Minister approves the division of the annuity benefits of a judge who had been granted an annuity by reason of an infirmity but was not otherwise eligible to be paid an annuity at the end of the period subject to division, the spouse, former spouse or former common-law partner shall be accorded a share of the annuity benefits consisting of

(a) an amount equal to 50% of the contributions that would have been made during the period described in subparagraph (2)(b)(i) if the judge had continued in office, on the basis of the salary annexed to the office held by the judge at the time the judge ceased to hold office, plus 50% of any interest payable on those contributions; or

(b) if the terms of the court order or agreement on which the application for division is based provide for the payment to the spouse, former spouse or former common-law partner of a share of annuity benefits that is less than the amount determined under paragraph (a), that lesser share.

Partage des contributions : pensionnaire infirme

(3.1) Sous réserve du paragraphe (4), lorsque le ministre approuve le partage des prestations de pension d'un juge à qui a été accordée une pension pour cause d'infirmité mais qui n'était pas autrement admissible à une pension à la fin de la période visée par le partage, l'époux, ex-époux ou ancien conjoint de fait a droit à une partie des prestations de pension équivalant à l'une des sommes suivantes :

a) une somme égale à la moitié des cotisations qui auraient été versées pendant la période visée au sous-alinéa (2)b)(i), calculée en se fondant sur le traitement attaché à la charge que le juge occupait à la date de cessation de ses fonctions, si le juge était resté en poste et à la moitié de tout intérêt à payer sur celles-ci;

b) si l'ordonnance ou l'accord sur lequel la demande de partage est fondée prévoit que l'époux, ex-époux ou ancien conjoint de fait reçoit une partie des prestations de pension qui équivaut à une somme inférieure à celle visée à l'alinéa a), cette partie.

Election by spouse

(4) A judge's spouse, former spouse or former common-law partner who is entitled to be accorded a share of the judge's annuity benefits under subsection (3) or (3.1) may

Choix de l'époux, etc.

(4) L'époux, ex-époux ou ancien conjoint de fait d'un juge qui a droit à une partie des cotisations de celui-ci aux termes des paragraphes (3) ou (3.1) peut choisir,

elect in the manner prescribed by the regulations, in lieu of receiving that share, to receive — at the time the judge becomes eligible to be granted or paid an annuity, or at the time the judge would have become eligible to be paid an annuity had the judge not resigned or been removed from office by reason of an infirmity — a share of the annuity benefits for which the judge is or would have been eligible, determined as provided in subsection (1).

Death or resignation of judge

(5) If an election has been made under subsection (4) and, before becoming eligible to be paid an annuity, the judge dies, resigns, is removed from office or otherwise ceases to hold office, the spouse, former spouse or former common-law partner shall instead be paid immediately the portion of the judge's contributions to which the spouse was otherwise entitled under subsection (3) or (3.1).

Determination of periods of division and cohabitation

(6) For the purposes of this section and sections 52.15 and 52.16,

(a) a period subject to division is the portion of a period of cohabitation during which a judge held office under this Act, measured in years to the nearest one tenth of a year; and

(b) a period of cohabitation is the period during which interested parties cohabited, as specified by the court order or agreement on which an application for division is based or, if none is specified, as determined in accordance with the regulations on the basis of evidence submitted by either or both of the interested parties.

Death of spouse, former spouse or former common-law partner

(7) A share of annuity benefits that cannot be accorded under subsection (1) by reason only of the death of the spouse, former spouse or former common-law partner shall be paid to that person's estate or succession.

Adjustment of accrued benefits

(8) Where the Minister approves the division of a judge's annuity benefits, the annuity benefits payable to the judge under this Act shall be adjusted in accordance with the regulations.

Notice of division

(9) The Minister shall send a notice of the division of annuity benefits in the prescribed manner to each interested party.

2006, c. 11, s. 15; 2015, c. 3, s. 128(F); 2017, c. 20, s. 225; 2017, c. 33, s. 251(E).

selon les modalités réglementaires, de recevoir en échange de cette partie, au moment où le juge a droit à une pension — ou au moment où le juge aurait été admissible à une pension s'il n'avait pas démissionné ou été révoqué par suite d'une infirmité —, une part de la pension à laquelle le juge a ou aurait eu droit, déterminée conformément au paragraphe (1).

Décès du juge

(5) Si le juge décède ou cesse d'exercer ses fonctions, notamment par mise à la retraite d'office, démission ou révocation, avant d'être admissible à une pension, l'époux, ex-époux ou ancien conjoint de fait qui a effectué le choix visé au paragraphe (4) reçoit plutôt sur-le-champ la partie des cotisations versées par le juge à laquelle il avait autrement droit conformément aux paragraphes (3) ou (3.1).

Détermination de la période visée par le partage et de la période de cohabitation

(6) Pour l'application du présent article et des articles 52.15 et 52.16 :

a) la période visée par le partage est la partie de la période de cohabitation pendant laquelle le juge a exercé des fonctions judiciaires au titre de la présente loi, calculée au dixième d'année près;

b) la période de cohabitation est la période pendant laquelle, selon l'ordonnance ou l'accord, les intéressés ont cohabité; à défaut de précision dans l'ordonnance ou l'accord, la période est déterminée, conformément aux règlements, selon la preuve fournie par l'un ou l'autre des intéressés.

Décès de l'époux, ex-époux ou ancien conjoint de fait

(7) En cas de décès de l'époux, ex-époux ou ancien conjoint de fait, la part des prestations de pension est versée à sa succession.

Date de l'ajustement

(8) Lorsque le ministre approuve le partage des prestations de pension d'un juge, les prestations de pension à payer au juge en vertu de la présente loi sont ajustées selon les modalités réglementaires.

Avis de partage

(9) Le ministre envoie, selon les modalités réglementaires, un avis du partage à chacun des intéressés.

2006, ch. 11, art. 15; 2015, ch. 3, art. 128(F); 2017, ch. 20, art. 225; 2017, ch. 33, art. 251(A).

Transfer and payment of share

52.15 (1) The spouse's, former spouse's or former common-law partner's share of a judge's annuity benefits shall be accorded by

(a) the transfer of the specified portion of that share to a retirement savings plan established for the spouse, former spouse or former common-law partner that is of the prescribed kind for the purposes of section 26 of the *Pension Benefits Standards Act, 1985*; and

(b) the payment of the remainder of that share, if any, to the spouse, former spouse or former common-law partner.

Calculation of specified portion

(2) For the purpose of paragraph (1)(a), the specified portion of a spouse's, former spouse's or former common-law partner's share of a judge's annuity benefits is

(a) if that share consists of a portion of the judge's contributions, that portion; or

(b) in any other case, the amount determined by the formula

(A × B × C) / D

where

A is the share of the annuity benefits,

B is the period subject to division,

C is the defined benefit limit, within the meaning of regulations made under the *Income Tax Act*, for the calendar year in which the share is accorded, and

D is the portion of the annuity that is attributed, in accordance with the regulations, to the period subject to division.

Tax treatment

(3) For the purposes of the *Income Tax Act*, an amount transferred to a retirement savings plan in accordance with paragraph (1)(a) is deemed to be an amount transferred from a registered pension plan in accordance with subsection 147.3(5) of that Act.

2006, c. 11, s. 15.

Further divisions precluded

52.16 Where a division of annuity benefits is made in respect of a period subject to division under section 52.14, no further divisions may be made under that section in respect of that period.

2006, c. 11, s. 15.

Transfert et paiement

52.15 (1) L'attribution d'une part des prestations de pension du juge à son époux, ex-époux ou ancien conjoint de fait s'effectue de la manière suivante :

a) une partie déterminée de la part est transférée à un régime d'épargne-retraite destiné à l'époux, ex-époux ou ancien conjoint de fait et prévu par règlement pour l'application de l'article 26 de la *Loi de 1985 sur les normes de prestation de pension*;

b) le reste de la part, s'il en existe, est versée à l'époux, ex-époux ou ancien conjoint de fait.

Calcul de la partie déterminée

(2) Pour l'application de l'alinéa (1)a), on entend par « partie déterminée de la part » :

a) si cette part est constituée d'une partie des cotisations versées par le juge, cette partie des cotisations;

b) dans tous les autres cas, la somme calculée selon la formule suivante :

(A × B × C) / D

où :

A représente la part des prestations de pension;

B la période visée par le partage;

C le plafond des prestations déterminées — au sens des règlements pris en vertu de la *Loi de l'impôt sur le revenu* — pour l'année au cours de laquelle est attribuée la part des prestations de pension;

D la partie de la pension qui est attribuée, selon les règlements, pour la période visée par le partage.

Conséquences fiscales

(3) Pour l'application de la *Loi de l'impôt sur le revenu*, toute somme transférée dans un régime d'épargne-retraite conformément à l'alinéa (1)a) est réputée être une somme transférée d'un régime de pension agréé conformément au paragraphe 147.3(5) de cette loi.

2006, ch. 11, art. 15.

Partages ultérieurs interdits

52.16 Le partage prévu à l'article 52.14 ne peut être effectué plus d'une fois pour la même période.

2006, ch. 11, art. 15.

Amounts transferred in error

52.17 Where the amount transferred or paid in respect of a spouse, former spouse or former common-law partner, or paid to the estate or succession of a deceased spouse, former spouse or former common-law partner, under section 52.14 or 52.15 exceeds the amount that the spouse, former spouse or former common-law partner was entitled to have transferred or paid or the estate or succession was entitled to be paid, the amount in excess constitutes a debt due to Her Majesty in right of Canada by that spouse, former spouse or former common-law partner or that estate or succession.

2006, c. 11, s. 15.

Transferts par erreur

52.17 Lorsque la somme transférée ou versée à l'égard de l'époux, ex-époux ou ancien conjoint de fait ou la somme versée à la succession de l'une de ces personnes en vertu des articles 52.14 ou 52.15 est supérieure à celle qui aurait dû l'être conformément à ces articles, l'excédent constitue une créance de Sa Majesté du chef du Canada sur l'époux, ex-époux ou ancien conjoint de fait ou sur la succession.

2006, ch. 11, art. 15.

Amounts paid before adjustment

52.18 Where an adjustment is made under subsection 52.14(8) and an amount is or has been paid to a judge that exceeds the amount to which the judge is or would have been entitled under this Act after the effective date of that adjustment, the amount in excess constitutes a debt due to Her Majesty in right of Canada by the judge and may be recovered at any time by set-off against any annuity benefit that is payable to the judge under this Act, without prejudice to any other recourse available to Her Majesty in right of Canada with respect to its recovery.

2006, c. 11, s. 15.

Recouvrement

52.18 Dans le cas où le juge reçoit ou a reçu une somme supérieure à celle à laquelle il a ou aurait eu droit au titre de la présente loi après la prise d'effet de l'ajustement visé au paragraphe 52.14(8), l'excédent constitue une créance de Sa Majesté du chef du Canada sur le juge, recouvrable par retenue sur toute prestation due à celui-ci au titre de la présente loi, sans préjudice des autres recours ouverts en l'occurrence à Sa Majesté du chef du Canada.

2006, ch. 11, art. 15.

Void transactions

52.19 (1) Amounts that a spouse, former spouse or former common-law partner is or may become entitled to under section 52.14 are not capable of being assigned, charged, anticipated or given as security, and any transaction that purports to assign, charge, anticipate or give as security any such amount is void.

Opérations nulles

52.19 (1) Les sommes auxquelles l'époux, ex-époux ou ancien conjoint de fait a droit ou peut avoir droit en vertu de l'article 52.14 ne peuvent être cédées, grevées, assorties d'un exercice anticipé ou données en garantie, et toute opération en ce sens est nulle.

Exemption from attachment, etc.

(2) Amounts that a spouse, former spouse or former common-law partner is or may become entitled to under section 52.14 are exempt from attachment, seizure and execution, either at law or in equity.

2006, c. 11, s. 15.

Exemption

(2) Les sommes auxquelles l'époux, ex-époux ou ancien conjoint de fait a ou peut avoir droit en vertu de l'article 52.14 sont, en droit et en équité, exemptes d'exécution, de saisie et de saisie-arrêt.

2006, ch. 11, art. 15.

Access of spouse, etc. to division of benefits

52.2 Notwithstanding any other provision of this Act, a court of competent jurisdiction may order, for any period that the court determines, that no action be taken by the Minister under this Act that may prejudice the ability of the spouse, common-law partner, former spouse or former common-law partner to make an application or obtain the division of the judge's annuity benefits under this Act.

2006, c. 11, s. 15.

Ordonnance

52.2 Malgré toute autre disposition de la présente loi, le tribunal compétent peut rendre une ordonnance interdisant au ministre de prendre au titre de la présente loi, pendant la période visée dans l'ordonnance, des mesures risquant de compromettre la capacité de l'époux, de l'ex-époux, du conjoint de fait ou de l'ancien conjoint de fait de présenter une demande ou d'obtenir le partage des prestations de pension en vertu de la présente loi.

2006, ch. 11, art. 15.

Information for spouse, etc. re benefits

52.21 Subject to the regulations, the Minister shall, at the request of a spouse, common-law partner, former spouse or former common-law partner of a judge, provide that person with information prescribed by the regulations concerning the benefits that are or may become payable to or in respect of that judge under this Act.

2006, c. 11, s. 15.

Regulations

52.22 The Governor in Council may make regulations

(a) respecting the manner of making an application, the information that is to be provided in it and the documents that are to accompany it;

(b) prescribing the circumstances in which interested parties are deemed to have been living separate and apart for the purposes of paragraph 52.11(2)(b);

(c) prescribing circumstances in which a person may make an application or object to an application on behalf of another person, or may act on behalf of another person in proceeding with an application made by that other person;

(d) prescribing circumstances in which, the manner in which and the conditions under which the personal representative or the liquidator of the succession of a deceased judge or of a deceased spouse, former spouse or former common-law partner of a judge may make or object to an application or may proceed with an application that was made by or on behalf of the judge, spouse, former spouse or former common-law partner;

(e) when regulations are made under paragraph (c) or (d), respecting the manner in which and the extent to which any provision of this Act applies to a person referred to in that paragraph or in the circumstances prescribed by those regulations, and adapting any provision of this Act to those persons or circumstances;

(f) prescribing circumstances in which, the manner in which and the conditions under which a spouse, former spouse or former common-law partner of a judge may make an application after the death of the judge;

(g) respecting the notice of receipt of applications to be given to interested parties under subsection 52.11(3);

(h) respecting the withdrawal of applications;

(i) respecting the manner of submitting notices of objection under subsection 52.12(1);

Renseignements sur les prestations

52.21 Sous réserve des règlements, à la demande de l'époux, de l'ex-époux, du conjoint de fait ou de l'ancien conjoint de fait d'un juge, le ministre lui fournit les renseignements réglementaires sur les prestations dues au juge ou à l'égard de celui-ci ou susceptibles de le devenir au titre de la présente loi.

2006, ch. 11, art. 15.

Règlements

52.22 Le gouverneur en conseil peut, par règlement :

a) régir les modalités d'une demande, les renseignements à fournir dans la demande et les documents qui doivent l'accompagner;

b) déterminer, pour l'application de l'alinéa 52.11(2)b), les circonstances dans lesquelles les intéressés sont réputés avoir vécu séparément;

c) déterminer les circonstances dans lesquelles une personne peut, pour le compte d'autrui, présenter, contester ou poursuivre une demande;

d) déterminer dans quelles conditions et circonstances et selon quelles modalités le représentant successoral ou le liquidateur de la succession du juge ou de son époux, ex-époux ou ancien conjoint de fait peut présenter ou contester une demande ou poursuivre une demande préalablement présentée par l'intéressé ou pour son compte;

e) dans le cas de règlements pris en vertu des alinéas c) ou d), prévoir de quelle manière et dans quelle mesure les dispositions de la présente loi s'appliquent soit aux personnes visées par ces alinéas, soit dans les circonstances déterminées par ces règlements, et adapter ces dispositions à ces personnes ou à ces circonstances;

f) déterminer les conditions et les circonstances dans lesquelles l'époux, ex-époux ou ancien conjoint de fait peut présenter une demande après le décès du juge, et fixer les modalités de présentation de la demande;

g) régir l'avis de réception de la demande à donner aux intéressés en vertu du paragraphe 52.11(3);

h) prévoir les modalités de retrait des demandes;

i) prévoir les modalités selon lesquelles un avis d'opposition écrit peut être adressé en vertu du paragraphe 52.12(1);

(j) for determining the value of an annuity to be attributed to a period subject to division, for the purposes of subsection 52.14(1);

(k) for determining the expected date of retirement of a judge, for the purposes of subsections 52.14(2) and (3.1);

(l) respecting the actuarial assumptions on which the determinations made under paragraphs (j) and (k) are to be based;

(m) prescribing the manner in which a judge's spouse, former spouse or former common-law partner may make an election under subsection 52.14(4), and respecting the notification of a judge of such an election;

(n) prescribing, for the purposes of paragraph 52.14(6)(b), the manner of determining the period during which interested parties cohabited;

(o) respecting the adjustment of the annuity benefits payable to a judge under subsection 52.14(8), including the determination of the effective date of the adjustment;

(p) generally respecting the division of the annuity benefits of a judge who resigns or is removed from office by reason of an infirmity;

(q) respecting the manner in which and the extent to which any provision of this Act applies, notwithstanding the other provisions of this Act, to a judge, to a spouse, former spouse, common-law partner or former common-law partner of a judge or to any other person when annuity benefits are divided under section 52.14, and adapting any provision of this Act to those persons;

(r) for determining the portion of an annuity to be attributed to a period subject to division, for the purposes of subsection 52.15(2);

(s) for the purposes of section 52.21, respecting the manner in which a request for information is to be made by a spouse, former spouse, common-law partner or former common-law partner of a judge, prescribing the information that is to be provided to that person concerning the benefits that are or may become payable to or in respect of the judge and specifying circumstances in which a request may be refused;

(t) prescribing remedial action that may be taken in prescribed circumstances in response to administrative error or the provision of erroneous information;

j) régir, pour l'application du paragraphe 52.14(1), la valeur d'une pension attribuée pour une période visée par le partage;

k) régir, pour l'application des paragraphes 52.14(2) et (3.1), la date prévue pour la retraite du juge;

l) prévoir les hypothèses actuarielles sur lesquelles doit être fondée la détermination de la valeur de la pension et de la date visées aux alinéas j) et k);

m) prévoir la façon dont l'époux, ex-époux ou ancien conjoint de fait peut effectuer son choix en vertu du paragraphe 52.14(4) et régir l'avis du choix effectué que doit recevoir le juge;

n) prévoir, pour l'application de l'alinéa 52.14(6)b), la façon de déterminer la période pendant laquelle les intéressés ont cohabité;

o) prévoir, pour l'application du paragraphe 52.14(8), l'ajustement des prestations de pension payables au juge, notamment la détermination de la date de prise d'effet de l'ajustement;

p) d'une façon générale, régir le partage des prestations de pension d'un juge qui démissionne ou est révoqué pour cause d'infirmité;

q) prévoir — malgré les autres dispositions de la présente loi — de quelle manière et dans quelle mesure les dispositions de la présente loi s'appliquent au juge, à l'époux, à l'ex-époux, au conjoint de fait ou à l'ancien conjoint de fait ou à toute autre personne en cas de partage en vertu de l'article 52.14 et adapter les dispositions de la présente loi à ces personnes;

r) régir, pour l'application du paragraphe 52.15(2), la portion d'une pension attribuée pour une période visée par le partage;

s) prévoir de quelle manière la demande de renseignements visée à l'article 52.21 doit être faite, prévoir les renseignements à fournir concernant les prestations qui sont dues au juge ou à son égard ou sont susceptibles de le devenir et spécifier les circonstances dans lesquelles une demande peut être refusée;

t) prescrire les mesures correctives qui s'imposent dans les circonstances réglementaires relativement à l'erreur d'un fonctionnaire ou la fourniture de renseignements erronés;

u) prendre toute mesure d'ordre réglementaire prévue aux articles 52.1 à 52.21;

(u) prescribing any matter or thing that may be prescribed under sections 52.1 to 52.21; and

(v) generally for carrying out the purposes and provisions of sections 52.1 to 52.21 and this section.

2006, c. 11, s. 15; 2017, c. 20, s. 226(F).

v) prendre toute mesure d'application des articles 52.1 à 52.21 et du présent article.

2006, ch. 11, art. 15; 2017, ch. 20, art. 226(F).

Payment of Salaries, Allowances, Annuities and Other Amounts

Amounts payable out of C.R.F.

53 (1) The salaries, allowances and annuities payable under this Act and the amounts payable under sections 46.1, 51 and 52.15 shall be paid out of the Consolidated Revenue Fund.

Prorating

(2) For any period less than a year, the salaries and annuities payable under this Act shall be paid pro rata.

Monthly instalments

(3) The salaries and annuities payable under this Act shall be paid by monthly instalments.

First payment

(4) The first payment of salary of any judge shall be made pro rata on the first day of the month that occurs next after the appointment of the judge.

Legal representatives

(5) If a judge resigns the office of judge or dies, the judge or his or her legal representatives are entitled to receive such proportionate part of the judge's salary as has accrued during the time that the judge executed the office since the last payment.

R.S., 1985, c. J-1, s. 53; 1989, c. 8, s. 13; 2002, c. 8, s. 111(E); 2006, c. 11, s. 16.

Versement des traitements et autres montants

Paiement sur le Trésor

53 (1) Les traitements, indemnités et pensions prévus par la présente loi, ainsi que les montants payables au titre des articles 46.1, 51 et 52.15, sont payés sur le Trésor.

Paiement au prorata

(2) Pour toute fraction d'année, les traitements et pensions sont payés au prorata.

Mensualité

(3) Les traitements et pensions sont payables mensuellement.

Premier versement

(4) Le premier versement du traitement s'effectue, au prorata des jours travaillés, le premier jour du mois qui suit la nomination de l'intéressé.

Ayants cause

(5) En cas de démission ou de décès, le juge ou ses ayants cause ont droit à la fraction du traitement correspondant à la période écoulée depuis le dernier versement.

L.R. (1985), ch. J-1, art. 53; 1989, ch. 8, art. 13; 2002, ch. 8, art. 111(A); 2006, ch. 11, art. 16.

Absence from Judicial Duties

Leave of absence

54 (1) No judge of a superior court shall be granted leave of absence from his or her judicial duties for a period

(a) of six months or less, except with the approval of the chief justice of the superior court; or

(b) of more than six months, except with the approval of the Governor in Council.

Absence

Congés

54 (1) Les congés demandés par des juges des juridictions supérieures sont subordonnés :

a) s'ils sont de six mois ou moins, à l'autorisation du juge en chef de la juridiction supérieure en cause;

b) s'ils sont de plus de six mois, à l'autorisation du gouverneur en conseil.

Notification of leave by chief justice

(1.1) Whenever a leave of absence is granted under paragraph (1)(a), the chief justice of the superior court shall, without delay, notify the Minister of Justice of Canada and, in the case of provincial or territorial courts, the minister of justice or the attorney general of the province or territory.

Notification of leave by Minister of Justice of Canada

(1.2) Whenever a leave of absence is granted under paragraph (1)(b), the Minister of Justice of Canada shall, without delay, notify the chief justice of the superior court and, in the case of provincial or territorial courts, the minister of justice or the attorney general of the province or territory.

Report by chief justice of absence

(2) If it appears to the chief justice of a superior court that a judge of the court is absent from the judge's judicial duties without the approval required by subsection (1), the chief justice shall report the absence to the Minister of Justice of Canada.

Absentee judge to report

(3) Whenever a judge of a superior court is absent from the judge's judicial duties for a period of more than 30 days, the judge shall report the absence and the reasons for it to the Minister of Justice of Canada.

(4) [Repealed, 2017, c. 33, s. 252]

R.S., 1985, c. J-1, s. 54; 1992, c. 51, s. 24; 1996, c. 30, s. 4; 1999, c. 3, s. 76; 2002, c. 7, s. 194, c. 8, s. 101; 2012, c. 31, s. 218; 2017, c. 33, s. 252.

Avis

(1.1) Dans le cas où un congé est accordé au titre de l'alinéa (1)a), le juge en chef de la juridiction supérieure en cause avise sans délai le ministre de la Justice du Canada. Si le congé est accordé à un juge d'une cour provinciale ou territoriale, il avise également le ministre de la Justice ou le procureur général de la province ou du territoire en cause.

Avis

(1.2) Dans le cas où un congé est accordé au titre de l'alinéa (1)b), le ministre de la Justice du Canada avise sans délai le juge en chef de la juridiction supérieure en cause. Si le congé est accordé à un juge d'une cour provinciale ou territoriale, il avise également le ministre de la Justice ou le procureur général de la province ou du territoire en cause.

Rapport

(2) Le juge en chef d'une juridiction supérieure doit signaler au ministre de la Justice du Canada les cas de congés non autorisés au titre du paragraphe (1) qu'il constate au sein de son tribunal.

Motifs de l'absence

(3) S'ils s'absentent pendant plus de trente jours, les juges d'une juridiction supérieure sont tenus d'en informer le ministre de la Justice du Canada et de lui faire part des motifs de l'absence.

(4) [Abrogé, 2017, ch. 33, art. 252]

L.R. (1985), ch. J-1, art. 54; 1992, ch. 51, art. 24; 1996, ch. 30, art. 4; 1999, ch. 3, art. 76; 2002, ch. 7, art. 194, ch. 8, art. 101; 2012, ch. 31, art. 218; 2017, ch. 33, art. 252.

Extra-judicial Employment

Judicial duties exclusively

55 No judge shall, either directly or indirectly, for himself or herself or others, engage in any occupation or business other than his or her judicial duties, but every judge shall devote himself or herself exclusively to those judicial duties.

R.S., 1985, c. J-1, s. 55; 2002, c. 8, s. 102(E).

Acting as commissioner, etc.

56 (1) No judge shall act as commissioner, arbitrator, adjudicator, referee, conciliator or mediator on any commission or on any inquiry or other proceeding unless

(a) in the case of any matter within the legislative authority of Parliament, the judge is by an Act of Parliament expressly authorized so to act or the judge is

Fonctions extrajudiciaires

Incompatibilités

55 Les juges se consacrent à leurs fonctions judiciaires à l'exclusion de toute autre activité, qu'elle soit exercée directement ou indirectement, pour leur compte ou celui d'autrui.

L.R. (1985), ch. J-1, art. 55; 2002, ch. 8, art. 102(A).

Qualité de commissaire

56 (1) Les juges ne peuvent faire fonction de commissaire, d'arbitre, de conciliateur ou de médiateur au sein d'une commission ou à l'occasion d'une enquête ou autre procédure que sur désignation expresse :

a) par une loi fédérale ou par une nomination ou autorisation à cet effet du gouverneur en conseil, s'il

thereunto appointed or so authorized by the Governor in Council; or

(b) in the case of any matter within the legislative authority of the legislature of a province, the judge is by an Act of the legislature of the province expressly authorized so to act or the judge is thereunto appointed or so authorized by the lieutenant governor in council of the province.

s'agit d'une question relevant de la compétence législative du Parlement;

b) par une loi provinciale ou par une nomination ou autorisation à cet effet du lieutenant-gouverneur en conseil de la province, s'il s'agit d'une question relevant de la compétence législative de la législature d'une province.

Acting as statutory assessor or arbitrator

(2) Subsection (1) does not apply to judges acting as arbitrators or assessors of compensation or damages under any public Act, whether of general or local application, of Canada or of a province, whereby a judge is required or authorized without authority from the Governor in Council or lieutenant governor in council to assess or ascertain compensation or damages.

R.S., 1985, c. J-1, s. 56; 1996, c. 10, s. 233.

Évaluateurs ou arbitres

(2) Le paragraphe (1) ne s'applique pas aux juges faisant fonction d'arbitre ou d'évaluateur expert en matière d'indemnité ou de dommages-intérêts sous le régime de toute loi publique fédérale ou provinciale, d'application générale ou locale, prévoyant l'exercice de cette fonction par un juge, sans nécessité d'autorisation du gouverneur en conseil ou du lieutenant-gouverneur en conseil.

L.R. (1985), ch. J-1, art. 56; 1996, ch. 10, art. 233.

Authorization

56.1 (1) Notwithstanding section 55, Madam Justice Louise Arbour of the Ontario Court of Appeal is authorized to take a leave from her judicial duties to serve as Prosecutor of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia and of the International Tribunal for Rwanda.

Autorisation

56.1 (1) Par dérogation à l'article 55, madame la juge Louise Arbour, de la Cour d'appel de l'Ontario, est autorisée à exercer les fonctions de procureur du Tribunal international chargé de poursuivre les personnes présumées responsables de violations graves du droit international humanitaire commises sur le territoire de l'ex-Yougoslavie et du Tribunal international pour le Rwanda.

Expenses

(2) Madam Justice Louise Arbour may receive moving or transportation expenses and reasonable travel and other expenses, in connection with her service as Prosecutor, from the United Nations.

Frais

(2) Elle peut être indemnisée, dans le cadre de ses fonctions de procureur, de ses frais de transport et des frais de séjour et autres frais raisonnables par les Nations Unies.

Leave without pay

(3) Madam Justice Louise Arbour may elect to take a leave of absence without pay for the purpose described in subsection (1), in which case she is not entitled to receive any salary or allowances under this Act for the duration of the leave, but may receive remuneration from the United Nations for her service as Prosecutor.

Congé non rémunéré

(3) Elle peut choisir de prendre un congé non rémunéré pour exercer ses fonctions de procureur, auquel cas elle n'a pas droit au traitement et aux indemnités prévus par la présente loi pendant la durée de son congé; toutefois, elle a le droit d'être rémunérée par les Nations Unies.

Ceasing contributions

(4) If Madam Justice Louise Arbour elects to take a leave of absence without pay under subsection (3), she shall not continue the contributions required by section 50 for the duration of the leave and that section does not apply to her for the duration of the leave, which duration shall not be counted as time during which she held judicial office for the purposes of sections 28, 29 and 42.

Non-versement des cotisations

(4) Si elle choisit de prendre un congé non rémunéré, elle ne peut pas continuer de verser la cotisation prévue à l'article 50 pendant la durée de son congé; cet article ne lui est pas alors applicable et il n'est pas tenu compte de la durée de son congé pour déterminer, dans le cadre des articles 28, 29 et 42, la durée d'exercice de ses fonctions judiciaires.

Deemed salary in event of death

(5) For the purposes of subsections 44(1) and (2), section 46.1 and subsection 47(3), if Madam Justice Louise Arbour dies while on a leave of absence without pay, she is deemed to be in receipt at the time of death of the salary that she would have been receiving if she had not been absent on leave without pay.

1996, c. 30, s. 5.

Extra Remuneration

No extra remuneration

57 (1) Except as provided in subsection (3), no judge shall accept any salary, fee, remuneration or other emolument or any expenses or allowances for acting in any capacity described in subsection 56(1) or as administrator or deputy of the Governor General or for performing any duty or service, whether judicial or executive, that the judge may be required to perform for or on behalf of the Government of Canada or the government of a province.

Exception

(2) The right of a judge to receive remuneration under any Act of the legislature of a province, other than for acting in any capacity described in subsection 56(1), is not affected by subsection (1), but no judge is entitled to receive remuneration under any such Act or Acts in an aggregate amount exceeding $3,000 per annum.

Expenses excepted

(3) In the cases described in subsection (1), a judge may receive his or her moving or transportation expenses and the reasonable travel and other expenses incurred by him or her away from his or her ordinary place of residence while acting in any such capacity or in the performance of any such duty or service, in the same amount and under the same conditions as if the judge were performing a function or duty as such judge, if those expenses are paid in respect of any matter within the legislative authority of Parliament, by the Government of Canada, and in respect of any matter within the legislative authority of the legislature of a province, by the government of the province.

R.S., 1985, c. J-1, s. 57; 2002, c. 8, s. 103(E).

Présomption

(5) Pour l'application des paragraphes 44(1) et (2), de l'article 46.1 et du paragraphe 47(3), en cas de décès de madame la juge Louise Arbour au cours de son congé non rémunéré, elle est réputée recevoir, au moment du décès, un traitement égal à celui qu'elle aurait reçu en l'absence du congé.

1996, ch. 30, art. 5.

Rémunération supplémentaire

Absence de rémunération supplémentaire

57 (1) Sauf cas prévu au paragraphe (3), ne donne lieu à aucune rémunération ou indemnité l'exercice par un juge des fonctions — soit visées au paragraphe 56(1), soit en qualité d'administrateur du Canada ou de suppléant du gouverneur général, soit ressortissant au pouvoir judiciaire ou exécutif — qu'il est tenu de remplir pour le gouvernement du Canada ou d'une province ou en leur nom.

Exception

(2) Le paragraphe (1) n'a pas pour effet d'empêcher un juge de recevoir au titre de lois provinciales, pour des fonctions autres que celles visées au paragraphe 56(1), une rémunération qui ne saurait toutefois dépasser 3 000 $ par an au total.

Indemnités

(3) Dans les cas visés au paragraphe (1), le juge peut toutefois être indemnisé de ses frais de transport et des frais de séjour et autres entraînés par l'accomplissement des fonctions hors de son lieu ordinaire de résidence à condition que l'indemnité soit versée par le gouvernement du Canada ou celui de la province, selon le cas; le montant et les modalités de versement de l'indemnité sont ceux qui sont par ailleurs attachés au poste du juge.

L.R. (1985), ch. J-1, art. 57; 2002, ch. 8, art. 103(A).

PART II

Canadian Judicial Council

Interpretation

Definition of *Minister*

58 In this Part, ***Minister*** means the Minister of Justice of Canada.

Constitution of the Council

Council established

59 (1) There is hereby established a Council, to be known as the Canadian Judicial Council, consisting of

(a) the Chief Justice of Canada, who shall be the chairman of the Council;

(b) the chief justice and any senior associate chief justice and associate chief justice of each superior court or branch or division thereof; and

(c) [Repealed, 2017, c. 33, s. 253]

(d) the Chief Justice of the Court Martial Appeal Court of Canada.

(e) [Repealed, 2002, c. 8, s. 104]

(2) and (3) [Repealed, 1999, c. 3, s. 77]

Substitute member

(4) Each member of the Council may appoint a judge of that member's court to be a substitute member of the Council and the substitute member shall act as a member of the Council during any period in which he or she is appointed to act, but the Chief Justice of Canada may, in lieu of appointing a member of the Supreme Court of Canada, appoint any former member of that Court to be a substitute member of the Council.

R.S., 1985, c. J-1, s. 59; 1992, c. 51, s. 25; 1996, c. 30, s. 6; 1999, c. 3, s. 77; 2002, c. 7, s. 195, c. 8, s. 104; 2017, c. 33, s. 253.

Objects of Council

60 (1) The objects of the Council are to promote efficiency and uniformity, and to improve the quality of judicial service, in superior courts.

PARTIE II

Conseil canadien de la magistrature

Définition

Définition de *ministre*

58 Dans la présente partie, ***ministre*** s'entend du ministre de la Justice du Canada.

Constitution et fonctionnement du Conseil

Constitution

59 (1) Est constitué le Conseil canadien de la magistrature, composé :

a) du juge en chef du Canada, qui en est le président;

b) des juges en chef, juges en chef associés et juges en chef adjoints des juridictions supérieures ou de leurs sections ou chambres;

c) [Abrogé, 2017, ch. 33, art. 253]

d) du juge en chef de la Cour d'appel de la cour martiale du Canada.

e) [Abrogé, 2002, ch. 8, art. 104]

(2) et (3) [Abrogés, 1999, ch. 3, art. 77]

Choix d'un suppléant

(4) Chaque membre du Conseil peut nommer au Conseil un suppléant choisi parmi les juges du tribunal dont il fait partie; le suppléant fait partie du Conseil pendant la période pour laquelle il est nommé. Le juge en chef du Canada peut choisir son suppléant parmi les juges actuels ou anciens de la Cour suprême du Canada.

L.R. (1985), ch. J-1, art. 59; 1992, ch. 51, art. 25; 1996, ch. 30, art. 6; 1999, ch. 3, art. 77; 2002, ch. 7, art. 195, ch. 8, art. 104; 2017, ch. 33, art. 253.

Mission du Conseil

60 (1) Le Conseil a pour mission d'améliorer le fonctionnement des juridictions supérieures, ainsi que la qualité de leurs services judiciaires, et de favoriser l'uniformité dans l'administration de la justice devant ces tribunaux.

Powers of Council

(2) In furtherance of its objects, the Council may

(a) establish conferences of chief justices and associate chief justices;

(b) establish seminars for the continuing education of judges;

(c) make the inquiries and the investigation of complaints or allegations described in section 63; and

(d) make the inquiries described in section 69.

R.S., 1985, c. J-1, s. 60; 1992, c. 51, s. 26; 2002, c. 8, s. 105.

Meetings of Council

61 (1) The Council shall meet at least once a year.

Work of Council

(2) Subject to this Act, the work of the Council shall be carried on in such manner as the Council may direct.

By-laws

(3) The Council may make by-laws

(a) respecting the calling of meetings of the Council;

(b) respecting the conduct of business at meetings of the Council, including the fixing of quorums for such meetings, the establishment of committees of the Council and the delegation of duties to any such committees; and

(c) respecting the conduct of inquiries and investigations described in section 63.

R.S., c. J-1, s. 30; R.S., c. 16(2nd Supp.), s. 10; 1976-77, c. 25, s. 15.

Employment of counsel and assistants

62 The Council may engage the services of such persons as it deems necessary for carrying out its objects and duties, and also the services of counsel to aid and assist the Council in the conduct of any inquiry or investigation described in section 63.

R.S., c. 16(2nd Supp.), s. 10; 1976-77, c. 25, ss. 15, 16; 1980-81-82-83, c. 157, ss. 16, 17(F).

Inquiries concerning Judges

Inquiries

63 (1) The Council shall, at the request of the Minister or the attorney general of a province, commence an inquiry as to whether a judge of a superior court should be removed from office for any of the reasons set out in paragraphs 65(2)(a) to (d).

Pouvoirs

(2) Dans le cadre de sa mission, le Conseil a le pouvoir :

a) d'organiser des conférences des juges en chef et juges en chef adjoints;

b) d'organiser des colloques en vue du perfectionnement des juges;

c) de procéder aux enquêtes visées à l'article 63;

d) de tenir les enquêtes visées à l'article 69.

L.R. (1985), ch. J-1, art. 60; 1992, ch. 51, art. 26; 2002, ch. 8, art. 105.

Réunions du Conseil

61 (1) Le Conseil se réunit au moins une fois par an.

Travaux

(2) Sous réserve des autres dispositions de la présente loi, le Conseil détermine la conduite de ses travaux.

Règlements administratifs

(3) Le Conseil peut, par règlement administratif, régir :

a) la convocation de ses réunions;

b) le déroulement de ses réunions, la fixation du quorum, la constitution de comités, ainsi que la délégation de pouvoirs à ceux-ci;

c) la procédure relative aux enquêtes visées à l'article 63.

S.R., ch. J-1, art. 30; S.R., ch. 16(2e suppl.), art. 10; 1976-77, ch. 25, art. 15.

Nomination du personnel

62 Le Conseil peut employer le personnel nécessaire à l'exécution de sa mission et engager des conseillers juridiques pour l'assister dans la tenue des enquêtes visées à l'article 63.

S.R., ch. 16(2e suppl.), art. 10; 1976-77, ch. 25, art. 15 et 16; 1980-81-82-83, ch. 157, art. 16 et 17(F).

Enquêtes sur les juges

Enquêtes obligatoires

63 (1) Le Conseil mène les enquêtes que lui confie le ministre ou le procureur général d'une province sur les cas de révocation au sein d'une juridiction supérieure pour tout motif énoncé aux alinéas 65(2)a) à d).

Investigations

(2) The Council may investigate any complaint or allegation made in respect of a judge of a superior court.

Inquiry Committee

(3) The Council may, for the purpose of conducting an inquiry or investigation under this section, designate one or more of its members who, together with such members, if any, of the bar of a province, having at least ten years standing, as may be designated by the Minister, shall constitute an Inquiry Committee.

Powers of Council or Inquiry Committee

(4) The Council or an Inquiry Committee in making an inquiry or investigation under this section shall be deemed to be a superior court and shall have

(a) power to summon before it any person or witness and to require him or her to give evidence on oath, orally or in writing or on solemn affirmation if the person or witness is entitled to affirm in civil matters, and to produce such documents and evidence as it deems requisite to the full investigation of the matter into which it is inquiring; and

(b) the same power to enforce the attendance of any person or witness and to compel the person or witness to give evidence as is vested in any superior court of the province in which the inquiry or investigation is being conducted.

Prohibition of information relating to inquiry, etc.

(5) The Council may prohibit the publication of any information or documents placed before it in connection with, or arising out of, an inquiry or investigation under this section when it is of the opinion that the publication is not in the public interest.

Inquiries may be public or private

(6) An inquiry or investigation under this section may be held in public or in private, unless the Minister requires that it be held in public.

R.S., 1985, c. J-1, s. 63; 1992, c. 51, s. 27; 2002, c. 8, s. 106.

Notice of hearing

64 A judge in respect of whom an inquiry or investigation under section 63 is to be made shall be given reasonable notice of the subject-matter of the inquiry or investigation and of the time and place of any hearing thereof and shall be afforded an opportunity, in person or by

Enquêtes facultatives

(2) Le Conseil peut en outre enquêter sur toute plainte ou accusation relative à un juge d'une juridiction supérieure.

Constitution d'un comité d'enquête

(3) Le Conseil peut constituer un comité d'enquête formé d'un ou plusieurs de ses membres, auxquels le ministre peut adjoindre des avocats ayant été membres du barreau d'une province pendant au moins dix ans.

Pouvoirs d'enquête

(4) Le Conseil ou le comité formé pour l'enquête est réputé constituer une juridiction supérieure; il a le pouvoir de :

a) citer devant lui des témoins, les obliger à déposer verbalement ou par écrit sous la foi du serment — ou de l'affirmation solennelle dans les cas où elle est autorisée en matière civile — et à produire les documents et éléments de preuve qu'il estime nécessaires à une enquête approfondie;

b) contraindre les témoins à comparaître et à déposer, étant investi à cet égard des pouvoirs d'une juridiction supérieure de la province où l'enquête se déroule.

Protection des renseignements

(5) S'il estime qu'elle ne sert pas l'intérêt public, le Conseil peut interdire la publication de tous renseignements ou documents produits devant lui au cours de l'enquête ou découlant de celle-ci.

Publicité de l'enquête

(6) Sauf ordre contraire du ministre, les enquêtes peuvent se tenir à huis clos.

L.R. (1985), ch. J-1, art. 63; 1992, ch. 51, art. 27; 2002, ch. 8, art. 106.

Avis de l'audition

64 Le juge en cause doit être informé, suffisamment à l'avance, de l'objet de l'enquête, ainsi que des date, heure et lieu de l'audition, et avoir la possibilité de se faire entendre, de contre-interroger les témoins et de présenter tous éléments de preuve utiles à sa décharge, personnellement ou par procureur.

L.R. (1985), ch. J-1, art. 64; 2002, ch. 8, art. 111(A).

counsel, of being heard at the hearing, of cross-examining witnesses and of adducing evidence on his or her own behalf.

R.S., 1985, c. J-1, s. 64; 2002, c. 8, s. 111(E).

Report and Recommendations

Report of Council

65 (1) After an inquiry or investigation under section 63 has been completed, the Council shall report its conclusions and submit the record of the inquiry or investigation to the Minister.

Recommendation to Minister

(2) Where, in the opinion of the Council, the judge in respect of whom an inquiry or investigation has been made has become incapacitated or disabled from the due execution of the office of judge by reason of

(a) age or infirmity,

(b) having been guilty of misconduct,

(c) having failed in the due execution of that office, or

(d) having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of that office,

the Council, in its report to the Minister under subsection (1), may recommend that the judge be removed from office.

R.S., 1985, c. J-1, s. 65; R.S., 1985, c. 27 (2nd Supp.), s. 5; 2002, c. 8, s. 111(E).

Effect of Inquiry

66 (1) [Repealed, R.S., 1985, c. 27 (2nd Supp.), s. 6]

Leave of absence with salary

(2) The Governor in Council may grant leave of absence to any judge found, pursuant to subsection 65(2), to be incapacitated or disabled, for such period as the Governor in Council, in view of all the circumstances of the case, may consider just or appropriate, and if leave of absence is granted the salary of the judge shall continue to be paid during the period of leave of absence so granted.

Annuity to judge who resigns

(3) The Governor in Council may grant to any judge found to be incapacitated or disabled, if the judge resigns, the annuity that the Governor in Council might have granted the judge if the judge had resigned at the

Rapports et recommandations

Rapport du Conseil

65 (1) À l'issue de l'enquête, le Conseil présente au ministre un rapport sur ses conclusions et lui communique le dossier.

Recommandation au ministre

(2) Le Conseil peut, dans son rapport, recommander la révocation s'il est d'avis que le juge en cause est inapte à remplir utilement ses fonctions pour l'un ou l'autre des motifs suivants :

a) âge ou invalidité;

b) manquement à l'honneur et à la dignité;

c) manquement aux devoirs de sa charge;

d) situation d'incompatibilité, qu'elle soit imputable au juge ou à toute autre cause.

L.R. (1985), ch. J-1, art. 65; L.R. (1985), ch. 27 (2e suppl.), art. 5; 2002, ch. 8, art. 111(A).

Conséquences de l'enquête

66 (1) [Abrogé, L.R. (1985), ch. 27 (2e suppl.), art. 6]

Congé avec traitement

(2) Le gouverneur en conseil peut accorder au juge reconnu inapte pour l'un des motifs énoncés au paragraphe 65(2) un congé, avec traitement, pour la période qu'il estime indiquée en l'espèce.

Pension au démissionnaire

(3) Si le juge dont il a constaté l'inaptitude démissionne, le gouverneur en conseil peut lui octroyer la pension qu'il aurait reçue s'il avait démissionné dès la constatation.

L.R. (1985), ch. J-1, art. 66; L.R. (1985), ch. 27 (2e suppl.), art. 6.

time when the finding was made by the Governor in Council.

R.S., 1985, c. J-1, s. 66; R.S., 1985, c. 27 (2nd Supp.), s. 6.

67 [Repealed, R.S., 1985, c. 16 (3rd Supp.), s. 5]

68 [Repealed, R.S., 1985, c. 16 (3rd Supp.), s. 6]

Inquiries concerning Other Persons

Further inquiries

69 (1) The Council shall, at the request of the Minister, commence an inquiry to establish whether a person appointed pursuant to an enactment of Parliament to hold office during good behaviour other than

(a) a judge of a superior court or a prothonotary of the Federal Court, or

(b) a person to whom section 48 of the *Parliament of Canada Act* applies,

should be removed from office for any of the reasons set out in paragraphs 65(2)(a) to (d).

Applicable provisions

(2) Subsections 63(3) to (6), sections 64 and 65 and subsection 66(2) apply, with such modifications as the circumstances require, to inquiries under this section.

Removal from office

(3) The Governor in Council may, on the recommendation of the Minister, after receipt of a report described in subsection 65(1) in relation to an inquiry under this section in connection with a person who may be removed from office by the Governor in Council other than on an address of the Senate or House of Commons or on a joint address of the Senate and House of Commons, by order, remove the person from office.

R.S., 1985, c. J-1, s. 69; 1992, c. 1, s. 144(F), c. 51, s. 28; 1993, c. 34, s. 89; 2002, c. 8, s. 107; 2014, c. 39, s. 326.

Report to Parliament

Orders and reports to be laid before Parliament

70 Any order of the Governor in Council made pursuant to subsection 69(3) and all reports and evidence relating thereto shall be laid before Parliament within fifteen days after that order is made or, if Parliament is not then sitting, on any of the first fifteen days next thereafter that either House of Parliament is sitting.

1974-75-76, c. 48, s. 18; 1976-77, c. 25, s. 15.

67 [Abrogé, L.R. (1985), ch. 16 (3e suppl.), art. 5]

68 [Abrogé, L.R. (1985), ch. 16 (3e suppl.), art. 6]

Enquêtes sur les titulaires de poste

Enquêtes

69 (1) Sur demande du ministre, le Conseil enquête aussi sur les cas de révocation — pour les motifs énoncés au paragraphe 65(2) — des titulaires de poste nommés à titre inamovible aux termes d'une loi fédérale, à l'exception des :

a) juges des juridictions supérieures ou des protonotaires de la Cour fédérale;

b) personnes visées par l'article 48 de la *Loi sur le Parlement du Canada*.

Dispositions applicables

(2) Les paragraphes 63(3) à (6), les articles 64 et 65 et le paragraphe 66(2) s'appliquent, compte tenu des adaptations nécessaires, aux enquêtes prévues au présent article.

Révocation

(3) Au vu du rapport d'enquête prévu au paragraphe 65(1), le gouverneur en conseil peut, par décret, révoquer — s'il dispose déjà par ailleurs d'un tel pouvoir de révocation — le titulaire en cause sur recommandation du ministre, sauf si la révocation nécessite une adresse du Sénat ou de la Chambre des communes ou une adresse conjointe de ces deux chambres.

L.R. (1985), ch. J-1, art. 69; 1992, ch. 1, art. 144(F), ch. 51, art. 28; 1993, ch. 34, art. 89; 2002, ch. 8, art. 107; 2014, ch. 39, art. 326.

Rapport au Parlement

Dépôt des décrets

70 Les décrets de révocation pris en application du paragraphe 69(3), accompagnés des rapports et éléments de preuve à l'appui, sont déposés devant le Parlement dans les quinze jours qui suivent leur prise ou, si le Parlement ne siège pas, dans les quinze premiers jours de séance ultérieurs de l'une ou l'autre chambre.

1974-75-76, ch. 48, art. 18; 1976-77, ch. 25, art. 15.

Removal by Parliament or Governor in Council

Powers, rights or duties not affected

71 Nothing in, or done or omitted to be done under the authority of, any of sections 63 to 70 affects any power, right or duty of the House of Commons, the Senate or the Governor in Council in relation to the removal from office of a judge, a prothonotary of the Federal Court or any other person in relation to whom an inquiry may be conducted under any of those sections.

R.S., 1985, c. J-1, s. 71; 2014, c. 39, s. 327.

Révocation par le Parlement ou le gouverneur en conseil

Maintien du pouvoir de révocation

71 Les articles 63 à 70 n'ont pas pour effet de porter atteinte aux attributions de la Chambre des communes, du Sénat ou du gouverneur en conseil en matière de révocation des juges, des protonotaires de la Cour fédérale ou des autres titulaires de poste susceptibles de faire l'objet des enquêtes qui y sont prévues.

L.R. (1985), ch. J-1, art. 71; 2014, ch. 39, art. 327.

PART III

Administration of Federal Judicial Affairs

Interpretation

Definitions

72 In this Part,

Commissioner means the Commissioner for Federal Judicial Affairs referred to in section 73; (*commissaire*)

Minister means the Minister of Justice of Canada. (*ministre*)

Commissioner for Federal Judicial Affairs

Commissioner for Federal Judicial Affairs

73 There shall be an officer, called the Commissioner for Federal Judicial Affairs, who shall have the rank and status of a deputy head of a department and who shall be appointed by the Governor in Council after consultation by the Minister with the Council or such committee thereof as is named for the purpose by the Council.

1976-77, c. 25, s. 17.

Duties and functions of Commissioner

74 (1) It shall be the duty and function of the Commissioner, under the Minister, to

(a) act as the deputy of the Minister in performing all such duties and functions in relation to the administration of Part I as fall, by law, within the responsibility of the Minister;

PARTIE III

Administration des affaires judiciaires fédérales

Définitions

Définitions

72 Les définitions qui suivent s'appliquent à la présente partie.

commissaire Le commissaire à la magistrature fédérale visé à l'article 73. (*Commissioner*)

ministre Le ministre de la Justice du Canada. (*Minister*)

Commissaire à la magistrature fédérale

Création du poste

73 Est créé le poste de commissaire à la magistrature fédérale dont le titulaire est nommé par le gouverneur en conseil après consultation par le ministre du Conseil ou du comité constitué à cet effet par ce dernier. Le commissaire a rang et statut d'administrateur général de ministère.

1976-77, ch. 25, art. 17.

Attributions du commissaire

74 (1) Le commissaire, sous l'autorité du ministre :

a) exerce, à titre de délégué du ministre, les attributions dévolues de droit à celui-ci pour l'application de la partie I;

b) établit le budget du Conseil;

(b) prepare budgetary submissions for the requirements of the Council;

(c) be responsible for any other administrative arrangements that are necessary to ensure that all reasonable requirements, including those for premises, equipment and other supplies and services and for officers, clerks and employees of the Council for the carrying out of its operations, are provided for in accordance with law; and

(d) do such other things as the Minister may require in connection with any matter or matters falling, by law, within the Minister's responsibilities for the proper functioning of the judicial system in Canada.

c) prend les mesures d'ordre administratif qui s'imposent pour doter le Conseil en personnel, services, locaux et matériel, conformément à la loi;

d) accomplit les missions que le ministre lui confie, dans le cadre de sa compétence, pour la bonne administration de la justice au Canada.

Interpretation of subsection (1)

(2) It is hereby declared for greater certainty that such of the duties and functions of the Minister as are, by paragraphs (1)(a) to (d), subject to be performed by the Commissioner do not form part of the duties and functions assigned to the Minister by the *Department of Justice Act*.

R.S., 1985, c. J-1, s. 74; 2002, c. 8, s. 108.

Précision

(2) Il est entendu que les attributions que le ministre peut déléguer au commissaire en vertu des alinéas (1)a) à d) ne font pas partie des attributions que lui confère la *Loi sur le ministère de la Justice*.

L.R. (1985), ch. J-1, art. 74; 2002, ch. 8, art. 108.

Registrar of the Supreme Court of Canada

Duties and functions

75 (1) The duties and functions described in paragraphs 74(1)(a) to (c) shall, in relation to the Supreme Court of Canada and the judges thereof, be carried out by the Registrar of the Court, who may, for that purpose, utilize the services of other persons on the staff of the Court.

Registrar deemed deputy head

(2) The Registrar of the Supreme Court of Canada shall, for the purposes of the *Public Service Employment Act* and other Acts of Parliament and for purposes relating to the duties and functions of the Registrar under this section, be deemed to be the deputy head of the portion of the federal public administration appointed under subsection 12(2) of the *Supreme Court Act*.

R.S., 1985, c. J-1, s. 75; 2003, c. 22, s. 224(E).

76 [Repealed, 2002, c. 8, s. 109]

Commissioner's Staff

Appointment

77 The officers, clerks and employees who are required by the Commissioner to carry out the Commissioner's

Registraire de la Cour suprême du Canada

Attributions

75 (1) Dans le cas de la Cour suprême du Canada, les attributions visées aux alinéas 74(1) a) à c) sont exercées par son registraire; celui-ci peut, à cet effet, se faire assister des autres membres du personnel de ce tribunal.

Statut du registraire

(2) Pour l'application de la *Loi sur l'emploi dans la fonction publique* et des autres lois fédérales, le registraire de la Cour suprême du Canada est, pour l'exercice des attributions que lui confère le présent article, réputé être l'administrateur général du secteur de l'administration publique fédérale nommé en vertu du paragraphe 12(2) de la *Loi sur la Cour suprême*.

L.R. (1985), ch. J-1, art. 75; 2003, ch. 22, art. 224(A).

76 [Abrogé, 2002, ch. 8, art. 109]

Personnel du commissariat

Nomination

77 Le personnel nécessaire au commissaire pour l'exercice des attributions visées à l'article 74 est nommé

duties and functions under section 74 shall be appointed under the *Public Service Employment Act*.

R.S., 1985, c. J-1, s. 77; 2002, c. 8, s. 110.

conformément à la *Loi sur l'emploi dans la fonction publique*.

L.R. (1985), ch. J-1, art. 77; 2002, ch. 8, art. 110.

Commissioner is deputy head

78 The Commissioner and the officers, clerks and employees appointed under section 77 shall be a portion of the federal public administration that is separate from the Department of Justice and of which the Commissioner shall be the deputy head.

R.S., 1985, c. J-1, s. 78; 2002, c. 8, s. 110; 2003, c. 22, s. 224(E).

Statut d'administrateur général

78 Le commissaire et le personnel visé à l'article 77 constituent un secteur de l'administration publique fédérale distinct du ministère de la Justice et dont le commissaire est l'administrateur général.

L.R. (1985), ch. J-1, art. 78; 2002, ch. 8, art. 110; 2003, ch. 22, art. 224(A).

RELATED PROVISIONS

— R.S., 1985, c. 50 (1st Supp.), s. 4(2)

4 (2) For the twelve month period commencing April 1, 1986 and for each twelve month period thereafter,

(a) section 25 of the *Judges Act* does not apply in respect of judges of county and district courts;

(b) the salary annexed to the office of Chief Judge and Associate Chief Judge of a county or district court shall be $5,000 lower than the salary annexed to the office of Chief Justice and Associate Chief Justice of the superior court of a province; and

(c) the salary annexed to the office of judge of a county or district court, other than Chief Judge and Associate Chief Judge, shall be $5,000 lower than the salary annexed to the office of judge of the superior court of a province, other than a Chief Justice or Associate Chief Justice.

— R.S., 1985, c. 50 (1st Supp.), s. 5(3)

Application

5 (3) Subsections (1) and (2) apply in respect of the year commencing April 1, 1985 and subsequent years.

— R.S., 1985, c. 50 (1st Supp.), s. 7(2)

Application

7 (2) Subsection (1) applies in respect of the year commencing April 1, 1985 and subsequent years.

— R.S., 1985, c. 50 (1st Supp.), ss. 8(1) and (2)

Where person ceased to hold office between April 1, 1985 and date of Royal Assent to this Act

8 (1) For greater certainty, where a person ceased to hold office as lieutenant governor or as judge in the period commencing on April 1, 1985 and ending on the day preceding the day on which this Act is assented to,

(a) that person shall be paid the retroactive salary increment resulting from section 3 or 4 in respect of the period commencing on April 1, 1985 and ending on the day on which the person ceased to hold office;

(b) in the case of a lieutenant governor, any retroactive salary increment paid to the lieutenant governor pursuant to paragraph (a) shall, for the purposes of subsection 3(2) of the *Lieutenant Governors Superannuation Act*, be deemed to have been received by that person during the person's term of office; and

DISPOSITIONS CONNEXES

— L.R. (1985), ch. 50 (1er suppl.), par. 4(2)

4 (2) Pour chaque période de douze mois à compter du 1er avril 1986 :

a) l'article 25 de la *Loi sur les juges* ne s'applique pas aux juges des cours de comté et de district;

b) le traitement des juges en chef et juges en chef adjoints des cours de comté et de district est inférieur de 5 000 $ à celui des juges en chef et juges en chef adjoints des juridictions supérieures des provinces;

c) le traitement des autres juges des cours de comté et de district est inférieur de 5 000 $ à celui des juges des juridictions supérieures des provinces, autres que les juges en chef et juges en chef adjoints.

— L.R. (1985), ch. 50 (1er suppl.), par. 5(3)

Application

5 (3) Les paragraphes (1) et (2) s'appliquent à l'année qui commence le 1er avril 1985 et aux années suivantes.

— L.R. (1985), ch. 50 (1er suppl.), par. 7(2)

Application

7 (2) Le paragraphe (1) s'applique à l'année qui commence le 1er avril 1985 et aux années suivantes.

— L.R. (1985), ch. 50 (1er suppl.), par. 8(1) et (2)

Cas où la cessation de fonctions a eu lieu entre le 1er avril 1985 et la date de sanction de la présente loi

8 (1) Il est entendu que, dans le cas où une personne a cessé d'exercer les fonctions de lieutenant-gouverneur ou de juge pendant la période commençant le 1er avril 1985 et se terminant le jour précédant la date de sanction de la présente loi, les règles suivantes s'appliquent :

a) il doit lui être versé la majoration rétroactive de traitement découlant des articles 3 ou 4 pour la période commençant le 1er avril 1985 et se terminant à la date où elle a cessé d'exercer ses fonctions;

b) la majoration rétroactive de traitement versée conformément à l'alinéa a) est réputée, pour l'application du paragraphe 3(2) de la *Loi sur la pension de retraite des lieutenants-gouverneurs*, avoir été reçue par l'intéressé alors qu'il exerçait ses fonctions;

(c) in the case of a judge, any annuity granted to or in respect of that judge is increased, as of the day it was granted, to reflect the higher salary annexed to the office held by the judge on the day on which the judge ceased to hold office.

c) toute pension accordée à un juge ou à son égard est majorée, à compter de la date où elle a été accordée, afin de tenir compte du traitement plus élevé attaché au poste qu'il occupait à la date où il a cessé d'exercer ses fonctions.

Where person deceased

(2) Where a person to whom a retroactive salary increment or a retroactive pension or annuity increment would be payable as a result of subsection (1) is deceased, that retroactive increment shall be paid as a death benefit to that person's estate or, if less than one thousand dollars, as may be directed by the Secretary of State of Canada (in the case of a lieutenant governor) or the Minister of Justice (in the case of a judge).

Décès du bénéficiaire

(2) En cas de décès de la personne à laquelle elle serait payable en conséquence du paragraphe (1), la majoration rétroactive de traitement ou de pension est versée, à titre de prestation consécutive au décès, aux héritiers de cette personne ou, si la majoration est inférieure à mille dollars, en conformité avec les directives du secrétaire d'État du Canada, dans le cas du lieutenant-gouverneur, ou du ministre de la Justice, dans le cas d'un juge.

— R.S., 1985, c. 27 (2nd Supp.), s. 12

— L.R. (1985), ch. 27 (2e suppl.), art. 12

Transitional: other references to P.E.I. Court

12 (1) A reference in any Act, other than in the provisions amended by the schedule to this Act, or in any document, instrument, regulation, proclamation or order in council, to the Supreme Court of Prince Edward Island shall be construed, as regards any transaction, matter or thing subsequent to the coming into force of this section, to be a reference to the Supreme Court of Prince Edward Island, Appeal Division, or the Supreme Court of Prince Edward Island, Trial Division, as the case may require.

Disposition transitoire : Île-du-Prince-Édouard

12 (1) Dans les lois et dispositions qui ne sont pas indiquées à l'annexe de la présente loi et dans les règlements, décrets, proclamations et autres documents, un renvoi à la Cour suprême de l'Île-du-Prince-Édouard est, à l'égard de toute question qui survient après l'entrée en vigueur du présent article, réputé être un renvoi à la Section d'appel ou à la Section de première instance de la Cour suprême de l'Île-du-Prince-Édouard, selon le cas.

Transitional: other references to Newfoundland Court

(2) A reference in any Act, other than in the provisions amended by the schedule to this Act, or in any document, instrument, regulation, proclamation or order in council, to the District Court of Newfoundland shall be construed, as regards any transaction, matter or thing subsequent to the coming into force of this section, to be a reference to the Trial Division of the Supreme Court of Newfoundland.

Disposition transitoire : Terre-Neuve

(2) Dans les lois et dispositions qui ne sont pas indiquées à l'annexe de la présente loi et dans les règlements, décrets, proclamations et autres documents, un renvoi à une cour de district de Terre-Neuve est, à l'égard de toute question qui survient après l'entrée en vigueur du présent article, réputé être un renvoi à la Section de première instance de la Cour suprême de Terre-Neuve.

— R.S., 1985, c. 27 (2nd Supp.), s. 13

— L.R. (1985), ch. 27 (2e suppl.), art. 13

Transitional: salary for P.E.I. Court

13 (1) Subject to subsection (2), the salaries of the judges of the Appeal Division and Trial Division of the Supreme Court of Prince Edward Island are, on the coming into force of this section, the same as the salary annexed to the office of judge of the Supreme Court of Prince Edward Island, other than the Chief Justice thereof, immediately before this section comes into force.

Disposition transitoire : traitement des juges de l'Île-du-Prince-Édouard

13 (1) Sous réserve du paragraphe (2), le traitement des juges de la Section d'appel et de la Section de première instance de la Cour suprême de l'Île-du-Prince-Édouard demeure, à l'entrée en vigueur du présent article, le même que le traitement prévu pour le poste de juge de la Cour suprême de l'Île-du-Prince-Édouard, à l'exception du juge en chef de cette cour, avant cette entrée en vigueur.

Idem

(2) The salaries of the Chief Justice of Prince Edward Island and the Chief Justice of the Trial Division of the Supreme Court of Prince Edward Island are, on the coming into force of this section, the same as the salary

Idem

(2) Le traitement du juge en chef de l'Île-du-Prince-Édouard et du juge en chef de la Section de première instance de la Cour suprême de l'Île-du-Prince-Édouard demeure, à l'entrée en vigueur du présent article, le même

annexed to the office of Chief Justice of the Supreme Court of Prince Edward Island immediately before this section comes into force.

Transitional: salary

(3) Notwithstanding any other provision of this Act or the *Judges Act*, the person holding the office of Chief Judge of the District Court of Newfoundland immediately before the coming into force of section 2 of this Act shall continue to be paid the salary then annexed to that office until such time as the salary annexed to the office of judge of the Trial Division of the Supreme Court of Newfoundland exceeds that salary, at which time that person shall be paid the salary annexed to the office of judge of the Trial Division of the Supreme Court of Newfoundland.

— R.S., 1985, c. 39 (3rd Supp.), s. 1(2)

1 (2) The salary annexed to the office of a judge referred to in subsection (1) shall not be adjusted in accordance with section 25 of the said Act for the twelve month periods commencing April 1, 1986, April 1, 1987 and April 1, 1988.

— R.S., 1985, c. 39 (3rd Supp.), s. 2(2)

Transitional

2 (2) Where, before the coming into force of this Act, payment of an annuity to the spouse or surviving spouse of a judge was suspended or ceased, on remarriage of the spouse or surviving spouse, pursuant to section 44 of the said Act, as that provision read from time to time, or any provision similar to that provision contained in any Act mentioned in subsection 44(2) of the said Act, payment of the annuity to the spouse or surviving spouse shall, subject to the said Act, be resumed on and with effect from the coming into force of this Act.

— R.S., 1985, c. 39 (3rd Supp.), s. 3(2)

Transitional

3 (2) Where, before the coming into force of this Act, payment of an annuity to a child of a judge ceased, on marriage of the child, pursuant to paragraph 47(1)(b) of the said Act, payment of the annuity to the child shall, subject to the said Act, be resumed on and with effect from the coming into force of this Act.

— 1989, c. 8, s. 14

Coming into force

14 (1) Subsections 27(1) and (2) of the said Act, as enacted by section 10 of this Act, are applicable to the year commencing on April 1, 1989 and to subsequent years

que le traitement prévu pour le poste de juge en chef de la Cour suprême de l'Île-du-Prince-Édouard avant cette entrée en vigueur.

Disposition transitoire : traitement

(3) Par dérogation à toute autre disposition de la présente loi ou à la *Loi sur les juges*, la personne qui occupe le poste de juge en chef de la Cour de district de Terre-Neuve à l'entrée en vigueur de l'article 2 de la présente loi continue de recevoir le traitement alors prévu pour ce poste jusqu'à la date où le traitement prévu pour le poste de juge de la Section de première instance de la Cour suprême de Terre-Neuve excède ce traitement; à compter de cette date, cette personne reçoit le traitement prévu pour le poste de juge de la Section de première instance de la Cour suprême de Terre-Neuve.

— L.R. (1985), ch. 39 (3e suppl.), par. 1(2)

1 (2) Le traitement attaché au poste d'un juge visé au paragraphe (1) n'est pas ajusté en conformité avec l'article 25 de la même loi pendant les périodes de douze mois qui commencent le 1er avril 1986, le 1er avril 1987 et le 1er avril 1988.

— L.R. (1985), ch. 39 (3e suppl.), par. 2(2)

Disposition transitoire

2 (2) Lorsque, avant l'entrée en vigueur de la présente loi, le paiement de la pension au conjoint ou au conjoint survivant d'un juge a été suspendu ou a pris fin à cause du remariage de ce conjoint ou de ce conjoint survivant en application de l'article 44 de la même loi, en ses différents états successifs, ou d'une disposition semblable d'une loi mentionnée au paragraphe 44(2) de la même loi, le paiement de la pension au conjoint ou au conjoint survivant reprend, sous réserve des autres dispositions de la même loi, à compter de l'entrée en vigueur de la présente loi.

— L.R. (1985), ch. 39 (3e suppl.), par. 3(2)

Disposition transitoire

3 (2) Lorsque, avant l'entrée en vigueur de la présente loi, le paiement d'une pension à l'enfant d'un juge a pris fin à cause du mariage de cet enfant en application de l'alinéa 47(1)b) de la même loi, le paiement de la pension à cet enfant reprend, sous réserve des autres dispositions de la même loi, à compter de l'entrée en vigueur de la présente loi.

— 1989, ch. 8, art. 14

Entrée en vigueur de certaines dispositions

14 (1) Les paragraphes 27(1) et (2) de la même loi, édictés par l'article 10, s'appliquent à l'année commençant le 1er avril 1989 ainsi qu'aux années subséquentes et

and, for greater certainty, apply to a judge therein described who ceased to hold office during the period commencing on that day and ending on the day preceding the day on which this Act is assented to.

Idem

(2) Paragraphs 40(1)(e) and (f) and subsection 40(1.2) of the said Act, as enacted by section 11 of this Act, shall be deemed to have come into force on April 1, 1988 and, for greater certainty, apply to a judge therein described who ceased to hold office during the period commencing on that day and ending on the day preceding the day on which this Act is assented to.

— 1990, c. 16, s. 24(1)

Transitional: proceedings

24 (1) Every proceeding commenced before the coming into force of this subsection and in respect of which any provision amended by this Act applies shall be taken up and continued under and in conformity with that amended provision without any further formality.

— 1990, c. 16, s. 25

Salary of Associate Chief Justice

25 (1) The salary of the Associate Chief Justice of the Supreme Court of British Columbia is, on the coming into force of this subsection, the same as the salary annexed to the office of the Chief Justice of that Court.

Transitional: salary

(2) Notwithstanding the *Judges Act*, the person who holds the office of Chief Judge of the County Courts of British Columbia immediately before the coming into force of subsection 15(2) shall continue to be paid the salary then annexed to that office until such time as the salary annexed to the office of judge of the Supreme Court of British Columbia exceeds that salary, at which time that person shall be paid the salary annexed to the last-mentioned office.

— 1990, c. 17, s. 45(1)

Transitional: proceedings

45 (1) Every proceeding commenced before the coming into force of this subsection and in respect of which any provision amended by this Act applies shall be taken up and continued under and in conformity with that amended provision without any further formality.

— 1990, c. 17, s. 46

Transitional: salary

46 (1) Notwithstanding the *Judges Act*, a person who holds the office of Chief Judge or Associate Chief Judge

s'appliquent notamment aux juges visés par ces paragraphes qui ont cessé d'exercer leurs fonctions entre cette date et la veille de la sanction royale de la présente loi.

Idem

(2) Les alinéas 40(1)e) et f) et le paragraphe 40(1.2) de la même loi, édictés par l'article 11, sont réputés entrés en vigueur le 1er avril 1988 et s'appliquent notamment aux juges visés par ces dispositions qui ont cessé d'exercer leurs fonctions entre cette date et la veille de la sanction royale de la présente loi.

— 1990, ch. 16, par. 24(1)

Disposition transitoire : procédures

24 (1) Les procédures intentées avant l'entrée en vigueur du présent paragraphe et auxquelles des dispositions visées par la présente loi s'appliquent se poursuivent sans autres formalités en conformité avec ces dispositions dans leur forme modifiée.

— 1990, ch. 16, art. 25

Traitement du juge en chef adjoint

25 (1) Le traitement du juge en chef adjoint de la Cour suprême de la Colombie-Britannique est, à l'entrée en vigueur du présent paragraphe, identique à celui du juge en chef de cette cour.

Disposition transitoire : traitement

(2) Par dérogation à la *Loi sur les juges*, la personne qui occupe le poste de juge en chef des cours de comté de la Colombie-Britannique, à la date d'entrée en vigueur du paragraphe 15(2), continue de recevoir le traitement alors prévu pour ce poste jusqu'à la date où le traitement prévu pour le poste de juge de la Cour suprême excède le sien; elle reçoit dès lors le traitement prévu pour ce dernier poste.

— 1990, ch. 17, par. 45(1)

Disposition transitoire : procédures

45 (1) Les procédures intentées avant l'entrée en vigueur du présent paragraphe et auxquelles s'appliquent des dispositions visées par la présente loi se poursuivent sans autres formalités en conformité avec ces dispositions dans leur forme modifiée.

— 1990, ch. 17, art. 46

Disposition transitoire : traitement

46 (1) Par dérogation à la *Loi sur les juges*, les personnes qui occupent les postes de juge en chef ou de juge

of the District Court of Ontario immediately before the coming into force of section 30 shall continue to be paid the salary then annexed to that office until such time as the salary annexed to the office of judge of the Ontario Court (General Division) exceeds that salary, at which time that person shall be paid the salary annexed to the last-mentioned office.

Transitional: annuity

(2) Notwithstanding the *Judges Act*, the Chief Judge and the Associate Chief Judge of the District Court of Ontario shall, on the coming into force of this subsection, be deemed to have made an election in accordance with section 32 of that Act for the purposes of subsection 43(2) of that Act, and if, at the time of their resignation, removal or attaining the age of retirement, they were holding office as judge of the Ontario Court (General Division), the annuity payable to them under section 42 of that Act shall be an annuity equal to two thirds of the salary annexed to the office of chief judge of a county court or, if there is no such office at that time, two thirds of the result obtained by subtracting five thousand dollars from the salary annexed at that time to the office of Chief Justice of the Ontario Court.

— 1992, c. 51, s. 67(1)

Transitional: proceedings

67 (1) Every proceeding commenced before the coming into force of this subsection and in respect of which any provision amended by this Act applies shall be taken up and continued under and in conformity with that amended provision without any further formality.

— 1992, c. 51, s. 68

Transitional: salary

68 (1) Notwithstanding the *Judges Act*, a person who holds the office of Chief Judge of the County Court of Nova Scotia immediately before the coming into force of section 6 shall continue to be paid the salary then annexed to that office until the salary annexed to the office of judge of the Supreme Court of Nova Scotia exceeds that salary, at which time that person shall be paid the salary annexed to the last-mentioned office.

Transitional: annuity

(2) Notwithstanding the *Judges Act*, the Chief Judge of the County Court of Nova Scotia shall, on the coming into force of this subsection, be deemed to have made an election in accordance with section 32 of that Act for the purposes of subsection 43(2) of that Act, and if, at the time of resignation, removal or attaining the age of retirement, is holding office as a puisne judge of the Supreme Court of Nova Scotia or the Nova Scotia Court of Appeal, the annuity payable under section 42 of that Act shall be an annuity equal to two thirds of the result obtained by

en chef adjoint de la Cour de district de l'Ontario, à la date d'entrée en vigueur de l'article 30, continuent de recevoir le traitement alors prévu pour ces postes jusqu'à la date où le traitement prévu pour le poste de juge de la Cour de l'Ontario (Division générale) excède leur traitement; elles reçoivent dès lors le traitement prévu pour ce dernier poste.

Disposition transitoire : pension

(2) Par dérogation à la *Loi sur les juges*, le juge en chef et le juge en chef adjoint de la Cour de district de l'Ontario sont, à l'entrée en vigueur du présent paragraphe, réputés avoir exercé, pour l'application du paragraphe 43(2) de cette loi, la faculté visée à l'article 32 de la même loi; ils ont dès lors droit, au titre de l'article 42 de la même loi, à une pension égale aux deux tiers du traitement prévu pour le poste de juge en chef d'une cour de comté si, au moment de la cessation de leurs fonctions par mise à la retraite d'office, démission ou révocation, ils occupaient un poste de juge à la Cour de l'Ontario (Division générale). Toutefois, si à ce moment ce poste n'existe plus, ils ont droit aux deux tiers de la différence entre le traitement prévu pour le poste de juge en chef de la Cour de l'Ontario et cinq mille dollars.

— 1992, ch. 51, par. 67(1)

Disposition transitoire : procédures

67 (1) Les procédures intentées avant l'entrée en vigueur du présent paragraphe et auxquelles s'appliquent des dispositions visées par la présente loi se poursuivent sans autres formalités en conformité avec ces dispositions dans leur forme modifiée.

— 1992, ch. 51, art. 68

Disposition transitoire : traitement

68 (1) Par dérogation à la *Loi sur les juges*, la personne qui occupe le poste de juge en chef de la cour de comté de la Nouvelle-Écosse, à la date d'entrée en vigueur de l'article 6, continue de recevoir le traitement alors prévu pour ce poste jusqu'à la date où le traitement prévu pour le poste de juge de la Cour suprême de la Nouvelle-Écosse excède son traitement; elle reçoit dès lors le traitement prévu pour ce dernier poste.

Disposition transitoire : pension

(2) Par dérogation à la *Loi sur les juges*, le juge en chef de la cour de comté de la Nouvelle-Écosse est, à l'entrée en vigueur du présent paragraphe, réputé avoir exercé, pour l'application du paragraphe 43(2) de cette loi, la faculté visée à l'article 32 de la même loi; si, au moment de la cessation de ses fonctions par mise à la retraite d'office, démission ou révocation, il occupe un poste de juge, autre que celui de juge en chef, à la Cour suprême ou à la Cour d'appel de la Nouvelle-Écosse, il a droit, au titre de l'article 42 de la même loi, à une pension égale aux deux

subtracting five thousand dollars from the salary annexed at that time to the office of Chief Justice of the Supreme Court of Nova Scotia.

Idem

(3) Where, before the coming into force of this subsection, an annuity has been granted to or in respect of a judge of a county or district court of any province pursuant to sections 42, 43, 44 and 47 of the *Judges Act*, payment of that annuity shall continue in accordance with those sections, as they read immediately before the coming into force of this subsection.

— 1996, c. 2, s. 1(2)

Application

1 (2) For greater certainty, subsection 26(2) of the Act, as enacted by subsection (1), applies with respect to the report to be submitted by the commissioners appointed effective September 30, 1995.

— 1996, c. 30, s. 7

Application of subsections 27(2) and (3) of the *Judges Act*

7 For greater certainty, payments of allowances made before the coming into force of this Act to judges of the Supreme Court of the Yukon Territory and the Supreme Court of the Northwest Territories under subsection 27(2) of the *Judges Act* and to judges of the Federal Court under subsection 27(3) of that Act, as those subsections read immediately before the coming into force of this Act, are authorized.

— 2002, c. 8, ss. 185(11), (12)

Interpretation

185 (11) For the purposes of subsections 31(1) and (2) of the *Judges Act*, as enacted by subsection 90(1) of this Act, any period during which a person holds the office of Chief Justice or Associate Chief Justice of the Federal Court of Canada is deemed to be a period during which he or she holds the office of Chief Justice of the Federal Court of Appeal or the Federal Court.

For greater certainty

(12) For greater certainty, for the purposes of sections 31, 43 and 44 of the English version of the *Judges Act*, "Chief Justice" and "Associate Chief Justice" include "Chief Judge" and "Associate Chief Judge", respectively.

tiers de la différence entre le traitement prévu pour le poste de juge en chef de la Cour suprême de la Nouvelle-Écosse et cinq mille dollars.

Idem

(3) Le paiement des pensions accordées à l'égard d'un juge d'une cour de district ou de comté d'une province avant l'entrée en vigueur du présent paragraphe aux termes des articles 42, 43, 44 et 47 de la *Loi sur les juges* continue de se faire aux termes de ces articles, dans leur version antérieure à cette entrée en vigueur.

— 1996, ch. 2, par. 1(2)

Application

1 (2) Il est entendu que le paragraphe 26(2) de la même loi, édicté par le paragraphe (1), s'applique au rapport que doivent transmettre les commissaires dont la nomination a pris effet le 30 septembre 1995.

— 1996, ch. 30, art. 7

Application des par. 27(2) et (3) de la *Loi sur les juges*

7 Il est entendu que sont autorisées les indemnités versées, avant l'entrée en vigueur de la présente loi, au titre des paragraphes 27(2) ou (3) de la *Loi sur les juges*, dans leur version antérieure à l'entrée en vigueur de la présente loi, aux juges des cours suprêmes du territoire du Yukon et des Territoires du Nord-Ouest et aux juges de la Cour fédérale, selon le cas.

— 2002, ch. 8, par. 185(11) et (12)

Interprétation

185 (11) Pour l'application des paragraphes 31(1) et (2) de la *Loi sur les juges* édictés par le paragraphe 90(1) de la présente loi, toute période pendant laquelle une personne exerce les fonctions de juge en chef ou de juge en chef adjoint de la Cour fédérale du Canada est assimilée à une période pendant laquelle elle exerce les fonctions de juge en chef de la Cour d'appel fédérale ou de la Cour fédérale.

Précision

(12) Il demeure entendu que, pour l'application des articles 31, 43 et 44 de la version anglaise de la *Loi sur les juges*, « Chief Justice » et « Associate Chief Justice » visent également « Chief Judge » et « Associate Chief Judge ».

— 2006, c. 11, s. 36

Section 44.2 of the *Judges Act*

36 Section 44.2 of the *Judges Act*, as enacted by section 163 of the *Modernization of Benefits and Obligations Act*, chapter 12 of the Statutes of Canada, 2000, and replaced by section 24 of *An Act to amend the Judges Act and to amend another Act in consequence*, chapter 7 of the Statutes of Canada, 2001, and the *Optional Survivor Annuity Regulations*, made by Order in Council P.C. 2001-1362 on August 1, 2001 and registered as SOR/2001-283, are deemed to have come into force on August 1, 2001.

— 2006, ch. 11, art. 36

Article 44.2 de la *Loi sur les juges*

36 L'article 44.2 de la *Loi sur les juges*, édicté par l'article 163 de la *Loi sur la modernisation de certains régimes d'avantages et d'obligations*, chapitre 12 des Lois du Canada (2000), et remplacé par l'article 24 de la *Loi modifiant la Loi sur les juges et une autre loi en conséquence*, chapitre 7 des Lois du Canada (2001), et le *Règlement sur la pension viagère facultative du survivant*, pris par le décret C.P. 2001-1362 du 1er août 2001 portant le numéro d'enregistrement DORS/2001-283, sont réputés être entrés en vigueur le 1er août 2001.

— 2014, c. 39, s. 329

Salary

329 Despite section 10.1 of the *Judges Act*, a prothonotary of the Federal Court is only entitled to be paid, in respect of the period beginning on April 1, 2012 and ending on the day on which this section comes into force, the difference between the salary described in that section 10.1 and any salary paid or payable to the prothonotary for the same period under the *Federal Courts Act*.

— 2014, ch. 39, art. 329

Traitement

329 Malgré l'article 10.1 de la *Loi sur les juges*, un protonotaire de la Cour fédérale n'a droit, pour la période commençant le 1er avril 2012 et se terminant à l'entrée en vigueur du présent article, qu'à la différence entre le traitement visé à cet article 10.1 et tout traitement payé ou à payer à celui-ci pour la même période en application de la *Loi sur les Cours fédérales*.

— 2014, c. 39, s. 330

Election

330 (1) A prothonotary of the Federal Court who holds office on the day on which this section comes into force will continue to be deemed to be employed in the public service for the purposes of the *Public Service Superannuation Act*, as if subsection 12(5) of the *Federal Courts Act* was not repealed, if the prothonotary makes an election to that effect. The election must be made in writing, signed by the prothonotary, and sent to the President of the Treasury Board within six months after the day on which this section comes into force.

— 2014, ch. 39, art. 330

Choix

330 (1) Un protonotaire de la Cour fédérale qui exerçait cette charge à l'entrée en vigueur du présent article continue d'être réputé appartenir à la fonction publique pour l'application de la *Loi sur la pension de la fonction publique* comme si le paragraphe 12(5) de la *Loi sur les Cours fédérales* n'était pas abrogé, s'il en fait le choix par notification écrite au président du Conseil du Trésor dans les six mois suivant l'entrée en vigueur du présent article. La notification est signée par le protonotaire.

Election irrevocable

(2) An election made under subsection (1) is irrevocable.

Choix irrévocable

(2) Un choix effectué en vertu du paragraphe (1) est irrévocable.

No election — no prior pensionable service

(3) If a prothonotary does not make an election under subsection (1) and the prothonotary did not have any pensionable service to their credit for the purposes of the *Public Service Superannuation Act* before holding the office of prothonotary,

(a) the prothonotary ceases to be deemed to be employed in the public service for the purposes of that Act on the day on which this section comes into force;

(b) the prothonotary is not entitled to a refund of any contributions made by the prothonotary under that

Aucun choix — aucune période de service préalable ouvrant droit à pension

(3) Si le protonotaire n'effectue pas de choix en vertu du paragraphe (1) et si, avant d'exercer cette charge, il ne comptait pas à son crédit une période de service ouvrant droit à pension pour l'application de la *Loi sur la pension de la fonction publique* :

a) il cesse d'être réputé appartenir à la fonction publique, à la date d'entrée en vigueur du présent article, pour l'application de cette loi;

Act in respect of any period during which the prothonotary held the office of prothonotary;

(c) the prothonotary is not entitled to a return of contributions under subsection 12(3) of that Act in respect of any period during which the prothonotary held the office of prothonotary;

(d) the period during which the prothonotary held the office of prothonotary is not counted as pensionable service for the purposes of that Act;

(e) if the prothonotary made an election under subsection 51(1) of that Act, the election is deemed never to have been made; and

(f) subsection 51(2) of that Act does not apply to the prothonotary.

No election — prior pensionable service

(4) If a prothonotary does not make an election under subsection (1) and the prothonotary had pensionable service to their credit for the purposes of the *Public Service Superannuation Act* before holding the office of prothonotary,

(a) the prothonotary ceases to be deemed to be employed in the public service for the purposes of that Act on the day on which this section comes into force;

(b) the prothonotary is not entitled to a refund of any contributions made by the prothonotary under that Act in respect of any period during which the prothonotary held the office of prothonotary;

(c) the period during which the prothonotary held the office of prothonotary before the day on which this section comes into force is not counted as pensionable service for the purposes of that Act, other than for the purposes of sections 12 and 13 of that Act;

(d) despite subsection 69(3) of that Act, for the purposes of section 69 of that Act, the retirement year or retirement month of the prothonotary is the year or month, as the case may be, in which the prothonotary was appointed to the office of prothonotary; and

(e) for the purposes of Part II of that Act, the prothonotary's salary is their salary in the public service on the day before the day on which they were appointed to the office of prothonotary, expressed in terms of an annual rate.

— 2017, c. 20, s. 227

Tenure extension

227 Despite subsection 26.1(3) of the *Judges Act*, the term of office of the three members appointed under

b) il n'a droit à aucun remboursement des contributions qu'il a versées au titre de cette loi pour toute période durant laquelle il exerçait cette charge;

c) il n'a droit à aucun remboursement de contributions au titre du paragraphe 12(3) de cette loi à l'égard de toute période durant laquelle il exerçait cette charge;

d) la période durant laquelle il exerçait cette charge ne compte pas comme service ouvrant droit à pension pour l'application de cette loi;

e) s'il a effectué un choix en vertu du paragraphe 51(1) de cette loi, il est réputé ne l'avoir jamais fait;

f) le paragraphe 51(2) de cette loi ne s'applique pas à lui.

Aucun choix — période de service préalable ouvrant droit à pension

(4) Si le protonotaire n'effectue pas de choix en vertu du paragraphe (1) et si, avant d'exercer cette charge, il comptait à son crédit une période de service ouvrant droit à pension pour l'application de la *Loi sur la pension de la fonction publique* :

a) il cesse d'être réputé appartenir à la fonction publique, à la date d'entrée en vigueur du présent article, pour l'application de cette loi;

b) il n'a droit à aucun remboursement de contributions qu'il a versées au titre de cette loi à l'égard de toute période durant laquelle il exerçait cette charge;

c) la période durant laquelle il exerçait cette charge avant la date d'entrée en vigueur du présent article ne compte pas comme service ouvrant droit à pension pour l'application de cette loi, à l'exception des articles 12 et 13 de cette loi;

d) malgré le paragraphe 69(3) de cette loi, pour l'application de l'article 69 de cette loi, l'année ou le mois de sa retraite est l'année ou le mois, selon le cas, de sa nomination à titre de protonotaire;

e) pour l'application de la partie II de cette loi, son traitement est son traitement dans la fonction publique le jour précédant sa nomination à titre de protonotaire, exprimé sous forme de taux annuel.

— 2017, ch. 20, art. 227

Mandat prorogé

227 Malgré le paragraphe 26.1(3) de la *Loi sur les juges*, le mandat des trois personnes nommées en vertu de

section 26.1 of that Act to the Judicial Compensation and Benefits Commission that began its inquiry on October 1, 2015 is extended to May 31, 2020.

— 2017, c. 33, s. 254

Definition of *senior judge*

254 (1) In this section, *senior judge* has the same meaning as in subsection 22(3) of the *Judges Act* as it read immediately before the day on which subsection 232(4) of this Act comes into force.

Rights preserved

(2) For the purposes of the *Judges Act*, the years during which a senior judge of the Supreme Court of Yukon, the Supreme Court of Northwest Territories or the Nunavut Court of Justice has continued in office are deemed to be years during which a chief justice has continued in judicial office.

l'article 26.1 de cette loi à la Commission d'examen de la rémunération des juges qui a commencé son enquête le 1er octobre 2015 est prorogé au 31 mai 2020.

— 2017, ch. 33, art. 254

Définition de *juge principal*

254 (1) Au présent article, *juge principal* s'entend au sens du paragraphe 22(3) de la *Loi sur les juges*, dans sa version antérieure à la date d'entrée en vigueur du paragraphe 232(4) de la présente loi.

Maintien des droits

(2) Pour l'application de la *Loi sur les juges*, les années d'ancienneté d'un juge principal qui a exercé des fonctions judiciaires de juge principal aux cours suprêmes du Yukon ou des Territoires du Nord-Ouest ou à la Cour de justice du Nunavut sont réputées être des années d'ancienneté d'un juge en chef.

Indexed as:

Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island
R. v. Campbell; R. v. Ekmecic; R. v. Wickman
Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice)

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

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

[**1997] 3 S.C.R. 3**

[1997] 3 R.C.S. 3

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

[1997] A.C.S. no 75

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

Supreme Court of Canada

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

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

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

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

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

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

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

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

Constitutional law -- Charter of Rights -- Independent and impartial tribunal -- Provincial Courts -- Individual financial security -- Provincial legislation providing that Lieutenant Governor in Council "may" set judicial salaries -- Whether legislation infringes judicial independence -- If so, whether infringement justifiable -- Canadian Charter of Rights and Freedoms, ss. 1, 11(d) -- Provincial Court Judges Act, S.A. 1981, c. P-20.1, s. 17(1).

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

Constitutional law -- Charter of Rights -- Independent and impartial tribunal -- Provincial Courts -- Salary negotiations -- Whether provincial government violated judicial independence of Provincial Court by attempting to engage in salary negotiations with Provincial Judges Association -- Canadian Charter of Rights and Freedoms, s. 11(d).

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

Constitutional law -- Charter of Rights -- Independent and impartial tribunal -- Provincial Courts -- Administrative independence -- Closure of Provincial Court -- Whether closure of Provincial Court by provincial government for several days infringed judicial independence -- If so, whether infringement justifiable -- Canadian Charter of Rights and Freedoms, ss. 1, 11(d) -- Public Sector Reduced Work Week and Compensation Management Act, S.M. 1993, c. 21, s. 4.

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

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

Courts -- Constitutionality of legislation -- Notice to Attorney General -- Constitutionality of provincial legislation not raised by counsel -- Superior court judge proceeding on his own initiative

without giving required notice to Attorney General -- Whether superior court judge erred in considering constitutionality of legislation.

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

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

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

In Alberta, three accused in separate and unrelated criminal proceedings in Provincial Court challenged the constitutionality of their trials. They each brought a motion before the Court of Queen's Bench, arguing that, as a result of the salary reduction of the Provincial Court judges pursuant to the Payment to Provincial Judges Amendment Regulation and s. 17(1) of the Provincial Court Judges Act, the Provincial Court was not an independent and impartial tribunal for the purposes of s. 11(d). The accused also challenged the constitutionality of the Attorney General's power to designate the court's sitting days and judges' place of residence. The accused requested various remedies, includ-

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

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

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

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

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

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

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

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

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

While s. 11(d) of the Charter does not, as a matter of principle, automatically provide the same level of protection to provincial courts as s. 100 and the other judicature provisions of the Constitution Act, 1867 do to superior court judges, the constitutional parameters of the power to change or freeze superior court judges' salaries under s. 100 are equally applicable to the guarantee of financial security provided by s. 11(d) to provincial court judges.

Financial security has both an individual and an institutional dimension. The institutional dimension of financial security has three components. First, as a general constitutional principle, the salaries of provincial court judges can be reduced, increased, or frozen, either as part of an overall economic measure which affects the salaries of all or some persons who are remunerated from public funds, or as part of a measure which is directed at provincial court judges as a class. However, to avoid the possibility of, or the appearance of, political interference through economic manipulation, a body, such as a commission, must be interposed between the judiciary and the other branches of government. The constitutional function of this body would be to depoliticize the process of determining changes to or freezes in judicial remuneration. This objective would be achieved by setting that body the specific task of issuing a report on the salaries and benefits of judges to the executive and the legislature. Provinces are thus under a constitutional obligation to establish bodies which are independent, effective and objective. Any changes to or freezes in judicial remuneration made without prior recourse to the body are unconstitutional. Although the recommendations of the body are non-binding they should not be set aside lightly. If the executive or legislature chooses to depart

from them, it has to justify its decision according to a standard of simple rationality -- if need be, in a court of law. Across-the-board measures which affect substantially every person who is paid from the public purse are prima facie rational, whereas a measure directed at judges alone may require a somewhat fuller explanation. Second, under no circumstances is it permissible for the judiciary -- not only collectively through representative organizations, but also as individuals -- to engage in negotiations over remuneration with the executive or representatives of the legislature. Any such negotiations would be fundamentally at odds with judicial independence. That does not preclude chief justices or judges, or bodies representing judges, however, from expressing concerns or making representations to governments regarding judicial remuneration. Third, any reductions to judicial remuneration cannot take those salaries below a basic minimum level of remuneration which is required for the office of a judge. Public confidence in the independence of the judiciary would be undermined if judges were paid at such a low rate that they could be perceived as susceptible to political pressure through economic manipulation. In order to guard against the possibility that government inaction could be used as a means of economic manipulation, by allowing judges' real salaries to fall because of inflation, and in order to protect against the possibility that judicial salaries will fall below the adequate minimum guaranteed by judicial independence, the body must convene if a fixed period of time has elapsed since its last report, in order to consider the adequacy of judges' salaries in light of the cost of living and other relevant factors. The components of the institutional dimension of financial security need not be adhered to in cases of dire and exceptional financial emergency precipitated by unusual circumstances.

Prince Edward Island

The salary reduction imposed by s. 3(3) of the Provincial Court Act, as amended by s. 10 of the Public Sector Pay Reduction Act, was unconstitutional since it was made by the legislature without recourse to an independent, objective and effective process for determining judicial remuneration. In fact, no such body exists in P.E.I. However, if in the future, after P.E.I. establishes a salary commission, that commission were to issue a report with recommendations which the legislature declined to follow, a salary reduction such as the impugned one would probably be prima facie rational, and hence justified, because it would be part of an overall economic measure which reduces the salaries of all persons who are remunerated by public funds. Since the province has made no submissions on the absence of an independent, effective and objective process to determine judicial salaries, the violation of s. 11(d) is not justified under s. 1 of the Charter.

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

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

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

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

Alberta

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

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

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

Section 13(1)(a) of the Provincial Court Judges Act, which confers the power to "designate the place at which a judge shall have his residence", and s. 13(1)(b), which confers the power to "des-

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

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

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

Manitoba

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

The Manitoba government also violated the judicial independence of the Provincial Court by attempting to engage in salary negotiations with the Provincial Judges Association. The purpose of these negotiations was to set salaries without recourse to the JCC. Moreover, when the judges would not grant the government an assurance that they would not launch a constitutional challenge to Bill 22, the government threatened to abandon a joint recommendation. The surrounding circumstances indicate that the Association was not a willing participant and was effectively coerced into these negotiations. No matter how one-sided, however, it was improper for government and the judiciary to engage in salary negotiations. The expectations of give and take, and of threat and counter-threat, are fundamentally at odds with judicial independence. It raises the prospect that the

courts will be perceived as having altered the manner in which they adjudicate cases, and the extent to which they will protect and enforce the Constitution, as part of the process of securing the level of remuneration they consider appropriate. The attempted negotiations between the government and the judiciary were not authorized by a legal rule and thus are incapable of being justified under s. 1 of the Charter because they are not prescribed by law.

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

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

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

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

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

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By Lamer C.J.

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APPEAL and CROSS-APPEAL from a judgment of the Prince Edward Island Supreme Court, Appeal Division (1995), 130 Nfld. & P.E.I.R. 29, 405 A.P.R. 29, 124 D.L.R. (4th) 528, 39 C.P.C. (3d) 241, [1995] P.E.I.J. No. 66 (QL), in the matter of a reference concerning the independence and impartiality of the Provincial Court judges of Prince Edward Island. Appeal allowed in part, La Forest J. dissenting. Cross-appeal allowed in part.

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

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

Peter C. Ghiz, for the appellants in the P.E.I. references.
Gordon L. Campbell and Eugene P. Rossiter, Q.C., for the respondent in the P.E.I. references.
Richard F. Taylor and Ken Tjosvold, for the appellant Her Majesty the Queen.
John A. Legge, for the respondents Campbell and Ekmecic.
R. S. Prithipaul, for the respondent Wickman.
Robb Tonn and M. B. Nepon, for the appellants the Judges of the Provincial Court of Manitoba.

E. W. Olson, Q.C., and Vivian E. Rachlis, for the respondent Her Majesty the Queen in right of Manitoba.
Edward R. Sojonky, Q.C., and Josephine A. L. Palumbo, for the intervener the Attorney General of Canada.
Jean-Yves Bernard and Marise Visocchi, for the intervener the Attorney General of Quebec.
Donna J. Miller, Q.C., for the intervener the Attorney General of Manitoba.
Eugene P. Rossiter, Q.C., and Gordon L. Campbell, for the intervener the Attorney General of Prince Edward Island.
Graeme G. Mitchell and Gregory Wm. Koturbash, for the intervener the Attorney General for Saskatchewan.
Richard F. Taylor, for the intervener the Attorney General for Alberta.
John P. Nelligan, Q.C., and J. J. Mark Edwards, for the intervener the Canadian Association of Provincial Court Judges.
L. Yves Fortier, Q.C., and Leigh D. Crestohl, for the intervener the Canadian Judges Conference.
Raynold Langlois, Q.C., for the intervener the Conférence des juges du Québec.
Robert McKercher, Q.C., and Michelle Ouellette, for the intervener the Saskatchewan Provincial Court Judges Association.
D.O. Sabey, Q.C., Bradley G. Nemetz and Scott H. D. Bower, for the intervener the Alberta Provincial Judges' Association.
Thomas G. Heintzman, Q.C., and Michael J. Bryant, for the intervener the Canadian Bar Association.
Ronald D. Manes and Duncan N. Embury, for the intervener the Federation of Law Societies of Canada.

Solicitor for the appellants in the P.E.I. references: Peter C. Ghiz, Charlottetown.
Solicitors for the respondent in the P.E.I. references: Stewart McKelvey Stirling Scales, Charlottetown.
Solicitor for the appellant Her Majesty the Queen: The Department of Justice, Edmonton.
Solicitors for the respondents Campbell and Ekmecic: Legge & Muszynski, Calgary.
Solicitors for the respondent Wickman: Gunn & Prithipaul, Edmonton.
Solicitors for the appellants the Judges of the Provincial Court of Manitoba: Myers Weinberg Kussin Weinstein Bryk, Winnipeg.
Solicitors for the respondent Her Majesty the Queen in right of Manitoba: Thompson Dorfman Sweatman, Winnipeg.
Solicitor for the intervener the Attorney General of Canada: George Thomson, Ottawa.
Solicitor for the intervener the Attorney General of Quebec: The Department of Justice, Sainte-Foy.
Solicitor for the intervener the Attorney General of Manitoba: The Department of Justice, Winnipeg.
Solicitors for the intervener the Attorney General of Prince Edward Island: Stewart McKelvey Stirling Scales, Charlottetown.
Solicitor for the intervener the Attorney General for Saskatchewan: The Department of Justice, Regina.
Solicitor for the intervener the Attorney General for Alberta: The Department of Justice, Edmonton.
Solicitors for the intervener the Canadian Association of Provincial Court Judges: Nelligan Power, Ottawa.
Solicitors for the intervener the Canadian Judges Conference: Ogilvy Renault, Montreal.
Solicitors for the intervener the Conférence des juges du Québec: Langlois Robert, Québec.

Solicitors for the intervener the Saskatchewan Provincial Court Judges Association: McKercher McKercher & Whitmore, Saskatoon.
Solicitors for the intervener the Alberta Provincial Judges' Association: Bennett Jones Verchere, Calgary.
Solicitors for the intervener the Canadian Bar Association: McCarthy Tétrault, Toronto.
Solicitors for the intervener the Federation of Law Societies of Canada: Torkin, Manes, Cohen & Arbus, Toronto.

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

THE CHIEF JUSTICE:--

I. Introduction

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

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

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

tive or institutional dimension of financial security for judges of provincial courts, which was not at issue in Valente. In particular, I will address the institutional arrangements which are comprehended by the guarantee of collective financial security.

4 Almost a year after Valente was heard, but before it had been handed down, this Court heard the appeal in Beauregard. In that case, the Court rejected a constitutional challenge to federal legislation establishing a contributory pension scheme for superior court judges. It had been argued that the pension scheme amounted to a reduction in the salaries of those judges during their term of office, and for that reason contravened judicial independence and was beyond the powers of Parliament. Although the Court found that there had been no salary reduction on the facts of the case, the judgment has been taken to stand for the proposition that salary reductions which are "non-discriminatory" are not unconstitutional.

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

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

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

8 The task of the Court in these appeals is to explain the proper constitutional relationship between provincial court judges and provincial executives, and thereby assist in removing the strain on this relationship. The failure to do so would undermine "the web of institutional relationships...

which continue to form the backbone of our constitutional system" (Cooper v. Canada (Human Rights Commission), [1996] 3 S.C.R. 854, at para. 3).

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

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

II. Facts

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

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

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

13 The second reference, Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island, was issued on February 13, 1995, by Order in Council No.

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

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

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

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

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

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

18 The allegations of unconstitutionality, inter alia, dealt with a 5 percent reduction in the salaries of judges of the Provincial Court brought about by the Payment to Provincial Judges Amendment Regulation, Alta. Reg. 116/94, and s. 17(1) of the Provincial Court Judges Act, S.A. 1981, c. P-20.1, which is the statutory basis for the aforementioned regulation. The 5 percent reduction was accomplished by a 3.1 percent direct salary reduction, and by 5 unpaid days leave of absence. The respondents also attacked the constitutionality of changes to the judges' pension plan by the Provincial Judges and Masters in Chambers Pension Plan Amendment Regulation, Alta. Reg. 29/92, and

the Management Employees Pension Plan, Alta. Reg. 367/93, which respectively had the effect of reducing the base salary for calculating pension benefits, and limiting cost of living increases to 60 percent of the Consumer Price Index. In addition, the respondents challenged the constitutionality of the power of the Attorney General to designate the court's sitting days and judges' place of residence. McDonald J., on the motions, also put at issue the process for disciplining Provincial Court judges and the grounds for removal of judges of the Provincial Court.

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

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

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

21 This appeal deals with reductions to the salaries of judges of the Manitoba Provincial Court, by The Public Sector Reduced Work Week and Compensation Management Act, S.M. 1993, c. 21, otherwise known as "Bill 22". Bill 22 led to the reduction of the salaries of a large number of public sector employees, including employees of Crown corporations, hospitals, personal care homes, child and family services agencies, municipalities, school boards, universities and colleges. The legislation was passed as part of a plan to reduce the province's deficit. Bill 22 provided for different treatment of the several classes of employees to which it applied. It provided that public sector employers "may" require employees to take unpaid days of leave. However, judges of the Provincial Court, along with persons who received remuneration as members of a Crown agency or a board, commission or committee to which they were appointed by the government, received a mandatory reduction of 3.8 percent in the 1993-94 fiscal year. For the next fiscal year, Bill 22 provided that judges' salaries were to be reduced

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

In the second year, the pay reduction of judges of the Provincial Court could have been achieved by days of leave without pay. Similar provisions governed the salary reduction for members of the provincial legislature. By contrast, medical practitioners were dealt with by a different set of provisions in Bill 22, which fixed the total payments for 1993-94 at 98 percent of the total payments in

the 1992-93 fiscal year, and payments for the 1994-95 year by an amount obtained by multiplying the payment for the 1993-94 year by a factor laid down in regulation. Bill 22 was time-limited legislation, and is no longer in effect.

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

III. Decisions Below

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

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

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

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

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

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

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

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

(a) Introduction

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

to question 6, and asks in what particular respect or respects it would be necessary to provide the same level of remuneration to the two groups of judges. Question 8 asks whether the violations of s. 11(d), if any, can be justified under s. 1 of the Charter.

(b) Statement of Facts

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

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

31 The statement of facts then proceeds to explain how judges of the P.E.I. Provincial Court are remunerated. At the time of this reference, the three members of the Provincial Court of P.E.I. were paid an annual salary of $98,243. The statement of facts also contrasts the salaries of Provincial Court judges with the per capita income averages across Canada and in P.E.I., and provides some data on income distribution within a number of provinces, including P.E.I. These statistics convey the general impression that Provincial Court judges in P.E.I., even after the salary reductions, are paid very well relative to the population as a whole, particularly in P.E.I.

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

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

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

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

(c) Question 1

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

(d) Question 2

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

51) that "[s]imilar and, in some instances, even less ideal measures were in issue in Valente" but were nevertheless upheld by this Court.

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

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

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

(e) Question 3

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

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

(f) Question 4

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

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

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

(g) Question 5

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

(h) Question 6

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

(i) Question 7

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

(j) Question 8

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

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

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

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

(a) Financial Security

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

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

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

54 Having concluded that superior court judges' salaries could not be reduced, McDonald J. held that the same rule should apply to provincial court judges' salaries. He reasoned that if provincial court judges received a lesser degree of constitutional protection, accused persons who appeared before them might have the impression that they were receiving second-class justice. McDonald J. appreciated the difficulty with this holding -- that it contradicts language in Valente which suggests that s. 11(d) does not automatically provide the same degree of protection for the

independence of provincial court judges as the judicature provisions of the Constitution Act, 1867, provide to superior court judges. McDonald J., however, confined the scope of Valente, holding that it had only considered the means whereby judges' salaries are set, not the substantive issue of what level of remuneration judges are entitled to.

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

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

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

58 However, McDonald J. rejected a challenge to s. 17(1) of the Provincial Court Judges Act, which provides that the Lieutenant Governor in Council "may make regulations... fixing the salaries to be paid to judges". That provision had been challenged because it was permissive and did not require salaries to be provided, because it did not prevent the executive branch from decreasing salaries or benefits, because it did not prevent the executive from providing different salaries to different types of judges, and because it did not prohibit remuneration on the basis of job performance. McDonald J. rejected all of these arguments. Some he rejected by reading down s. 17(1), so that the provision required the setting of salaries, did not authorize the reduction of salaries except as part of an overall economic measure, and did not authorize performance related remuneration. He also held that s. 11(d) did not prohibit different salaries for different judges.

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

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

(b) Security of Tenure

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

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

(c) Institutional Independence

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

(d) Disposition

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

countenance an abuse of process, since the defence had waited to the end of the trial to raise these constitutional issues.

(e) Remarks of Premier Klein

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

76 The Court of Appeal's views on the nature of the guarantee of financial security are not entirely clear. At one point, the court stated that s. 11(d) protects judges against "arbitrary interference" by the legislature or the executive which is "motivated by an improper or colourable purpose" (p. 63), at another that s. 11(d) prohibits the "discriminatory treatment of judges". However, despite this ambiguity, the court rejected the submission that a salary cut for judges is constitutional only if it is part of an overall economic measure, although it accepted that the fact that a reduction is part of such a measure would go to a finding that the reduction "was not enacted for an improper or colourable purpose" (p. 65).

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

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

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

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

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

IV. Financial Security

A. Introduction: The Unwritten Basis of Judicial Independence

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

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

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

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

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

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

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

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

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

89 The point which emerges from this brief discussion is that the interpretation of ss. 96 and 100 has come a long way from what those provisions actually say. This jurisprudential evolution undermines the force of the argument that the written text of the Constitution is comprehensive and definitive in its protection of judicial independence. The only way to explain the interpretation of ss.

96 and 100, in fact, is by reference to a deeper set of unwritten understandings which are not found on the face of the document itself.

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

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

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

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

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

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

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

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

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

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

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

97 I turn first to the jurisprudence under the division of powers, to illustrate how the process of gap-filling has occurred and how it can be understood by reference to the preamble. One example where the Court has inferred a fundamental constitutional rule which is not found in express terms in the Constitution is the doctrine of full faith and credit. Under this doctrine, the courts of one province are under a constitutional obligation to recognize the decisions of the courts of another province: Hunt v. T & N PLC, [1993] 4 S.C.R. 289. The justification for this rule has been aptly put by Professor Hogg (Constitutional Law of Canada (3rd ed. 1992 (loose-leaf)), vol. 1, at p. 13-18):

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

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

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

99 The preamble, by its reference to "a Constitution similar in Principle to that of the United Kingdom", points to the nature of the legal order that envelops and sustains Canadian society. That order, as this Court held in Reference re Manitoba Language Rights, [1985] 1 S.C.R. 721, at p. 749, is "an actual order of positive laws", an idea that is embraced by the notion of the rule of law. In that case, the Court explicitly relied on the preamble to the Constitution Act, 1867, as one basis for holding that the rule of law was a fundamental principle of the Canadian Constitution. The rule of law led the Court to confer temporary validity on the laws of Manitoba which were unconstitutional because they had been enacted only in English, in contravention of the Manitoba Act, 1870. The Court developed this remedial innovation notwithstanding the express terms of s. 52(1) of the Constitution Act, 1982, that unconstitutional laws are "of no force or effect", a provision that suggests that declarations of invalidity can only be given immediate effect. The Court did so in order to not "deprive Manitoba of its legal order and cause a transgression of the rule of law" (p. 753). Reference re Manitoba Language Rights therefore stands as another example of how the fundamental principles articulated by preamble have been given legal effect by this Court.

100 Finally, the preamble also speaks to the kind of constitutional democracy that our Constitution comprehends. One aspect of our system of governance is the importance of "parliamentary institutions, including popular assemblies elected by the people at large in both provinces and Dominion": Saumur v. City of Quebec, [1953] 2 S.C.R. 299, at p. 330, per Rand J. Again, the desire

for Parliamentary government through representative institutions is not expressly found in the Constitution Act, 1867; there is no reference in that document, for example, to any requirement that members of Parliament or provincial legislatures be elected. Nevertheless, members of the Court, correctly in my opinion, have been able to infer this general principle from the preamble's reference to "a Constitution similar in Principle to that of the United Kingdom".

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

> Strayer J. was of the opinion that courts had such a jurisdiction and found, in particular, that the adoption of the Charter fundamentally altered the nature of the Canadian Constitution such that it is no longer "similar in Principle to that of the United Kingdom" as is stated in the preamble to the Constitution Act, 1867. Accepting as we must that the adoption of the Charter transformed to a considerable extent our former system of Parliamentary supremacy into our current one of constitutional supremacy, as former Chief Justice Dickson described it, the sweep of Strayer J.'s comment that our Constitution is no longer similar in principle to that of the United Kingdom is rather wide. Granted much has changed in the new constitutional world of the Charter. But just as purists of federalism have learned to live with the federalist constitution that Canada adopted in 1867 based on principles of parliamentary government in a unitary state such that the United Kingdom was and continues to be, so it seems to me that the British system of constitutional government will continue to co-exist alongside the Charter if not entirely, which it never did, but certainly in many important respects. The nature of [sic] scope of this co-existence will depend naturally on the jurisprudence that results from the questions brought before the courts.

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

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

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

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

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

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

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

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

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

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

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

B. Section 11(d) of the Charter

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

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

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

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

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

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

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

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

> The question that now has to be determined is whether a reasonable person, who was informed of the relevant statutory provisions, their historical background and the traditions surrounding them, after viewing the matter realistically and practically would conclude [that the tribunal or court was independent].

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

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

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

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

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

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

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

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

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

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

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

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

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

121 What I do propose, however, is that financial security has both an individual and an institutional or collective dimension. Valente only talked about the individual dimension of financial security, when it stated that salaries must be established by law and not allow for executive interference in a manner which could "affect the independence of the individual judge" (p. 706). Similarly, in Généreux, speaking for a majority of this Court, I applied Valente and held that perfor-

mance-related pay for the conduct of judge advocates and members of a General Court Martial during the Court Martial violated s. 11(d), because it could reasonably lead to the perception that those individuals might alter their conduct during a hearing in order to favour the military establishment.

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

C. Institutional Independence

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

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

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

126 What follows as a consequence of the link between institutional independence and the separation of powers I will turn to shortly. The point I want to make first is that the institutional role demanded of the judiciary under our Constitution is a role which we now expect of provincial court

judges. I am well aware that provincial courts are creatures of statute, and that their existence is not required by the Constitution. However, there is no doubt that these statutory courts play a critical role in enforcing the provisions and protecting the values of the Constitution. Inasmuch as that role has grown over the last few years, it is clear therefore that provincial courts must be granted some institutional independence.

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

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

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

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

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

D. Collective or Institutional Financial Security

(1) Introduction

(a) Summary of General Principles

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

132 I begin by stating these components in summary fashion.

133 First, as a general constitutional principle, the salaries of provincial court judges can be reduced, increased, or frozen, either as part of an overall economic measure which affects the salaries of all or some persons who are remunerated from public funds, or as part of a measure which is directed at provincial court judges as a class. However, any changes to or freezes in judicial remuneration require prior recourse to a special process, which is independent, effective, and objective, for determining judicial remuneration, to avoid the possibility of, or the appearance of, political interference through economic manipulation. What judicial independence requires is an independent body, along the lines of the bodies that exist in many provinces and at the federal level to set or recommend the levels of judicial remuneration. Those bodies are often referred to as commissions, and for the sake of convenience, we will refer to the independent body required by s. 11(d) as a commission as well. Governments are constitutionally bound to go through the commission process. The recommendations of the commission would not be binding on the executive or the legislature. Nevertheless, though those recommendations are non-binding, they should not be set aside lightly, and, if the executive or the legislature chooses to depart from them, it has to justify its decision -- if need be, in a court of law. As I explain below, when governments propose to single out judges as a class for a pay reduction, the burden of justification will be heavy.

134 Second, under no circumstances is it permissible for the judiciary -- not only collectively through representative organizations, but also as individuals -- to engage in negotiations over remuneration with the executive or representatives of the legislature. Any such negotiations would be fundamentally at odds with judicial independence. As I explain below, salary negotiations are indelibly political, because remuneration from the public purse is an inherently political issue. Moreover, negotiations would undermine the appearance of judicial independence, because the Crown is almost always a party to criminal prosecutions before provincial courts, and because salary negotiations engender a set of expectations about the behaviour of parties to those negotiations which are

inimical to judicial independence. When I refer to negotiations, I utilize that term as it is traditionally understood in the labour relations context. Negotiations over remuneration and benefits, in colloquial terms, are a form of "horse-trading". The prohibition on negotiations therefore does not preclude expressions of concern or representations by chief justices and chief judges, and organizations that represent judges, to governments regarding the adequacy of judicial remuneration.

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

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

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

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

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

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

140 What is at issue here is the character of the relationships between the legislature and the executive on the one hand, and the judiciary on the other. These relationships should be depoliticized. When I say that those relationships are depoliticized, I do not mean to deny that they are political in the sense that court decisions (both constitutional and non-constitutional) often have political implications, and that the statutes which courts adjudicate upon emerge from the political process. What I mean instead is the legislature and executive cannot, and cannot appear to, exert polit-

ical pressure on the judiciary, and conversely, that members of the judiciary should exercise reserve in speaking out publicly on issues of general public policy that are or have the potential to come before the courts, that are the subject of political debate, and which do not relate to the proper administration of justice.

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

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

143 On the other hand, the fact remains that judges, although they must ultimately be paid from public monies, are not civil servants. Civil servants are part of the executive; judges, by definition, are independent of the executive. The three core characteristics of judicial independence -- security of tenure, financial security, and administrative independence -- are a reflection of that fundamental distinction, because they provide a range of protections to members of the judiciary to which civil servants are not constitutionally entitled.

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

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

145 With respect to the judiciary, the determination of the level of remuneration from the public purse is political in another sense, because it raises the spectre of political interference through economic manipulation. An unscrupulous government could utilize its authority to set judges' salaries as a vehicle to influence the course and outcome of adjudication. Admittedly, this would be very different from the kind of political interference with the judiciary by the Stuart Monarchs in England which is the historical source of the constitutional concern for judicial independence in the Anglo-American tradition. However, the threat to judicial independence would be as significant.

We were alive to this danger in Beauregard, supra, when we held (at p. 77) that salary changes which were enacted for an "improper or colourable purpose" were unconstitutional. Moreover, as I develop below, changes to judicial remuneration might create the reasonable perception of political interference, a danger which s. 11(d) must prevent in light of Valente.

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

(2) The Components of Institutional or Collective Financial Security

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

147 As a general principle, s. 11(d) allows that the salaries of provincial court judges can be reduced, increased, or frozen, either as part of an overall economic measure which affects the salaries of all persons who are remunerated from public funds, or as part of a measure which is directed at provincial court judges as a class. However, the imperative of protecting the courts from political interference through economic manipulation requires that an independent body -- a judicial compensation commission -- be interposed between the judiciary and the other branches of government. The constitutional function of this body would be to depoliticize the process of determining changes to or freezes in judicial remuneration. This objective would be achieved by setting that body the specific task of issuing a report on the salaries and benefits of judges to the executive and the legislature, responding to the particular proposals made by the government. As well, in order to guard against the possibility that government inaction could be used as a means of economic manipulation by allowing judges' real salaries to fall because of inflation, and also to protect against the possibility that judges' salaries will drop below the adequate minimum required by judicial independence, the commission must convene if a fixed period of time (e.g., three to five years) has elapsed since its last report, in order to consider the adequacy of judges' salaries in light of the cost of living and other relevant factors.

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

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

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

150 However, this is an erroneous interpretation of Beauregard. In fact, that decision stands for exactly the opposite position -- that Parliament can reduce the salaries of superior court judges. This conclusion is implicit in the analogy drawn and relied upon by the Court between the contributory scheme and income tax, another measure which imposed financial burdens on judges. The Court pointed out that the imposition of income tax on judges had withstood constitutional challenge (Judges v. Attorney-General of Saskatchewan, [1937] 2 D.L.R. 209 (P.C.)), and then stated that the pension scheme was not relevantly different. Although both schemes could reduce the take-home pay of judges, neither of them impaired judicial independence. As Dickson C.J. said at p. 77:

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

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

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

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

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

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

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

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

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

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

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

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

158 What this debate illustrates is that judicial independence can be threatened by measures which treat judges either differently from, or identically to, other persons paid from the public purse. Since s. 100 clearly permits identical treatment (Beauregard), I am driven to the conclusion that it is illogical for it to prohibit differential treatment as well. That is not to say, however, that the distinction between differential and identical treatment is a distinction without a difference. In my opinion, the risk of political interference through economic manipulation is clearly greater when judges are treated differently from other persons paid from the public purse. This is why we focussed on discriminatory measures in Beauregard. As Professor Renke, supra, has stated in the context of current appeals (at p. 19):

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

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

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

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

162 However, Valente should not be read as having decided that the jurisprudence under s. 100 is of no assistance in shaping the contours of judicial independence as it is protected by s. 11(d).

Rather, all that Valente held is that s. 11(d) does not, as a matter of principle, automatically provide the same level of protection to provincial courts as s. 100 and the other judicature provisions do to superior court judges. In the particular circumstances, though, s. 11(d) may in fact provide the same level of protection to provincial court judges as the judicature provisions do to superior court judges.

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

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

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

(ii) Independent, Effective and Objective Commissions

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

167 I do not wish to dictate the exact shape and powers of the independent commission here. These questions of detailed institutional design are better left to the executive and the legislature, although it would be helpful if they consulted the provincial judiciary prior to creating these bodies. Moreover, different provinces should be free to choose procedures and arrangements which are suitable to their needs and particular circumstances. Within the parameters of s. 11(d), there must be scope for local choice, because jurisdiction over provincial courts has been assigned to the provinces by the Constitution Act, 1867. This is one reason why we held in Valente, supra, at p. 694, that "[t]he standard of judicial independence for purposes of s. 11(d) cannot be a standard of uniform provisions".

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

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

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

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

172 Under ideal circumstances, it would be desirable if appointments to the salary commission were not made by any of the three branches of government, in order to guarantee the independence of its members. However, the members of that body would then have to be appointed by a body which must in turn be independent, and so on. This is clearly not a practical solution, and thus is not required by s. 11(d). As we said in Valente, supra, at p. 692:

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

What s. 11(d) requires instead is that the appointments not be entirely controlled by any one of the branches of government. The commission should have members appointed by the judiciary, on the one hand, and the legislature and the executive, on the other. The judiciary's nominees may, for example, be chosen either by the provincial judges' association, as is the case in Ontario (Courts of

Justice Act, Schedule, para. 6), or by the Chief Judge of the Provincial Court in consultation with the provincial judges' association, as in British Columbia (Provincial Court Act, s. 7.1(2)). The exact mechanism is for provincial governments to determine. Likewise, the nominees of the executive and the legislature may be chosen by the Lieutenant Governor in Council, although appointments by the Attorney General as in British Columbia (Provincial Court Act, s. 7.1(2)), or conceivably by the legislature itself, are entirely permissible.

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

174 Finally, and most importantly, the commission must also be effective. The effectiveness of these bodies must be guaranteed in a number of ways. First, there is a constitutional obligation for governments not to change (either by reducing or increasing) or freeze judicial remuneration until they have received the report of the salary commission. Changes or freezes of this nature secured without going through the commission process are unconstitutional. The commission must convene to consider and report on the proposed change or freeze. Second, in order to guard against the possibility that government inaction might lead to a reduction in judges' real salaries because of inflation, and that inaction could therefore be used as a means of economic manipulation, the commission must convene if a fixed period of time has elapsed since its last report, in order to consider the adequacy of judges' salaries in light of the cost of living and other relevant factors, and issue a recommendation in its report. Although the exact length of the period is for provincial governments to determine, I would suggest a period of three to five years.

175 Third, the reports of the commission must have a meaningful effect on the determination of judicial salaries. Provinces which have created salary commissions have adopted three different ways of giving such effect to these reports. One is to make a report of the commission binding, so that the government is bound by the commission's decision. Ontario, for example, requires that a report be implemented by the Lieutenant Governor in Council within 60 days, and gives a report of the Provincial Judges' Remuneration Commission statutory force (Courts of Justice Act, Schedule, para. 27). Another way of dealing with a report is the negative resolution procedure, whereby the report is laid before the legislature and its recommendations are implemented unless the legislature votes to reject or amend them. This is the model which has been adopted in British Columbia (Provincial Court Act, s. 7.1(10)) and Newfoundland (Provincial Court Act, 1991, s. 28(7)). The final way of giving effect to a report is the affirmative resolution procedure, whereby a report is laid be-

fore but need not be adopted by the legislature. As I shall explain below, until the adoption of Bill 22, this was very similar to the procedure followed in Manitoba (Provincial Court Act, s. 11.1(6)).

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

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

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

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

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

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

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

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

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

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

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

184 Although the test of justification -- one of simple rationality -- must be met by all measures which affect judicial remuneration and which depart from the recommendation of the salary commission, some will satisfy that test more easily than others, because they pose less of a danger of being used as a means of economic manipulation, and hence of political interference. Across-the-board measures which affect substantially every person who is paid from the public purse, in my opinion, are prima facie rational. For example, an across-the-board reduction in salaries that includes judges will typically be designed to effectuate the government's overall fiscal priorities, and hence will usually be aimed at furthering some sort of larger public interest. By contrast, a measure directed at judges alone may require a somewhat fuller explanation, precisely because it is directed at judges alone.

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

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

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

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

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

188 When I refer to negotiations, I use that term as it is understood in the labour relations context. Negotiation over remuneration and benefits involves a certain degree of "horse-trading" between the parties. Indeed, to negotiate is "to bargain with another respecting a transaction" (Black's Law Dictionary (6th ed. 1990), at p. 1036). That kind of activity, however, must be contrasted with expressions of concern and representations by chief justices and chief judges of courts, or by representative organizations such as the Canadian Judicial Council, the Canadian Judges Conference, and

the Canadian Association of Provincial Court Judges, on the adequacy of current levels of remuneration. Those representations merely provide information and cannot, as a result, be said to pose a danger to judicial independence.

189 I recognize that the constitutional prohibition against salary negotiations places the judiciary at an inherent disadvantage compared to other persons paid from the public purse, because they cannot lobby the executive and the legislature with respect to their level of remuneration. The point is put very well by Douglas A. Schmeiser and W. Howard McConnell in The Independence of Provincial Court Judges: A Public Trust (1996), at p. 13:

> Because of the constitutional convention that judges should not speak out on political matters, judges are at a disadvantage vis-à-vis other groups when making a case to governments for increments in salaries.

I have no doubt that this is the case, although to some extent, the inability of judges to engage in negotiations is offset by the guarantees provided by s. 11(d). In particular, the mandatory involvement of an independent commission serves as a substitute for negotiations, because it provides a forum in which members of the judiciary can raise concerns about the level of their remuneration that might have otherwise been advanced at the bargaining table. Moreover, a commission serves as an institutional sieve which protects the courts from political interference through economic manipulation, a danger which inheres in salary negotiations.

190 At the end of the day, however, any disadvantage which may flow from the prohibition of negotiations is a concern which the Constitution cannot accommodate. The purpose of the collective or institutional dimension of financial security is not to guarantee a mechanism for the setting of judicial salaries which is fair to the economic interests of judges. Its purpose is to protect an organ of the Constitution which in turn is charged with the responsibility of protecting that document and the fundamental values contained therein. If judges do not receive the level of remuneration that they would otherwise receive under a regime of salary negotiations, then this is a price that must be paid.

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

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

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

193 I have no doubt that the Constitution protects judicial salaries from falling below an acceptable minimum level. The reason it does is for financial security to protect the judiciary from political interference through economic manipulation, and to thereby ensure public confidence in the administration of justice. If salaries are too low, there is always the danger, however speculative, that members of the judiciary could be tempted to adjudicate cases in a particular way in order to secure a higher salary from the executive or the legislature or to receive benefits from one of the litigants. Perhaps more importantly, in the context of s. 11(d), there is the perception that this could happen. As Professor Friedland has written, supra, at p. 53:

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

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

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

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

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

> The salaries and pensions of judges shall be adequate, commensurate with the status, dignity and responsibility of their office, and shall be periodically reviewed to overcome or minimize the effect of inflation.

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

196 Finally, I want to emphasize that the guarantee of a minimum acceptable level of judicial remuneration is not a device to shield the courts from the effects of deficit reduction. Nothing would be more damaging to the reputation of the judiciary and the administration of justice than a perception that judges were not shouldering their share of the burden in difficult economic times. Rather, as I said above, financial security is one of the means whereby the independence of an organ of the Constitution is ensured. Judges are officers of the Constitution, and hence their remuneration must have some constitutional status.

E. Application of Legal Principles

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

(1) Prince Edward Island

(a) Salary Reduction

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

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

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

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

> 3. ...
>
> (3) The remuneration of judges for any year shall be determined
>
> (a) in respect of judges appointed before April 1, 1994, by calculating the average of the remuneration of provincial court judges in the other provinces of Canada as of April 1 in that year, less 7.5%;

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

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

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

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

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

203 In sum, the Public Sector Pay Reduction Act imposed an across-the-board cut which reduced the salaries of substantially every person remunerated from public funds, including members of the P.E.I. Provincial Court. On its face, it is therefore prima facie rational. The facts surrounding the enactment of the Act support this initial conclusion. The Act was enacted as part of a govern-

ment policy to reduce the provincial deficit, and was therefore designed to further the public interest. Although it is hard to assess the reasonableness of the factual foundation for this claim in the absence of a trial record, the statement of facts appended to the Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island suffices for the purposes of this illustrative discussion.

(b) Other Issues Regarding Financial Security

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

(I) Negotiations

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

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

(ii) Miscellaneous Provisions

207 The appellants also object to ss. 12(2) and 13 of the Provincial Court Act, which confer a discretion on the Lieutenant Governor in Council to grant leaves of absence due to illness and sabbatical leaves, respectively. It is unclear what the precise objection is to s. 13, other than making sabbatical leaves a matter for executive discretion. The objection to s. 12(2) is directed at the ability of the Lieutenant Governor in Council to grant leave "on such terms as he [sic] may consider ap-

propriate". Both the objections to ss. 12(2) and 13 implicate individual financial security. However, they are without merit. To understand why, I return to Valente, where the question of discretionary benefits for judges was considered. A number of discretionary benefits were at issue: unpaid leave, permission to take on extra-judicial employment, special leave, and paid leave. The Court dismissed the concern that discretionary benefits undermined judicial independence, at p. 714:

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

To my mind, the same reasoning applies here.

(2) Alberta

(a) Jurisdiction of the Alberta Court of Appeal

208 Next, I turn to the salary reduction in Alberta. As a preliminary point, I will consider whether the Alberta Court of Appeal was correct in declaring that it was without jurisdiction to hear the Crown's appeals under s. 784(1) of the Criminal Code. I conclude that s. 784(1) was applicable in this instance, and that the court below should have considered the merits of these appeals. Notwithstanding this error, we can assume the jurisdiction that the Court of Appeal had, and pronounce upon the merits ourselves, rather than send the matter back to be dealt with by the Alberta Court of Appeal. This Court would only be without jurisdiction to do so if the parties had appealed directly from the decision of the Alberta Court of Queen's Bench, which, through the operation of s. 784(1), was not the court of final resort in Alberta: Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835; R. v. Laba, [1994] 3 S.C.R. 965.

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

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

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

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

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

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

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

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

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

laration. The Crown appealed. The Court of Appeal held that it had jurisdiction under s. 719(1) (now s. 784(1)) of the Criminal Code, because the declaration was "in effect and intent prohibitory" (pp. 337-38).

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

(b) The Salary Reduction

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

218 The salaries and pensions of Provincial Court judges in Alberta are set down by regulations made by the Lieutenant Governor in Council. The source of this regulation-making power is s. 17(1) of the Provincial Court Judges Act, which provides in part:

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

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

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

220 The parties to this appeal engaged in a debate over how widespread and how uniform the salary reductions in the Alberta public sector were. To buttress their respective arguments, they attempted to adduce extrinsic evidence which had not been adduced in the courts below. We denied the motions to introduce this evidence, because the establishment of a factual record is a matter for trial courts, not courts of appeal. Moreover, nothing turns on this question, because we are not issuing judgment on the rationality of the salary reduction. For present purposes, it is sufficient to note that the trial judge proceeded on the basis that the salary reductions did apply across the public sector. Accordingly, the salary reduction in Alberta would likely have been prima facie rational. However, in the absence of a complete factual record, for the purposes of this illustration, I would be unable to reach the ultimate conclusion that there was a reasonable factual foundation for the government's claim, and hence that the pay reduction was in fact rational.

(c) Miscellaneous Provisions

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

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

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

(3) Manitoba

(a) Bill 22 and the Salary Reduction

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

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

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

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

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

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

227 Section 11.1 lays down the membership and powers of the JCC. There are three members, all appointed by the Lieutenant Governor in Council. Two members are designated by the responsible Minister, and the remaining member is designated by the judges of the Manitoba Provincial Court (s. 11.1(2)). The Lieutenant Governor in Council appoints one of these three to be the chair (s. 11.1(2)). The term of office is two years (s. 11.1(1)). Once appointed, the JCC is charged with the mandate of reviewing and issuing a report to the Minister on the salaries and benefits payable to judges, including pensions, vacations, sick leave, travel expenses and allowances (s. 11.1(1)). Once this report is submitted, it must be tabled by the Minister before the provincial legislature within 30 days if the legislature is in session, or within 30 days of the legislature commencing a new session (s. 11.1(4)). Within 30 days of being tabled, the report must be referred to a standing committee of the legislature, which in turn must report back on the recommendations of the JCC within 60 days (s. 11.1(5)). It is then left to the legislature to determine whether it will accept the report of the

standing committee (s. 11.1(6)). If the legislature adopts that report, all acts, regulations, and administrative practices are deemed to be amended as necessary to implement the report (s. 11.1(6)).

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

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

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

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

232 I reject the submission of the respondent on this point. Bill 22 is constitutionally defective in two respects. First, s. 9(1)(a) reduced the salary for the 1993-94 financial year which had been set by the legislature on the basis of the previous JCC's recommendation without further recourse to that body. Second, s. 9(1)(b) effectively precluded the future involvement of the JCC, at least for the 1994-95 financial year.

233 I first consider s. 9(1)(a). That provision reduced the salaries that the judges would have otherwise received commencing April 1, 1993 by 3.8 percent, for the 1993-94 year. The base salary to which the 3.8 percent reduction applied was the salary arrived at as a result of the report of the first JCC; this is the significance of the words "would otherwise be paid" in s. 9(1). What is important is that this reduction was imposed without the benefit of a report from the second JCC,

which had been constituted at the time. In fact, the second JCC was left out of the process entirely. Section 11(d) of the Charter requires that that change only be made after the report of an independent salary commission. The circumvention of the JCC by the province therefore violated an essential procedural requirement of the collective or institutional guarantee of financial security.

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

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

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

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

236 In conclusion, the salary reduction imposed by s. 9(1) of Bill 22 violated s. 11(d) of the Charter, because the government failed to respect the independent, effective, and objective process for setting judicial remuneration which was already operating in Manitoba. The appellants also submitted that Bill 22 was unconstitutional because it discriminated against members of the judiciary. The provisions governing salary reductions for the judiciary, they note, are mandatory; s. 9 provides that judges' salaries "shall" be reduced. By contrast, s. 4, which governs persons employed in the broader public sector, is framed in permissive terms. It provides that public sector employers "may" require their employers to take up to 15 days of unpaid leave.

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

(b) The Conduct of the Executive in Manitoba

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

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

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

241 The President of the Manitoba Provincial Judges Association instructed counsel to accept the offer on March 31, 1994. This letter confirms that negotiations were to replace the JCC as the means whereby salaries were set. There seems to have been the expectation that the JCC would merely rubber-stamp the salary increase negotiated by the parties:

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

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

242 I must confess that I am somewhat disturbed by this course of events, because it creates the impression that the Manitoba Provincial Judges Association was a willing participant in these negotiations, and thus compromised its own independence. If the Association had acted in this manner, its conduct would have been highly problematic. However, the surrounding circumstances have led me to conclude that the Association was effectively coerced into these negotiations. The offer of

March 11, 1994 must be viewed against the background of Bill 22. As I mentioned earlier, Bill 22 violated s. 11(d) because it changed judicial remuneration without first proceeding through the JCC, and because it effectively precluded the future operation of the JCC for the 1994-95 financial year. Faced with the prospect of a JCC which was destined to be completely ineffectual, if not inoperative, the Association had little choice but to enter into salary discussions. An indication of the Association's relatively weak position is the fact that they accepted the government's offer without requesting any modifications.

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

244 Thus, on May 3, 1994, counsel for the government wrote that in light of the Association's failure to give an assurance that it would not be challenging Bill 22, the government "had to reconsider the draft recommendation" in order to clarify that the 2.3 percent increase would be subject to Bill 22. The government then proposed that the Association accept one of two alternative changes to the proposed draft recommendation to address its concerns. The Association accepted one of these changes on May 4, 1994, but made it clear that it wished to treat the joint recommendation and a possible challenge to Bill 22 as separate issues. Counsel for the government then replied, on May 5, 1994, that the government would not sign the joint recommendation unless it received "a clear and unequivocal statement" of the Association's intentions with regard to Bill 22. The clear implication of this letter, as of a letter sent by counsel for the government on May 19, 1994, was that the government would not proceed with the joint recommendation unless the Association agreed to forego litigation on Bill 22. No such assurance was given, and the joint recommendation was never made.

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

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

V. Other Issues Raised in These Appeals

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

A. Prince Edward Island

(1) Security of Tenure

248 The appellants direct their submissions at the alleged lack of security of tenure created by s. 10 of the Provincial Court Act, as it stood at the time of the reference to the court below. They argue that the provision is constitutionally deficient in two respects: first, it permits the executive to suspend a judge if it has reason to believe that a judge is guilty of misbehaviour, or is unable to perform his or her duties properly, without requiring probable cause, and second, it is possible to remove judges without a prior inquiry. For these reasons, they submit that questions 1 and 2(c) of the Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island should be answered in the negative.

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

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

(2) Administrative Independence

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

purposes of s. 11(d)". That essential minimum was defined (at p. 709) as control by the judiciary over

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

These matters "bear directly and immediately on the exercise of the judicial function" (p. 712). Le Dain J. took pains to contrast the scope of s. 11(d) with claims for an increased measure of autonomy for the courts over financial and personnel aspects of administration. Although Le Dain J. may have been sympathetic to judicial control over these aspects of administration, he clearly held that they were not within the ambit of s. 11(d), because they were not essential for judicial independence, at pp. 711-12:

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

It is against this background that I analyse these questions.

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

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

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

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

256 Question 3(d) asks if communications between a judge of the P.E.I. Provincial Court and the executive on issues relating to the administration of justice undermine the administrative independence of the judiciary. I decline to answer this question, because it is too vague -- it does not offer sufficient detail on the subject-matter of the communication. However, I do wish to note that the separation of powers, which s. 11(d) protects, does not prevent the different branches of government from communicating with each other. This was acknowledged in the Court of Appeal's judgment in Valente, supra, at p. 433, in a passage which was cited with approval by Le Dain J. at p. 709:

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

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

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

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

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

> (d) respecting the qualifications, duties, responsibilities and jurisdiction of justices of the peace.

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

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

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

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

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

B. Alberta

(1) Security of Tenure

262 The trial judge found two sets of provisions of the Provincial Court Judges Act to violate s. 11(d) for failing to adequately protect security of tenure. He held that the presence of non-judges on the Judicial Council, the body with the power to receive and investigate complaints against members of the Alberta Provincial Court, violated s. 11(d) because Valente had held that judges could only be removed after a "judicial inquiry". As a result, he declared ss. 11(1)(c) and 11(2) of the Act, which empower the Council to investigate complaints, make recommendations to the Minister of Justice and Attorney General, and refer complaints to the Chief Judge of the Court or a committee of the Judicial Council for inquiry and report, to be of no force or effect. As well, he held that use of "lack of competence" and "conduct" as grounds of removal in s. 11(1)(b) of the Act also violated s.

11(d) of the Charter, because those grounds were unconstitutionally broad, and declared that provision to be of no force or effect.

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

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

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

(2) Administrative Independence

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

266 Section 13(1)(a) confers the power to "designate the place at which a judge shall have his residence". Counsel for the appellant rightly points out that it is reasonable (although not necessary) to vest responsibility for designating the residence of judges with the executive, because that decision concerns the proper allocation of court resources. However, my concern is that, as it is presently worded, s. 13(1)(a) creates the reasonable apprehension that it could be used to punish judges whose decisions do not favour the government, or alternatively, to favour judges whose decisions benefit the government. Section 13(1)(a)'s constitutional defect lies in the fact that it is not limited to the initial appointment of judges. The appellant tried to demonstrate that s. 13(1)(a), when properly interpreted, was so confined. However, the words of the provision are not qualified in the manner in which the appellant suggests. Section 13(1)(a) authorizes the Minister of Justice and the Attorney General to designate a judge's place of residence at any time, including his initial appointment or afterward. It therefore violates s. 11(d) of the Charter.

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

268 I do, however, wish to make one further comment in respect of this issue. The strongest argument made by the appellant in favour of the constitutionality of s. 13(1)(b) is that giving the executive control over sitting days enables the executive to give specific dates to defendants for their first appearance in criminal proceedings. The implication of this argument is that judicial con-

trol of the dates of court sittings would preclude the establishment of a system to inform defendants when they must first appear. This argument, however, is incorrect, because it ignores the fact that the courts can and should coordinate their sitting days with the relevant government authorities.

C. Manitoba: The Closing of the Provincial Court

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

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

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

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

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

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

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

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

273 These facts clearly demonstrate that the decision to withdraw court staff was taken almost two weeks before the Chief Judge ordered the closure of the Manitoba Provincial Court. As well, the court was closed on the same days as the unpaid days of leave for court staff. Moreover, it is the uncontroverted evidence of Judge Linda Giesbrecht, which was presented at trial, that the Manitoba Provincial Court could not function "without the assistance and presence of Courts' staff including Court clerks, Crown Attorneys, Legal Aid lawyers and Sheriff's officers and other administrative personnel". The only conclusion I can draw is that the government, through its decision of March 24, 1994, effectively forced Chief Judge Webster to close the Manitoba Provincial Court by her decision of April 6, 1994.

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

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

Judge alone. In my opinion, the decision to close the Manitoba Provincial Court is precisely this kind of decision.

276 In conclusion, the closure of the Manitoba Provincial Court on "Filmon Fridays" violated s. 11(d) of the Charter. Since s. 4 of Bill 22 authorized the withdrawal of court staff on "Filmon Fridays", and hence enabled the government to close the Manitoba Provincial Court on those days, that provision is therefore unconstitutional. It is worth emphasizing that s. 4 cannot be read down in such a precise way so as not to authorize conduct which violates the Charter. Although reading down the impugned legislation to the extent strictly necessary would be the normal solution in a case like this (Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038), this is very difficult in relation to violations of s. 11(d) because, unlike other Charter provisions, it requires that judicial independence be secured by "objective conditions or guarantees" (Valente, supra, at p. 685). Objective guarantees are the means by which the reasonable perception of independence is secured and, hence, any legislative provision which does not contain those objective guarantees is unconstitutional. In effect, then, to read down the legislation to its proper scope would amount to reading in those objective conditions and guarantees. This would result in a fundamental rewriting of the legislation. On the other hand, if the Court were to strike down the legislation in its entirety, the effect would be to prevent its application to all those employees of the Government of Manitoba who were required to take leave without pay. In the circumstances, the best solution would be to read down the legislation so that it would simply not apply to government workers employed in the Manitoba Provincial Court. In other words, the provision should be read as exempting provincial court staff from it. This is the remedy that best upholds the Charter values involved and will occasion the lesser intrusion on the role of the legislature. See Osborne v. Canada (Treasury Board), [1991] 2 S.C.R. 69, at p. 105. Accordingly, s. 4 should be read as follows:

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

VI. Section 1

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

A. Prince Edward Island

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

B. Alberta

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

C. Manitoba

280 The respondent Attorney General of Manitoba has offered brief submissions attempting to justify the infringements of s. 11(d) by Bill 22 under s. 1. However, the respondent has offered no justification whatsoever either for the circumvention of the independent, effective, and objective process for recommending judicial salaries that centres on the JCC before imposing the salary reduction on members of the Manitoba Provincial Court, or for the attempt to engage in salary negotiations with the Provincial Judges Association. Instead, its submissions focussed on the closure of the courts. I therefore have no choice but to conclude that the effective suspension of the operation of the JCC, and the attempted salary negotiations, are not justified under s. 1. Moreover, since the attempted negotiations were not authorized by a legal rule, be it a statute, a regulation, or a rule of the common law (R. v. Thomsen, [1988] 1 S.C.R. 640, at pp. 650-51), they are incapable of being justified under s. 1 because they are not prescribed by law.

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

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

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

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

stated at p. 288 that "the proper distribution of scarce resources must be weighed in a s. 1 analysis". Finally, in Egan v. Canada, [1995] 2 S.C.R. 513, where a scheme for pension benefits was under attack, Sopinka J. stated at para. 104 that

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

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

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

VII. The Remarks of Premier Klein

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

VIII. Summary

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

1. It is obvious to us that governments are free to reduce, increase, or freeze the salaries of provincial court judges, either as part of an overall economic measure which affects the salaries of all or some persons who are remunerated from public funds, or as part of a measure which is directed at provincial court judges as a class.
2. Provinces are under a constitutional obligation to establish bodies which are independent, effective, and objective, according to the criteria that I have laid down in these reasons. Any changes to or freezes in judicial re-

muneration require prior recourse to the independent body, which will review the proposed reduction or increase to, or freeze in, judicial remuneration. Any changes to or freezes in judicial remuneration made without prior recourse to the independent body are unconstitutional.

3. As well, in order to guard against the possibility that government inaction could be used as a means of economic manipulation, by allowing judges' real wages to fall because of inflation, and in order to protect against the possibility that judicial salaries will fall below the adequate minimum guaranteed by judicial independence, the commission must convene if a fixed period of time (e.g. three to five years) has elapsed since its last report, in order to consider the adequacy of judges' salaries in light of the cost of living and other relevant factors.
4. The recommendations of the independent body are non-binding. However, if the executive or legislature chooses to depart from those recommendations, it has to justify its decision according to a standard of simple rationality -- if need be, in a court of law.
5. Under no circumstances is it permissible for the judiciary to engage in negotiations over remuneration with the executive or representatives of the legislature. However, that does not preclude chief justices or judges, or bodies representing judges, from expressing concerns or making representations to governments regarding judicial remuneration.

IX. Conclusion and Disposition

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

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

288 The answers to the reference questions are as follows:

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

Question 1

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

(b): Yes.

Question 2: No.

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

Question 1

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

Question 2

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

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

Question 3

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

Question 4

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

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

(c): No.

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

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

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

Question 8: No.

(2) Disposition

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

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

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

290 The answers to the constitutional questions are as follows:

Question 1: Yes. Yes. The constitutionality of these provisions was not

Question 2: properly before the Court.
Question 3:

Question 4: The constitutionality of these provisions was not properly before the Court.

Question 5: Yes.

Question 6: Yes.

Question 7: No.

(2) Disposition

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

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

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

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

293 The answers to the constitutional questions are as follows:

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

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

(2) Disposition

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

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

The following are the reasons delivered by

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

I. Introduction

296 The primary issue raised in these appeals is a narrow one: has the reduction of the salaries of provincial court judges, in the circumstances of each of these cases, so affected the independence of these judges that persons "charged with an offence" before them are deprived of their right to "an independent and impartial tribunal" within the meaning of s. 11(d) of the Canadian Charter of Rights and Freedoms? I have had the advantage of reading the reasons of the Chief Justice who sets forth the facts and history of the litigation. Although I agree with substantial portions of his reasons, I cannot concur with his conclusion that s. 11(d) forbids governments from changing judges' salaries without first having recourse to the "judicial compensation commissions" he describes. Furthermore, I do not believe that s. 11(d) prohibits salary discussions between governments and judges. In

my view, reading these requirements into s. 11(d) represents both an unjustified departure from established precedents and a partial usurpation of the provinces' power to set the salaries of inferior court judges pursuant to ss. 92(4) and 92(14) of the Constitution Act, 1867. In addition to these issues, the Chief Justice deals with a number of other questions respecting the independence of provincial court judges that were raised by the parties to these appeals. I agree with his disposition of these issues.

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

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

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

300 My concern arises out of the nature of judicial power. As I see it, the judiciary derives its public acceptance and its strength from the fact that judges do not initiate recourse to the law. Rather, they respond to grievances raised by those who come before them seeking to have the law applied, listening fairly to the representations of all parties, always subject to the discipline provided by the facts of the case. This sustains their impartiality and limits their powers. Unlike the other branches of the government, the judicial branch does not initiate matters and has no agenda of its own. Its sole duty is to hear and decide cases on the issues presented to it in accordance with the law and the Constitution. And so it was that Alexander Hamilton referred to the courts as "the least dangerous" branch of government: The Federalist, No. 78.

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

> The policy which dictates restraint in constitutional cases is sound. It is based on the realization that unnecessary constitutional pronouncements may

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

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

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

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

303 I emphasize at the outset that it is not my position that s. 11(d) of the Charter and ss. 96-100 of the Constitution Act, 1867 comprise an exhaustive code of judicial independence. As I discuss briefly later, additional protection for judicial independence may inhere in other provisions of the Constitution. Nor do I deny that the Constitution embraces unwritten rules, including rules that find expression in the preamble of the Constitution Act, 1867; see New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly), [1993] 1 S.C.R. 319. I hasten to add that these rules really find their origin in specific provisions of the Constitution viewed in light of our constitutional heritage. In other words, what we are concerned with is the meaning to be attached to an expression used in a constitutional provision.

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

305 There is no similar historical basis, in contrast, for the idea that Parliament cannot interfere with judicial independence. At the time of Confederation (and indeed to this day), the British Con-

stitution did not contemplate the notion that Parliament was limited in its ability to deal with judges. The principle of judicial independence developed very gradually in Great Britain; see generally W. R. Lederman, "The Independence of the Judiciary" (1956), 34 Can. Bar Rev. 769 and 1139. In the Norman era, judicial power was concentrated in the hands of the King and his immediate entourage (the Curia Regis). Subsequent centuries saw the emergence of specialized courts and a professional judiciary, and the king's participation in the judicial function had by the end of the fifteenth century effectively withered. Thus Blackstone in his Commentaries was able to state:

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

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

306 Despite these advances, kings retained power to apply pressure on the judiciary to conform to their wishes through the exercise of the royal power of dismissal. Generally speaking, up to the seventeenth century, judges held office during the king's good pleasure (durante bene placito). This power to dismiss judges for political ends was wielded most liberally by the Stuart kings in the early seventeenth century as part of their effort to assert the royal prerogative powers over the authority of Parliament and the common law. It was thus natural that protection against this kind of arbitrary, executive interference became a priority in the post-revolution settlement. Efforts to secure such protection in legislation were scuttled in the two decades following 1688, but at the turn of the century William III gave his assent to the Act of Settlement, 12 & 13 Will. 3, c. 2, which took effect with the accession of George I in 1714. Section 3, para. 7 of that statute mandated that "Judges Commissions be made Quandiu se bene gesserint [during good behaviour], and their Salaries ascertained and established; but upon the Address of both Houses of Parliament it may be lawful to remove them". Further protection was provided by an Act of 1760 (Commissions and Salaries of Judges Act, 1 Geo. 3, c. 23), which ensured that the commissions of judges continued notwithstanding the demise of the king. Prior to this enactment, the governing rule provided that all royal appointees, including judges, vacated their offices upon the death of the king.

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

308 Even if it is accepted that judicial independence had become a "constitutional" principle in Britain by 1867, it is important to understand the precise meaning of that term in British law. Unlike Canada, Great Britain does not have a written constitution. Under accepted British legal theory, Parliament is supreme. By this I mean that there are no limitations upon its legislative competence. As Dicey explains, Parliament has "under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a

right to override or set aside the legislation of Parliament" (A. V. Dicey, Introduction to the Study of the Law of the Constitution (10th ed. 1959), at pp. 39-40). This principle has been modified somewhat in recent decades to take into account the effect of Great Britain's membership in the European Community, but ultimately, the British Parliament remains supreme; see E. C. S. Wade and A. W. Bradley, Constitutional and Administrative Law (11th ed. 1993), by A. W. Bradley and K. D. Ewing, at pp. 68-87; Colin Turpin, British Government and the Constitution (3rd ed. 1995), at pp. 298-99.

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

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

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

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

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

312 It might be asserted that the argument presented above is merely a technical quibble. After all, in Canada the Constitution is supreme, not the legislatures. Courts have had the power to invalidate unconstitutional legislation in this country since 1867. If judicial independence was a "consti-

tutional" principle in the broad sense in nineteenth-century Britain, and that principle was continued or established in Canada as a result of the preamble to the Constitution Act, 1867, why should Canadian courts resile from enforcing this principle by striking down incompatible legislation?

313 One answer to this question is the ambit of the Act of Settlement. The protection it accorded was limited to superior courts, specifically the central courts of common law; see Lederman, supra, at p. 782. It did not apply to inferior courts. While subsequent legislation did provide limited protection for the independence of the judges of certain statutory courts, such as the county courts, the courts there were not regarded as within the ambit of the "constitutional" protection in the British sense. Generally the independence and impartiality of these courts were ensured to litigants through the superintendence exercised over them by the superior courts by way of prerogative writs and other extraordinary remedies. The overall task of protection sought to be created for inferior courts in the present appeals seems to me to be made of insubstantial cloth, and certainly in no way similar to anything to be found in the United Kingdom.

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

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

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

317 This theory, which is not so much an "implied bill of rights", as it has so often been called, but rather a more limited guarantee of those communicative freedoms necessary for the existence of parliamentary democracy, is not without appeal. An argument can be made that, even under a constitutional structure that deems Parliament to be supreme, certain rights, including freedom of polit-

ical speech, should be enforced by the courts in order to safeguard the democratic accountability of Parliament. Without this limitation of its powers, the argument runs, Parliament could subvert the very process by which it acquired its legitimacy as a representative, democratic institution; see F. R. Scott, Civil Liberties and Canadian Federalism (1959), at pp. 18-21; Dale Gibson, "Constitutional Amendment and the Implied Bill of Rights" (1966-67), 12 McGill L.J. 497. It should be noted, however, that the idea that the Constitution contemplates implied protection for democratic rights has been rejected by a number of eminent jurists as being incompatible with the structure and history of the Constitution; see Attorney General for Canada and Dupond v. Montreal, [1978] 2 S.C.R. 770, at p. 796 (per Beetz J.); Bora Laskin, "An Inquiry into the Diefenbaker Bill of Rights" (1959), 37 Can. Bar Rev. 77, at pp. 100-103; Paul C. Weiler, "The Supreme Court and the Law of Canadian Federalism" (1973), 23 U.T.L.J. 307, at p. 344; Peter W. Hogg, Constitutional Law of Canada (3rd ed. 1992 (loose-leaf)), vol. 2, at pp. 31-12 and 31-13.

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

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

320 In other words, the approach adopted by the Chief Justice, in my view, misapprehends the nature of the Constitution Act, 1867. The Act was not intended as an abstract document on the nature of government. The philosophical underpinnings of government in a British colony were a given, and find expression in the preamble. The Act was intended to create governmental and judicial structures for the maintenance of a British system of government in a federation of former British colonies. Insofar as there were limits to legislative power in Canada, they flowed from the terms

of the Act (it being a British statute) that created them and vis-à-vis Great Britain the condition of dependency that prevailed in 1867. In considering the nature of the structures created, it was relevant to look at the principles underlying their British counterparts as the preamble invites the courts to do.

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

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

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

324 These are some of the issues that have persuaded me that this Court should not precipitously, and without the benefit of argument of any real relevance to the case before us, venture forth on this uncharted sea. It is not as if the law as it stands is devoid of devices to ensure independent and impartial courts and tribunals. Quite the contrary, I would emphasize that the express protections for judicial independence set out in the Constitution are broad and powerful. They apply to all superior court and other judges specified in s. 96 of the Constitution Act, 1867 as well as to inferior (provincial) courts exercising criminal jurisdiction. Nothing presented in these appeals suggests that these guarantees are not sufficient to ensure the independence of the judiciary as a whole. The superior courts have significant appellate and supervisory jurisdiction over inferior courts. If the impartiality of decisions from inferior courts is threatened by a lack of independence, any ensuing injustice may be rectified by the superior courts.

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

III. Financial Security

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

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

328 The Chief Justice also finds, as a general principle, that s. 11(d) of the Charter permits governments to reduce, increase or freeze the salaries of provincial court judges, either as part of an overall economic measure which affects the salaries of all persons paid from the public purse, or as part of a measure directed at judges as a class. I agree. He goes on to hold, however, that before such changes can be made, governments must consider and respond to the recommendations of an independent "judicial compensation commission". He further concludes that s. 11(d) forbids, under any circumstances, discussions about remuneration between the judiciary and the government.

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

> 11. Any person charged with an offence has the right
>
> . . .

> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal; [Emphasis added.]

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

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

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

Similarly, in R. v. Lippé, [1991] 2 S.C.R. 114, at p. 142, Lamer C.J. concluded that while the Quebec municipal court system, which allowed judges to continue to practice as lawyers was not "ideal", it was sufficient for the purposes of s. 11(d). He remarked:

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

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

331 I also note that s. 11(d) expressly provides that accused persons have a right to a hearing that is both "independent" and "impartial". As the Court explained in Valente, supra, independence

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

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

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

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

334 With this general principle in mind, I turn to the first question at hand: does s. 11(d) require governments to establish judicial compensation commissions and consider and respond to their recommendations before changing the salaries of provincial court judges? As noted by the Chief Justice in his reasons, this Court held unanimously in Valente, supra, that such commissions were not required for the purposes of s. 11(d). This holding should be followed, in my opinion, not simply because it is authoritative, but because it is grounded in reason and common sense. As I have discussed, the Chief Justice asserts that the financial security component of judicial independence has both an individual and an institutional or collective dimension. In Valente, the Court focused solely on the individual dimension, holding at p. 706 that "the essential point" of financial security "is that the right to salary of a provincial court judge is established by law, and there is no way in which the Executive could interfere with that right in a manner to affect the independence of the individual judge".

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

336 The fact that the potential for such manipulation exists, however, does not justify the imposition of judicial compensation commissions as a constitutional imperative. As noted above, s. 11(d) does not mandate "any particular legislative or constitutional formula": Valente, supra, at p.

693; see also Généreux, supra, at pp. 284-85. This Court has repeatedly held that s. 11(d) requires only that courts exercising criminal jurisdiction be reasonably perceived as independent. In Valente, supra, Le Dain J. wrote the following for the Court at p. 689:

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

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

337 In my view, it is abundantly clear that a reasonable, informed person would not perceive that, in the absence of a commission process, all changes to the remuneration of provincial court judges threaten their independence. I reach this conclusion by considering the type of change to judicial salaries that is at issue in the present appeals. It is simply not reasonable to think that a decrease to judicial salaries that is part of an overall economic measure which affects the salaries of substantially all persons paid from public funds imperils the independence of the judiciary. To hold otherwise is to assume that judges could be influenced or manipulated by such a reduction. A reasonable person, I submit, would believe judges are made of sturdier stuff than this.

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

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

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

341 In Valente, the Court held that none of these factors could reasonably be perceived to compromise the institutional independence of the judiciary. All that is required, Le Dain J. stated for the Court at p. 712, is that the judiciary retain control over "the administrative decisions that bear directly and immediately on the exercise of the judicial function". Similarly, the fact that changes to judicial salaries are linked, along with other persons paid from the public purse, to changes made to the remuneration of civil servants does not create the impression that judges are public employees who are not independent from government. It must be remembered that the test for judicial independence incorporates the perception of the reasonable, informed person. As noted by the Chief Justice in his reasons, the question is "whether a reasonable person, who was informed of the relevant statutory provisions, their historical background and the traditions surrounding them, after viewing the matter realistically and practically would conclude (that the tribunal or court was independent)" (para. 113). In my view, such a person would not view the linking of judges' salaries to those of civil servants as compromising judicial independence.

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

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

344 Although I have framed my argument in terms of reductions to judicial salaries that are part of across-the-board measures applying throughout the public sector, the same logic applies, a fortiori, to salary freezes and increases. In my view, furthermore, governments may make changes

to judicial salaries that are not parallelled by equivalent changes to the salaries of other persons paid from public funds. As I will develop later, changes, and especially decreases, to judicial salaries that are not part of an overall public measure should be subject to greater scrutiny than those that are. Under the reasonable perception test, however, commissions are not a necessary condition of independence. Of course, the existence of such a process may go a long way toward showing that a given change to judges' salaries does not threaten their independence. Requiring commissions a priori, however, is tantamount to enacting a new constitutional provision to extend the protection provided by s. 11(d). Section 11(d) requires only that tribunals exercising criminal jurisdiction be independent and impartial. To that end, it prohibits governments from acting in ways that threaten that independence and impartiality. It does not require legislatures, however, to establish what in some respects is a virtual fourth branch of government to police the interaction between the political branches and the judiciary. Judges, in my opinion, are capable of ensuring their own independence by an appropriate application of the Constitution. By employing the reasonable perception test, judges are able to distinguish between changes to their remuneration effected for a valid public purpose and those designed to influence their decisions.

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

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

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

348 In considering the effect of differential changes on judicial independence, the question that must be asked is whether the distinction between judges and other persons paid from public funds

amounts to a "substantial" difference in treatment. Trivial or insignificant differences are unlikely to threaten judicial independence. If the effect of the change on the financial position of judges and others is essentially similar, a reasonable person would not perceive it as potentially influencing judges to favour or disfavour the government's interests in litigation.

349 I now turn to the question of discussions between the judiciary and the government over salaries. In the absence of a commission process, the only manner in which judges may have a say in the setting of their salaries is through direct dialogue with the executive. The Chief Justice terms these discussions "negotiations" and would prohibit them, in all circumstances, as violations of the financial security component of judicial independence. According to him, negotiations threaten independence because a "reasonable person might conclude that judges would alter the manner in which they adjudicate cases in order to curry favour with the executive" (para. 187).

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

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

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

352 Although there is no general constitutional prohibition against salary discussions between the judiciary and the government, the possibility remains that governments may use such discussions to attempt to influence or manipulate the judiciary. In such cases, the actions of the government will be reviewed according to the same reasonable perception test that applies to salary changes.

IV. Application to the Present Appeals

1. Prince Edward Island

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

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

2. Alberta

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

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

357 In my view, it is not necessary to consider this factual dispute. The conclusion I have reached is based entirely on the Agreed Statement of Facts reproduced in the reasons of McDonald J. In any future litigation involving this issue, the parties will be free to adduce whatever evidence they feel is appropriate and a factual record will be developed accordingly.

3. Manitoba

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

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

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

361 There is no evidence, however, that these differences evince an intention to interfere with judicial independence. As Philp J.A. stated for the Manitoba Court of Appeal, "differences in the classes of persons affected by Bill 22 necessitated differences in treatment" ((1995), 102 Man. R. (2d) 51, at p. 66). In the case of the permissive-mandatory distinction, the evidence establishes that it served a rational and legitimate purpose. Though all those affected by Bill 22 were in one form or another "paid" from public funds, their relationship to government differed markedly. A number of the "employers" under Bill 22, such as school boards, Crown corporations, municipalities, universities and health care facilities, though ultimately dependent on government funding, have traditionally enjoyed a significant amount of financial autonomy. Generally speaking, the provincial government does not set the salaries of employees of these institutions. The legislation respects the autonomy of those bodies by permitting them to cope with reduced funding in alternative ways. Judges, though obviously required to be independent from government in specific, constitutionally guaranteed ways, are paid directly by the government. In this limited sense, they are analogous to

civil servants and not to employees of other public institutions such as school boards, universities or hospitals. Notably, the provincial government, as an "employer" under Bill 22, required its civil servants to take unpaid leaves. Moreover, unlike many public employees, judges are not in a collective bargaining relationship with the government. The government may have felt that permitting judges to "negotiate" the manner in which they would absorb reductions to their remuneration would have been inappropriate.

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

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

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

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

V. Conclusion and Disposition

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

(a) Answers to Reference Questions

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

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

Question 1

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

Question 2: Yes.

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

Question 1(c): Yes.

...

Question 4:

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

...

(d): No.

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

...

(I): No.

...

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

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

(b) Disposition

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

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

(a) Answers to Constitutional Questions

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

Question 1: No.

Question 2: No.

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

(b) Disposition

371 For the reasons given by the Chief Justice, I would allow the appeal by the Crown from the decision of the Alberta Court of Appeal that it was without jurisdiction to hear these appeals under s. 784(1) of the Criminal Code, R.S.C., 1985, c. C-46. I would also allow the appeal by the Crown from McDonald J.'s holding that ss. 11(1)(c), 11(2) and 11(1)(b) of the Provincial Court Judges Act

were unconstitutional. I would also dismiss the Crown's appeal from McDonald J.'s holding that ss. 13(1)(a) and 13(1)(b) of the Provincial Court Judges Act were unconstitutional and declare these provisions to be of no force or effect. Unlike the Chief Justice, however, I would allow the Crown's appeal from McDonald J.'s holding that the 5 percent pay reduction imposed on members of the Alberta Provincial Court by the Payment to Provincial Judges Amendment Regulation, Alta. Reg. 116/94, was unconstitutional and declare s. 17(1) of the Provincial Court Judges Act to be constitutional.

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

(a) Answers to Constitutional Questions

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

Question 1:

(a): No.

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

Question 2:

(a): No.

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

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

(b) Disposition

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

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

* * * * *

Appendix "A"

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

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

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

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

* * * * *

Appendix "B"

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

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

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

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

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

(a) the pension provision in section 8(1)(c) of the Provincial Court Act, supra?

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

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

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

and, if so affected, specifically in what way?

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

(a) the location of the Provincial Courts, the offices of the Judges of the Provincial Court, the staff and court clerks associated with the Provincial Court, in relation to the offices of other Judges of Superior Courts, Legal Aid offices, Crown Attorneys' offices, or the offices of representatives of the Attorney General?
(b) the fact that the Provincial Court Judges do not administer their own budget as provided to the Judicial Services Section of the Office of the Attorney General for the Province of Prince Edward Island?

(c) the designation of a place of residence of a particular Provincial Court Judge?
(d) communication between a Provincial Court Judge and the Director of Legal and Judicial Services in the Office of the Attorney General or the Attorney General for the Province of Prince Edward Island on issues relating to the administration of justice in the Province?
(e) the position of the Chief Judge being vacant?
(f) the fact that the Attorney General, via the Director of Legal and Judicial Services, declined to fund, and opposed an application to fund, legal counsel for the Chief Judge of the Provincial Court or Provincial Court Judges, as intervenor(s) in Reference re Remuneration of Provincial Court Judges and the Jurisdiction of the Legislature and Related Matters dated October 11, 1994?
(g) Regulation No. EC631/94 enacted pursuant to the Public Sector Pay Reduction Act, S.P.E.I. 1994, Cap. 51?

and, if so affected, specifically in what way?

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

(a) a general pay reduction for all public sector employees, and for all who hold public office, including Judges, which is enacted by the Legislative Assembly of Prince Edward Island?
(b) a remuneration freeze for all public sector employees, and for all who hold public office, including Judges, which is implemented by the Government of Prince Edward Island or is enacted by the Legislative Assembly of Prince Edward Island?
(c) the fact that Judges' salaries are not automatically adjusted annually to account for inflation?
(d) Provincial Court Judges having the ability to negotiate any aspect of their remuneration package?
(e) Provincial Court Judges' salaries being established directly by the Legislative Assembly for the Province of Prince Edward Island and per the Provincial Court Act, supra, indirectly by other legislative assemblies in Canada?
(f) section 12(2) of the Provincial Court Act, supra, which provides for a leave of absence to a Provincial Court Judge, due to illness, at the discretion of the Lieutenant Governor in Council?
(g) section 13 of the Provincial Court Act, supra, which provides for sabbatical leave to a Provincial Court Judge at the discretion of the Lieutenant Governor in Council?

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

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

(i) An Act to Amend the Provincial Court Act, assented to May 19, 1994, which provides, inter alia, that the remuneration of Provincial Court Judges appointed on or after April 1, 1994, shall be determined for any year by calculating the average of the remuneration of Provincial Court Judges in the Provinces of Nova Scotia, New Brunswick and Newfoundland on April 1 of the immediately preceding year?
(j) the fact that the Attorney General, via the Director of Legal and Judicial Services, declined to fund, and opposed an application to fund, legal counsel for the Chief Judge of the Provincial Court or Provincial Court Judges, as intervenor(s) in Reference re Remuneration of Provincial Court Judges and the Jurisdiction of the Legislature and Related Matters dated October 11, 1994?
(k) Regulation No. EC631/94 enacted pursuant to the Public Sector Pay Reduction Act, supra?

and, if so affected, specifically in what way?

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

ety within the meaning of section 1 of the Canadian Charter of Rights and Freedoms?

* * * * *

Appendix "C"

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

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

* * * * *

Appendix "D"

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

1. (a) Does s. 9 of The Public Sector Reduced Work Week and Compensation

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

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

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

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

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

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

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

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

Her Majesty The Queen in Right of the Province of New Brunswick as represented by the Minister of Finance *Appellant*

v.

Ian P. Mackin *Respondent*

and between

Her Majesty The Queen in Right of the Province of New Brunswick as represented by the Minister of Finance *Appellant*

v.

Douglas E. Rice *Respondent*

and

The Attorney General of Canada, the Attorney General for Ontario, the Attorney General of Quebec, the Attorney General of Manitoba, the Attorney General of British Columbia, the Attorney General for Saskatchewan, the Attorney General for Alberta, the Canadian Judges Conference and the Canadian Association of Provincial Court Judges *Interveners*

Sa Majesté la Reine du chef de la province du Nouveau-Brunswick, représentée par le ministre des Finances *Appelante*

c.

Ian P. Mackin *Intimé*

et entre

Sa Majesté la Reine du chef de la province du Nouveau-Brunswick, représentée par le ministre des Finances *Appelante*

c.

Douglas E. Rice *Intimé*

et

Le procureur général du Canada, le procureur général de l'Ontario, le procureur général du Québec, le procureur général du Manitoba, le procureur général de la Colombie-Britannique, le procureur général de la Saskatchewan, le procureur général de l'Alberta, la Conférence canadienne des juges et l'Association canadienne des juges de cours provinciales *Intervenants*

INDEXED AS: MACKIN *v.* NEW BRUNSWICK (MINISTER OF FINANCE); RICE *v.* NEW BRUNSWICK

RÉPERTORIÉ : MACKIN *c.* NOUVEAU-BRUNSWICK (MINISTRE DES FINANCES); RICE *c.* NOUVEAU-BRUNSWICK

Neutral citation: 2002 SCC 13.

File No.: 27722.

2001: May 23; 2002: February 14.

Present: L'Heureux-Dubé, Gonthier, Iacobucci, Major, Binnie, Arbour and LeBel JJ.

Référence neutre : 2002 CSC 13.

N° du greffe : 27722.

2001 : 23 mai; 2002 : 14 février.

Présents : Les juges L'Heureux-Dubé, Gonthier, Iacobucci, Major, Binnie, Arbour et LeBel.

ON APPEAL FROM THE COURT OF APPEAL FOR NEW BRUNSWICK

Constitutional law — Judicial independence — Provincial courts — Supernumerary judges — Provincial legislation eliminating system of supernumerary judges

EN APPEL DE LA COUR D'APPEL DU NOUVEAU-BRUNSWICK

Droit constitutionnel — Indépendance judiciaire — Cours provinciales — Juges surnuméraires — Loi provinciale éliminant le système de juges surnuméraires et

and replacing it with panel of retired judges paid per diem — Whether legislation violates guarantees of judicial independence — Canadian Charter of Rights and Freedoms, s. 11(d) — Constitution Act, 1867, Preamble — Act to Amend the Provincial Court Act, S.N.B. 1995, c. 6.

Constitutional law — Remedies — Damages — Provincial legislation eliminating system of supernumerary judges and replacing it with panel of retired judges paid per diem — Supernumerary judges successfully challenging constitutionality of legislation — Whether damages claim by supernumerary judges warranted — Constitution Act, 1982, ss. 24(1), 52.

Costs — Solicitor-client costs awarded on appeal — Whether solicitor-client costs appropriate.

In 1995, the New Brunswick *Act to Amend the Provincial Court Act* ("Bill 7") abolished the system of supernumerary judges and replaced it with a panel of retired judges paid on a *per diem* basis. Supernumerary judges, who were judges under the *Provincial Court Act*, received a salary and fringe benefits equivalent to those given to judges sitting full time. Although the *Provincial Court Act* was silent concerning the size of the reduction in workload, supernumerary judges were normally asked to take on only about 40 percent of the usual workload of a full-time judge. Supernumerary judges in office when Bill 7 came into force were required to choose between retiring or returning to sit full time before April 1, 1995. The change was made in the interest of efficiency and flexibility, and for economic and financial reasons. The respondent R began to sit as a supernumerary judge in 1993, but his workload was not significantly reduced between 1993 and his eventual retirement. When Bill 7 became law, he had to return to full-time judicial office. He retired in 1997 and asked to be placed on the panel of retired judges. Prior to the enactment of Bill 7, R had organized his financial and personal affairs in light of the conditions applying to supernumerary judges. The respondent M began to sit as a supernumerary judge in 1988. Until 1990, his workload was not appreciably reduced, but thereafter, the reorganization of his judicial duties enabled him to spend several winters in Australia. M did not express his intention to retire before April 1, 1995, and was deemed to have resumed his duties as a full-time judge. The respondents instituted separate proceedings, successfully challenging the constitutionality of Bill 7 at trial and on appeal, arguing that it unjustifiably affected the tenure and financial security that form part of judicial independence. The respondents' claim for damages was rejected at trial. The Court of Appeal held

le remplaçant par un tableau de juges à la retraite rémunérés sur une base journalière — La loi viole-t-elle les garanties d'indépendance judiciaire? — Charte canadienne des droits et libertés, art. 11d) — Préambule de la Loi constitutionnelle de 1867 — Loi modifiant la Loi sur la Cour provinciale, L.N.-B. 1995, ch. 6.

Droit constitutionnel — Réparations — Dommages-intérêts — Loi provinciale éliminant le système de juges surnuméraires et le remplaçant par un tableau de juges à la retraite rémunérés sur une base journalière — Des juges surnuméraires contestent sa constitutionnalité et ont gain de cause — Ont-ils droit aux dommages-intérêts qu'ils réclament? — Loi constitutionnelle de 1982, art. 24(1), 52.

Dépens — Dépens entre avocat et client en appel — Est-il approprié d'accorder des dépens entre avocat et client?

En 1995, la *Loi modifiant la Loi sur la Cour provinciale* (« Loi 7 ») du Nouveau-Brunswick abolit le système de juges surnuméraires et le remplace par un tableau de juges à la retraite rémunérés sur une base journalière. Les juges surnuméraires, qui étaient juges en vertu de la *Loi sur la Cour provinciale*, bénéficiaient d'un salaire et d'avantages sociaux équivalents à ceux des juges à temps plein. La *Loi sur la Cour provinciale* était muette sur la réduction de leur charge de travail, mais les juges surnuméraires devaient normalement remplir 40 p. 100 de la charge habituelle d'un juge à temps plein. Les juges surnuméraires en poste lors de l'entrée en vigueur de la Loi 7 devaient choisir avant le 1er avril 1995 soit de prendre leur retraite soit de recommencer à siéger à temps complet. La modification était motivée par des raisons d'efficacité et de flexibilité ainsi que par des raisons économiques et financières. L'intimé R devient juge surnuméraire en 1993, mais sa charge de travail ne diminue pas beaucoup entre 1993 et son départ à la retraite. Après l'adoption de la Loi 7, il doit recommencer à siéger à temps plein. Il prend sa retraite en 1997 et demande à être inscrit au tableau des juges à la retraite. Avant l'adoption de la Loi 7, R avait organisé ses affaires financières et personnelles en fonction des conditions liées à ses fonctions de juge surnuméraire. L'intimé M devient juge surnuméraire en 1988. Jusqu'en 1990, sa charge de travail ne diminue pas beaucoup mais, par la suite, le réaménagement de ses affectations judiciaires lui permet de passer plusieurs hivers en Australie. N'ayant pas communiqué son intention de prendre sa retraite avant le 1er avril 1995, M est réputé avoir repris ses fonctions de juge à temps plein. Les intimés engagent des procédures séparées plaidant l'inconstitutionnalité de la Loi 7 pour atteinte injustifiable aux composantes d'inamovibilité et de sécurité financière de l'indépendance judiciaire. Leur

that damages could be awarded and referred the question of the appropriate amount back to the trial judge. The respondents were awarded solicitor-client costs.

Held (Binnie and LeBel JJ. dissenting): The appeal should be allowed in part. Bill 7 is unconstitutional.

Per L'Heureux-Dubé, Gonthier, Iacobucci, Major and Arbour JJ.: Judicial independence is essential to the achievement and proper functioning of a free, just and democratic society based on the principles of constitutionalism and the rule of law. The general test for judicial independence is to ask whether a reasonable person fully informed of all the circumstances would consider that a particular court enjoyed the necessary independent status. This requires independence in fact and a reasonable perception of independence. Only objective legal guarantees are capable of meeting this double requirement. Judicial independence has individual and institutional dimensions, and three essential characteristics: financial security, security of tenure and administrative independence. The constitutional protection of judicial independence requires the existence in fact of these essential characteristics and the maintenance of the perception that they exist. Thus, each of them must be institutionalized through appropriate legal mechanisms.

The opportunity to sit as a supernumerary was not integral to the office of a judge and eliminating that opportunity was not a removal from office. The ability to perform 40 percent of the usual duties but not to work full time should be classified as an inability to perform the duties of a judge. The elimination of the duties of supernumerary judges should be treated as a question relating to financial security. Individually, financial security requires that judges' salaries be provided for by law and that neither the executive nor the legislative branch arbitrarily encroach upon this right in a manner that affects the independence of the courts. Any measure taken by a government that affects any aspect of the remuneration conditions of judges will automatically trigger the application of the principles relating to the institutional dimension of financial security. In particular, governments have a constitutional duty to use an independent, effective and objective body for recommendations on salary reductions, increases or freezes for judges. If these recommendations are ignored, that decision must be justified, if necessary in a court of law, on the basis of a simple rationality test.

demande de dommages-intérêts est rejetée en première instance. La Cour d'appel juge qu'on peut leur accorder des dommages-intérêts et renvoie la question du montant approprié au juge de première instance. Les intimés obtiennent des dépens entre avocat et client.

Arrêt (les juges Binnie et LeBel sont dissidents) : Le pourvoi est accueilli en partie. La Loi 7 est inconstitutionnelle.

Les juges L'Heureux-Dubé, Gonthier, Iacobucci, Major et Arbour : L'indépendance judiciaire est essentielle à la réalisation et au bon fonctionnement d'une société libre, juste et démocratique, fondée sur les principes du constitutionnalisme et de la primauté du droit. Le test général de l'indépendance judiciaire consiste à se demander si une personne raisonnable et bien informée de toutes les circonstances considérerait qu'un tribunal donné jouit du statut d'indépendance requis. Il faut une indépendance dans les faits et une perception raisonnable d'indépendance. Seules des garanties juridiques objectives peuvent satisfaire à cette double exigence. L'indépendance judiciaire a une dimension individuelle et institutionnelle, et trois caractéristiques essentielles : la sécurité financière, l'inamovibilité et l'indépendance administrative. Sa protection constitutionnelle requiert à la fois l'existence en fait de ces caractéristiques essentielles et le maintien de la perception qu'elles existent. Ainsi chacune d'elles doit être institutionnalisée par des mécanismes juridiques appropriés.

La possibilité de siéger comme juge surnuméraire n'était pas partie intégrante de la charge de juge et son élimination n'équivalait pas à une révocation. La capacité de remplir 40 p. 100 des fonctions habituelles, mais non de travailler à temps plein, devrait être caractérisée comme une incapacité de remplir les fonctions de juge. L'élimination des fonctions de juge surnuméraire devrait être traitée comme une question relevant de la sécurité financière. Sur le plan individuel, la sécurité financière exige que le traitement des juges soit prévu par la loi et que les pouvoirs exécutif et législatif ne puissent arbitrairement empiéter sur ce droit de façon à affecter l'indépendance des tribunaux. Toute mesure gouvernementale affectant quelque aspect des conditions de rémunération des juges déclenchera automatiquement l'application des principes liés à la dimension institutionnelle de la sécurité financière. Plus particulièrement, les gouvernements ont l'obligation constitutionnelle de recourir à un organisme indépendant, efficace et objectif qui fera ses recommandations sur les réductions, augmentations et blocages des traitements des juges. Si ces recommandations sont écartées, cette décision doit être justifiée, au besoin devant une cour de justice, sur la base d'un critère de simple rationalité.

Bill 7 violates the institutional guarantees of judicial independence contained in s. 11(*d*) of the *Canadian Charter of Rights and Freedoms* and the Preamble to the *Constitution Act, 1867* and is therefore declared unconstitutional. The system of supernumerary judges constituted an undeniable economic benefit for judges of the Provincial Court appointed before Bill 7 came into force and for eventual candidates for the position of judge in the court. There is no distinction in principle between a straight salary cut and the elimination of offices that offer a clear economic benefit since both raise controversial questions of public policy and resource allocation and raise the possibility of financial manipulation. By failing to refer the question of the elimination of the office of supernumerary judge to an independent, effective and objective body, the New Brunswick government breached a fundamental duty. The lack of a grandfather clause in favour of the supernumerary judges in office and the judges of the Provincial Court appointed before Bill 7 came into force aggravates the violation.

Since the appellant did not adduce any evidence tending to show that Bill 7's constitutional shortcomings were justified under s. 1 of the *Charter*, Bill 7 must therefore be declared invalid even though the New Brunswick government was pursuing a perfectly legitimate purpose in trying to make certain changes to the organization of its judiciary. The declaration of invalidity applies to both the elimination of the office of supernumerary judge and its replacement by the panel of judges. Except with respect to the respondents, the declaration is suspended for six months from the date of judgment. Although the directives issued by this Court in the *Provincial Court Judges Reference* did not acquire their full effect until September 18, 1998, the respondents instituted their proceedings before that decision was rendered. It would be unjust if they were not allowed to take advantage of the finding of unconstitutionality due to the sequence of events.

The respondents' claim for damages is dismissed. An action for damages brought under s. 24(1) of the *Charter* cannot normally be combined with an action for a declaration of invalidity based on s. 52 of the *Constitution Act, 1982*. In this case, the New Brunswick government did not display negligence, bad faith or wilful blindness with respect to its constitutional obligations. Nor was the Minister of Justice's failure to keep his promise to refer Bill 7 to the Law Amendments Committee an instance of bad faith that justified the damage awards.

La Loi 7 est déclarée inconstitutionnelle comme portant atteinte aux garanties institutionnelles d'indépendance judiciaire contenues à l'al. 11*d*) de la *Charte canadienne des droits et libertés* et au préambule de la *Loi constitutionnelle de 1867*. Le système de juges surnuméraires était un avantage économique indéniable pour les juges de la Cour provinciale nommés avant l'entrée en vigueur de la Loi 7 et pour d'éventuels candidats au poste de juge de cette cour. Il n'y a pas de distinction de principe entre une réduction de salaire pure et simple et l'élimination de postes présentant un avantage économique clair puisque les deux suscitent des questions controversées d'intérêt public et de répartition des ressources, et font naître une possibilité de manipulation financière. En omettant de renvoyer la question de l'élimination du poste de juge surnuméraire à un organisme indépendant, efficace et objectif, le gouvernement du Nouveau-Brunswick a manqué à une obligation fondamentale. L'absence de clause de droits acquis en faveur des juges surnuméraires en fonction et des juges de la Cour provinciale nommés avant l'entrée en vigueur de la Loi 7 aggrave la violation.

Puisque l'appelante n'a présenté aucune preuve qui tende à justifier en vertu de l'article premier de la *Charte* les manquements constitutionnels de la Loi 7, la Loi 7 doit être déclarée invalide même si le gouvernement du Nouveau-Brunswick poursuivait une fin parfaitement légitime en voulant apporter certaines modifications à son organisation judiciaire. La déclaration d'invalidité vise à la fois l'élimination du poste de juge surnuméraire et son remplacement par un tableau de juges. Sauf en ce qui concerne les intimés, la déclaration d'inconstitutionnalité est suspendue pour une période de six mois à partir de la date du jugement. Bien que les directives données par la Cour dans le *Renvoi : Juges de la Cour provinciale* n'aient pris plein effet que le 18 septembre 1998, les intimés ont engagé les procédures judiciaires avant cette décision. Il serait injuste de ne pas leur permettre de profiter de la conclusion d'inconstitutionnalité en raison de cette séquence des événements.

La demande des intimés en dommages-intérêts est rejetée. Une action en dommages-intérêts en vertu du par. 24(1) de la *Charte* ne peut normalement être jumelée à une action en déclaration d'invalidité fondée sur l'art. 52 de la *Loi constitutionnelle de 1982*. En l'espèce, le gouvernement du Nouveau-Brunswick n'a pas fait preuve de négligence, de mauvaise foi ou d'aveuglement volontaire à l'égard de ses obligations constitutionnelles. Le non-respect par le ministre de la Justice de sa promesse de soumettre le projet de Loi 7 au Comité de modification des lois n'était pas non plus un acte de mauvaise foi justifiant des dommages-intérêts.

The respondents are to have their costs throughout, on a party-and-party basis. Solicitor-client costs are not appropriate in this case.

Per Binnie and LeBel JJ. (dissenting): The Provincial Court judges in New Brunswick who elected supernumerary status did not enjoy a constitutional right to work only 40 percent of the time in exchange for 100 percent of the salary of a full-time judge.

The essential guarantees of judicial independence, including financial security, are intended for the benefit of the judged, not the judges.

Although the majority's statement of the broad principles of judicial independence was agreed with, the respondents' expectation of a reduced workload was neither spelled out in the Act nor otherwise put in a legally enforceable form. The workload varied dramatically from region to region and the bare concept of a "reduced" workload is too elastic to provide a manageable constitutional standard. The legislature was clearly not prepared to guarantee any fixed and defined benefit, or indeed any benefit at all. The doctrine of judicial independence does not protect "understandings" about specific financial benefits that are pointedly not written into the governing legislation. As the Provincial Court judges were given no guarantee in the Act, the anticipated reduced workload attaching to supernumerary status formed no part of the constitutional guarantee of judicial independence. Supernumerary status was a wholly discretionary potential benefit voluntarily conferred on the judges by the legislature, and its repeal could not and did not undermine the Provincial Court's institutional independence.

Even if the respondents could establish all of the elements of the administrative law doctrine of legitimate expectation, it would not be of assistance since the doctrine does not apply to a body exercising purely legislative functions. Nor can it operate to entitle the respondents to a substantive as opposed to procedural remedy. Furthermore the constitutional requirement of an independent, effective and objective process mandated by the *Provincial Court Judges Reference* was not elaborated by this Court until two years after the amendments in issue here.

Cases Cited

By Gonthier J.

Applied: *Valente v. The Queen*, [1985] 2 S.C.R. 673; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3;

Les intimés ont droit aux dépens entre parties dans toutes les cours. En l'espèce, il n'est pas approprié d'accorder de dépens entre avocat et client.

Les juges Binnie et LeBel (dissidents) : Les juges de la Cour provinciale du Nouveau-Brunswick qui ont choisi de devenir surnuméraires ne jouissaient d'aucun droit constitutionnel de ne travailler que 40 p. 100 du temps en contrepartie d'une rémunération de juge à temps plein.

Les garanties essentielles de l'indépendance judiciaire, dont la sécurité financière, ont été établies au profit des justiciables et non des juges.

Même si l'exposé des principes généraux de l'indépendance judiciaire présenté par les juges majoritaires est accepté, l'expectative des intimés d'une réduction de la charge de travail n'était ni inscrite dans la Loi ni autrement prescrite sous une forme légalement exécutoire. La charge de travail variait considérablement entre les régions et le simple concept de « réduction » de charge de travail est trop extensible pour être une norme constitutionnelle utilisable. Il est évident que la législature n'était pas disposée à garantir un avantage fixe et défini, ou en fait un avantage quelconque. Le principe de l'indépendance judiciaire ne protège pas des « ententes » sur des avantages financiers précis qui sont précisément omis dans la loi applicable. Puisque la Loi ne donnait aux juges de la Cour provinciale aucune garantie, la réduction prévue de la charge de travail attachée au statut de surnuméraire ne faisait pas partie de la garantie constitutionnelle d'indépendance judiciaire. Le statut de surnuméraire était un avantage potentiel discrétionnaire conféré volontairement aux juges par la législature; son abrogation ne pouvait pas miner l'indépendance institutionnelle de la Cour provinciale et ne l'a pas fait.

Même si les intimés pouvaient établir tous les éléments de la théorie de droit administratif relative à l'expectative légitime, cela n'appuierait pas leur contestation puisque la théorie ne s'applique pas à un organe qui exerce des fonctions purement législatives. Elle ne permet pas non plus aux intimés d'avoir droit à une réparation substantielle par opposition à une réparation procédurale. Par ailleurs, la Cour n'a élaboré l'exigence constitutionnelle d'un processus indépendant, efficace et objectif dans le *Renvoi : Juges de la Cour provinciale* que deux ans après les modifications contestées en l'espèce.

Jurisprudence

Citée par le juge Gonthier

Arrêts appliqués : *Valente c. La Reine*, [1985] 2 R.C.S. 673; *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*,

referred to: *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347; *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369; *Beauregard v. Canada*, [1986] 2 S.C.R. 56; *British Columbia (Provincial Court Judge) v. British Columbia* (1997), 40 B.C.L.R. (3d) 289; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1998] 1 S.C.R. 3; *Newfoundland Assn. of Provincial Court Judges v. Newfoundland* (2000), 191 D.L.R. (4th) 225; *Schachter v. Canada*, [1992] 2 S.C.R. 679; *Attorney-General for Alberta v. Attorney-General for Canada*, [1947] A.C. 503; *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *Welbridge Holdings Ltd. v. Greater Winnipeg*, [1971] S.C.R. 957; *Central Canada Potash Co. v. Government of Saskatchewan*, [1979] 1 S.C.R. 42; *Crown Trust Co. v. The Queen in Right of Ontario* (1986), 26 D.L.R. (4th) 41; *Young v. Young*, [1993] 4 S.C.R. 3; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3.

By Binnie J. (dissenting)

Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, [1997] 3 S.C.R. 3; *R. v. McCully*, N.B. Prov. Ct. (Moncton), February 13, 1996; *R. v. Woods* (1996), 179 N.B.R. (2d) 153; *R. v. Lapointe*, [1997] N.B.J. No. 57 (QL); *R. v. Leblanc* (1997), 190 N.B.R. (2d) 70; *Valente v. The Queen*, [1985] 2 S.C.R. 673; *R. v. Lippé*, [1991] 2 S.C.R. 114; *Beauregard v. Canada*, [1986] 2 S.C.R. 56; *Ridge v. Baldwin*, [1964] A.C. 40; *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

Statutes and Regulations Cited

Act to Amend the Provincial Court Act, S.N.B. 1995, c. 6, ss. 1, 2, 3, 9.

Canadian Charter of Rights and Freedoms, ss. 1, 2, 7 to 14, 11(*d*), 24.

Constitution Act, 1867, Preamble, ss. 91, 92, 92(14).

Constitution Act, 1982, ss. 35(1), 52.

Provincial Court Act, R.S.N.B. 1973, c. P-21 [am. 1987, c. 45], ss. 1 "judge", 2(1), 3.1 [ad. 1996, c. 54, s. 1], 4.1 [am. 1988, c. 37, s. 1], 4.2, 6, 6.1 to 6.13, 8(1), 14(2), 22.01 *et seq*.

Young Offenders Act, R.S.C. 1985, c. Y-1.

[1997] 3 R.C.S. 3; **arrêts mentionnés :** *Guimond c. Québec (Procureur général)*, [1996] 3 R.C.S. 347; *Committee for Justice and Liberty c. Office national de l'énergie*, [1978] 1 R.C.S. 369; *Beauregard c. Canada*, [1986] 2 R.C.S. 56; *British Columbia (Provincial Court Judge) c. British Columbia* (1997), 40 B.C.L.R. (3d) 289; *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1998] 1 R.C.S. 3; *Newfoundland Assn. of Provincial Court Judges c. Newfoundland* (2000), 191 D.L.R. (4th) 225; *Schachter c. Canada*, [1992] 2 R.C.S. 679; *Attorney-General for Alberta c. Attorney-General for Canada*, [1947] A.C. 503; *Renvoi relatif aux droits linguistiques au Manitoba*, [1985] 1 R.C.S. 721; *Welbridge Holdings Ltd. c. Greater Winnipeg*, [1971] R.C.S. 957; *Central Canada Potash Co. c. Gouvernement de la Saskatchewan*, [1979] 1 R.C.S. 42; *Crown Trust Co. c. The Queen in Right of Ontario* (1986), 26 D.L.R. (4th) 41; *Young c. Young*, [1993] 4 R.C.S. 3; *Friends of the Oldman River Society c. Canada (Ministre des Transports)*, [1992] 1 R.C.S. 3.

Citée par le juge Binnie (dissident)

Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard, [1997] 3 R.C.S. 3; *R. c. McCully*, C. prov. N.-B. (Moncton), 13 février 1996; *R. c. Woods* (1996), 179 R.N.-B. (2e) 153; *R. c. Lapointe*, [1997] A.N.-B. no 57 (QL); *R. c. Leblanc* (1997), 190 R.N.-B. (2e) 70; *Valente c. La Reine*, [1985] 2 R.C.S. 673; *R. c. Lippé*, [1991] 2 R.C.S. 114; *Beauregard c. Canada*, [1986] 2 R.C.S. 56; *Ridge c. Baldwin*, [1964] A.C. 40; *Nicholson c. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 R.C.S. 311; *Assoc. des résidents du vieux St-Boniface Inc. c. Winnipeg (Ville)*, [1990] 3 R.C.S. 1170; *Renvoi relatif au Régime d'assistance publique du Canada (C.-B.)*, [1991] 2 R.C.S. 525; *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817.

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Loi constitutionnelle de 1867, préambule, art. 91, 92, 92(14).

Loi constitutionnelle de 1982, art. 35(1), 52.

Loi modifiant la Loi sur la Cour provinciale, L.N.-B. 1995, ch. 6, art. 1, 2, 3, 9.

Loi sur la Cour provinciale, L.R.N.-B. 1973, ch. P-21 [mod. 1987, ch. 45], art. 1 « juge », 2(1), 3.1 [aj. 1996, c. 54, art. 1], 4.1 [am. 1988, ch. 37, art. 1], 4.2, 6, 6.1 à 6.13, 8(1), 14(2), 22.01 et suiv.

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APPEAL from a judgment of the New Brunswick Court of Appeal (1999), 40 C.P.C. (4th) 107, 23 C.C.P.B. 1, [1999] N.B.J. No. 544 (QL), allowing the respondent Mackin's appeal and dismissing the province's cross-appeal from a judgment of the Court of Queen's Bench (1998), 202 N.B.R. (2d) 324, 516 A.P.R. 324, 18 C.C.P.B. 30, 21 C.P.C. (4th) 29, [1998] N.B.J. No. 267 (QL). Appeal allowed in part, Binnie and LeBel JJ. dissenting.

APPEAL from a judgment of the New Brunswick Court of Appeal (1999), 235 N.B.R. (2d) 1, 607 A.P.R. 1, 181 D.L.R. (4th) 643, 39 C.P.C. (4th) 195, 22 C.C.P.B. 249, [1999] N.B.J. No. 543 (QL), allowing the respondent Rice's appeal and dismissing the province's cross-appeal from a judgment of the Court of Queen's Bench, [1998] N.B.J. No. 266 (QL). Appeal allowed in part, Binnie and LeBel JJ. dissenting.

Brian A. Crane, *Q.C.*, *Bruce Judah*, *Q.C.*, and *Ritu Gambhir*, for the appellant.

J. Brent Melanson, for the respondent Mackin.

J. Gordon Petrie, *Q.C.*, and *James M. Petrie*, for the respondent Rice.

Doctrine citée

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POURVOI contre un jugement de la Cour d'appel du Nouveau-Brunswick (1999), 40 C.P.C. (4th) 107, 23 C.C.P.B. 1, [1999] A.N.-B. nº 544 (QL), qui a accueilli l'appel de l'intimé Mackin et rejeté l'appel incident de la province contre un jugement de la Cour du Banc de la Reine (1998), 202 R.N.-B. (2e) 324, 516 A.P.R. 324, 18 C.C.P.B. 30, 21 C.P.C. (4th) 29, [1998] A.N.-B. nº 267 (QL). Pourvoi accueilli en partie, les juges Binnie et LeBel sont dissidents.

POURVOI contre un jugement de la Cour d'appel du Nouveau-Brunswick (1999), 235 R.N.-B. (2e) 1, 607 A.P.R. 1, 181 D.L.R. (4th) 643, 39 C.P.C. (4th) 195, 22 C.C.P.B. 249, [1999] A.N.-B. nº 543 (QL), qui a accueilli l'appel de l'intimé Rice et rejeté l'appel incident de la province contre un jugement de la Cour du Banc de la Reine, [1998] A.N.-B. nº 266 (QL). Pourvoi accueilli en partie, les juges Binnie et LeBel sont dissidents.

Brian A. Crane, *c.r.*, *Bruce Judah*, *c.r.*, et *Ritu Gambhir*, pour l'appelante.

J. Brent Melanson, pour l'intimé Mackin.

J. Gordon Petrie, *c.r.*, et *James M. Petrie*, pour l'intimé Rice.

Graham R. Garton, *Q.C.*, and *Karen Cuddy*, for the intervener the Attorney General of Canada.

Lori Sterling and *Sean Hanley*, for the intervener the Attorney General for Ontario.

Monique Rousseau, for the intervener the Attorney General of Quebec.

Deborah Carlson, for the intervener the Attorney General of Manitoba.

George H. Copley, *Q.C.*, for the intervener the Attorney General of British Columbia.

Graeme G. Mitchell, *Q.C.*, for the intervener the Attorney General for Saskatchewan.

Robert C. Maybank, for the intervener the Attorney General for Alberta.

Leigh D. Crestohl, for the intervener the Canadian Judges Conference.

Robert D. Tonn, for the intervener the Canadian Association of Provincial Court Judges.

The judgment of L'Heureux-Dubé, Gonthier, Iacobucci, Major and Arbour JJ. was delivered by

Graham R. Garton, *c.r.*, et *Karen Cuddy*, pour l'intervenant le procureur général du Canada.

Lori Sterling et *Sean Hanley*, pour l'intervenant le procureur général de l'Ontario.

Monique Rousseau, pour l'intervenant le procureur général du Québec.

Deborah Carlson, pour l'intervenant le procureur général du Manitoba.

George H. Copley, *c.r.*, pour l'intervenant le procureur général de la Colombie-Britannique.

Graeme G. Mitchell, *c.r.*, pour l'intervenant le procureur général de la Saskatchewan.

Robert C. Maybank, pour l'intervenant le procureur général de l'Alberta.

Leigh D. Crestohl, pour l'intervenante la Conférence canadienne des juges.

Robert D. Tonn, pour l'intervenante l'Association canadienne des juges de cours provinciales.

Version française du jugement des juges L'Heureux-Dubé, Gonthier, Iacobucci, Major et Arbour rendu par

GONTHIER J. —

I. Introduction

1 This appeal primarily raises the issue of whether the abolition by the legislature of the position of supernumerary judge of the Provincial Court of New Brunswick contravenes the constitutional guarantees of judicial independence in s. 11(*d*) of the *Canadian Charter of Rights and Freedoms* and in the Preamble to the *Constitution Act, 1867*. The incidental issues that arise are whether the respondent judges should be awarded damages and whether costs should be ordered on a solicitor-client basis.

II. Facts

2 The Provincial Court of New Brunswick was established in 1973 by the *Provincial Court Act*,

LE JUGE GONTHIER —

I. Introduction

Le présent appel soulève principalement la question de savoir si l'abolition législative du poste de juge surnuméraire à la Cour provinciale du Nouveau-Brunswick contrevient aux garanties constitutionnelles d'indépendance judiciaire conférées par l'al. 11*d*) de la *Charte canadienne des droits et libertés* et par le préambule de la *Loi constitutionnelle de 1867*. Se posent incidemment les questions de l'opportunité d'octroyer des dommages-intérêts aux juges intimés et des dépens entre avocat et client.

II. Les faits

La Cour provinciale du Nouveau-Brunswick est constituée en 1973 par la *Loi sur la Cour provinciale*,

R.S.N.B. 1973, c. P-21. Section 8(1) of the Act provides that "[e]ach judge is hereby constituted a court of record and, throughout the Province, has all the powers, authority, criminal jurisdiction and quasi-criminal jurisdiction vested in a police magistrate or in two or more justices of the peace sitting and acting together, under any law or statute in force in the Province". It accordingly has substantial criminal jurisdiction. The court is also the youth court designated by the province for the purposes of the *Young Offenders Act*, R.S.C. 1985, c. Y-1. Section 6 of the *Provincial Court Act* provides that a "judge holds office during good behaviour and may be removed from office only for misconduct, neglect of duty or inability to perform his duties". Section 4.2 provides that a "judge shall retire at the age of 75 years". Finally, s. 3.1 states that "[a] judge shall have the same protection and privileges as are conferred upon judges of The Court of Queen's Bench of New Brunswick, for any act done or omitted in the execution of his or her duty".

On January 1, 1988, the *Act to Amend the Provincial Court Act*, S.N.B. 1987, c. 45, the purpose of which was to create the office of supernumerary judge and to eliminate that of deputy judge, came into force. A judge of the Provincial Court could thereby elect to sit as a supernumerary judge if he or she met the following conditions: (i) he or she had reached the age of 65 years and had accumulated 15 years of service; or (ii) he or she had reached the age of 60 years and had accumulated 25 years of service; or, finally, (iii) he or she had reached the age of 70 years and had accumulated 10 years of service. Thus, as the conditions of eligibility for the office of supernumerary judge fully reflected the conditions of eligibility for payment of a retirement pension equivalent to 60 percent of the full salary, an additional choice was given to the judges of the Provincial Court who satisfied these conditions. They could then: retire and receive their pension; continue to sit as a full-time judge; or sit as a supernumerary judge. Section 4.1(5) of the *Provincial Court Act* provided that a supernumerary judge was to remain available in order to perform the duties assigned to him or her "from time to time" by the Chief Judge. It was understood by everyone,

L.R.N.-B. 1973, ch. P-21. Le paragraphe 8(1) de la Loi prescrit que « chacun [de ses] juges constitue une cour d'archives et a, dans toute la province, les pouvoirs, l'autorité et la compétence pénale et quasi pénale, d'un magistrat de police ou de deux juges de paix ou plus, siégeant et agissant ensemble, en vertu de toute loi ou règle de droit en vigueur dans la province ». Elle est donc investie d'une importante compétence pénale. La cour est également le tribunal pour adolescents désigné par la province aux fins de la *Loi sur les jeunes contrevenants*, L.R.C. 1985, ch. Y-1. L'article 6 de la *Loi sur la Cour provinciale* énonce qu'« un juge reste en fonction tant qu'il en est digne et ne peut en être démis que pour inconduite, négligence de ses devoirs ou inaptitude d'exercer ses fonctions ». L'article 4.2 porte qu'un juge doit prendre sa retraite à l'âge de 75 ans. Enfin, l'article 3.1 déclare qu'un juge jouit de la même immunité et des mêmes privilèges que les juges de la Cour du Banc de la Reine du Nouveau-Brunswick, pour tout acte fait ou omis dans l'exécution de ses devoirs.

Le 1er janvier 1988 entre en vigueur la *Loi modifiant la Loi sur la Cour provinciale*, L.N.-B. 1987, ch. 45, qui a notamment pour objet la création des fonctions de juge surnuméraire et l'élimination de celles de juge adjoint. Un juge de la Cour provinciale peut alors choisir de siéger comme juge surnuméraire dans les cas suivants : (i) il a atteint l'âge de 65 ans et a accumulé 15 ans de service; ou (ii) il a atteint l'âge de 60 ans et a accumulé 25 ans de service; ou, enfin, (iii) il a atteint l'âge de 70 ans et a accumulé 10 ans de service. Comme ces conditions d'admissibilité au poste de juge surnuméraire correspondent exactement aux conditions d'admissibilité au paiement d'une pension de retraite équivalant à 60 p. 100 du plein traitement, elles offrent un choix supplémentaire aux juges de la Cour provinciale qui remplissent ces conditions. Ils peuvent alors soit prendre leur retraite et toucher leur pension, soit continuer à siéger comme juge à temps plein, soit siéger comme juge surnuméraire. Le paragraphe 4.1(5) de la *Loi sur la Cour provinciale* dit qu'un juge surnuméraire doit demeurer disponible afin de remplir les tâches qui lui sont assignées « à l'occasion » par le juge en chef. Il est toutefois entendu par tous qu'un juge surnuméraire de la Cour

however, that while a supernumerary judge of the Provincial Court received a salary and fringe benefits equivalent to those given to judges sitting full time, he or she was in practice asked to take on only about 40 percent of the usual workload of a full-time judge.

4 On April 1, 1995, ss. 1 through 8 of the *Act to Amend the Provincial Court Act*, S.N.B. 1995, c. 6 (also called "Bill 7"), came into force. Section 2 provided for the straight abolition of the system of supernumerary judges and s. 3 provided for its replacement by a panel of retired judges sitting at the request of the Chief Judge or the Associate Chief Judge and paid on a *per diem* basis. Also, the supernumerary judges then in office were faced with a choice of retiring or beginning to sit full time again (s. 9(1)). They were required to give notice to the government of their decision before April 1, 1995. The legislation did not contain a so-called "grandfather" clause that would have allowed the supernumerary judges in office at that time as well as the other judges of the Provincial Court appointed before Bill 7 came into force to retain the privileges conferred upon them by law. According to the appellant, the government's decision to abolish the position of supernumerary judge was made for reasons of efficiency and flexibility as well as for economic and financial reasons. Thus, in its plea, it stated that "[t]he repeal of the supernumerary provisions by Bill 7 was a legislative initiative undertaken in the context of overall public fiscal restraint and a reasonable attempt to improve the utilization of resources and cost effectiveness in the administration of the Provincial Court".

5 The respondent Judge Douglas E. Rice joined the provincial judiciary on August 16, 1971. On July 2, 1992, upon reaching the age of 65 years and after sitting for more than 15 years, he was entitled to retire and to receive his pension. Rather than doing so, he decided to exercise his right to sit as a supernumerary judge, which he did starting on April 30, 1993. On April 2, 1995, after Bill 7 became law, he was forced, against his will, to return to a full-time judicial office. He finally retired on October 15, 1997 and asked to be placed on the new panel of judges paid on a *per diem* basis starting on December 4 of

provinciale, s'il bénéficie d'un salaire et d'avantages sociaux équivalents à ceux d'un juge à temps plein, n'est en pratique appelé à remplir qu'environ 40 p. 100 de la charge de travail normale à temps plein.

Le 1er avril 1995 entrent en vigueur les art. 1 à 8 de la *Loi modifiant la Loi sur la Cour provinciale*, L.N.-B. 1995, ch. 6 (« Loi 7 »). L'article 2 prévoit l'abolition pure et simple du système de juges surnuméraires et l'art. 3 son remplacement par un tableau de juges à la retraite, siégeant sur demande du juge en chef ou du juge en chef adjoint et rémunérés sur une base journalière. De plus, les juges surnuméraires alors en poste doivent choisir soit de prendre leur retraite soit de recommencer à siéger à temps complet (par. 9(1)). Leur décision doit être communiquée au gouvernement avant le 1er avril 1995. La législation ne contient pas de clause dite « de droits acquis », qui permettrait aux juges surnuméraires alors en poste ainsi qu'aux autres juges de la Cour provinciale nommés avant l'entrée en vigueur de la Loi 7 de conserver les privilèges qui leur avaient été conférés par la loi. Selon l'appelante, la décision du gouvernement d'abolir le poste de juge surnuméraire était motivée par des raisons d'efficacité et de flexibilité, ainsi que par des raisons économiques et financières. Son argumentation était que [TRADUCTION] « l'abrogation des dispositions de la Loi 7 relatives aux juges surnuméraires était une initiative législative prise dans le contexte de mesures générales de réduction des dépenses publiques et une tentative raisonnable d'améliorer l'utilisation des ressources et l'efficacité financière de l'administration de la Cour provinciale ».

Le juge Douglas E. Rice, intimé, accède à la magistrature provinciale le 16 août 1971. Le 2 juillet 1992, ayant atteint l'âge de 65 ans et exercé les fonctions de juge durant plus de 15 ans, il est en droit de prendre sa retraite et de recevoir sa pension. Au lieu de cela, il décide d'exercer son droit de siéger comme juge surnuméraire, ce qu'il fait à partir du 30 avril 1993. Le 2 avril 1995, après l'adoption de la Loi 7, il doit, contre son gré, recommencer à siéger à temps plein. Il prend finalement sa retraite le 15 octobre 1997 et demande à être inscrit au nouveau tableau de juges rémunérés sur une base journalière

that year. In his written submissions, Judge Rice mentioned that he had organized his financial and personal affairs in light of the conditions applying to his duties as a supernumerary judge.

The respondent Judge Ian P. Mackin joined the provincial judiciary on October 17, 1962. On October 17, 1987, upon reaching the age of 60 years and after accumulating more than 25 years of service, he acquired the right to receive his pension. Nevertheless, on August 15, 1988, he decided, like Judge Rice, to sit as a supernumerary judge. It appears that this reorganization of his judicial duties enabled him to plan the use of his time in such a way that he was able to spend several winters in Australia. Since he did not express his intentions following the enactment of Bill 7, Judge Mackin was deemed, in accordance with s. 9(1) of the Act, to have resumed his duties as a full-time judge. He still held this office as at the date of the hearing before this Court.

Following the coming into force of Bill 7, the two respondents instituted separate proceedings in the New Brunswick courts. Judge Mackin officially informed the government of his intention to bring legal proceedings on April 25, 1995, while Judge Rice submitted his written pleadings on June 24, 1997. The respondents challenged the constitutionality of the legislation abolishing the position of supernumerary judge, arguing that it affected the components of tenure and financial security that form part of judicial independence. Damages and payment of solicitor-client costs were also claimed. In this Court, both cases were joined and argued at the same time.

III. Judgments Under Appeal

A. *New Brunswick Court of Queen's Bench*

(1) *Mackin v. New Brunswick (Minister of Finance)* (1998), 202 N.B.R. (2d) 324

Deschênes J. began by noting the three essential conditions (financial security, security of tenure and administrative independence) and the two

à partir du 4 décembre suivant. Dans sa plaidoirie écrite, le juge Rice mentionne qu'il a organisé ses affaires financières et personnelles en fonction des conditions liées à ses fonctions de juge surnuméraire.

6 Le juge Ian P. Mackin, intimé, accède à la magistrature provinciale le 17 octobre 1962. Le 17 octobre 1987, ayant atteint l'âge de 60 ans et plus de 25 ans de service, il acquiert le droit de toucher sa pension. Néanmoins, le 15 août 1988, il décide, comme le juge Rice, de siéger comme juge surnuméraire. Il appert que ce réaménagement de ses fonctions judiciaires lui a permis de planifier son emploi du temps de façon à passer plusieurs hivers en Australie. N'ayant pas communiqué ses intentions après l'adoption de la Loi 7, le juge Mackin était réputé, conformément au par. 9(1) de cette loi, avoir repris ses fonctions de juge à temps plein. Il occupait toujours ces fonctions à la date de l'audience devant notre Cour.

7 Dans le sillage de l'entrée en vigueur de la Loi 7, les deux intimés engagent des procédures séparées devant les tribunaux du Nouveau-Brunswick. Le juge Mackin communique officiellement au gouvernement son intention d'entamer des procédures judiciaires le 25 avril 1995, tandis que le juge Rice produit sa plaidoirie écrite le 24 juin 1997. Les intimés mettent notamment en cause la constitutionnalité de la législation abolissant le poste de juge surnuméraire, plaidant qu'elle porte atteinte aux composantes d'inamovibilité et de sécurité financière propres à l'indépendance judiciaire. Ils demandent aussi des dommages-intérêts et le paiement de dépens entre avocat et client. Devant notre Cour, les deux dossiers sont joints et plaidés simultanément.

III. Les décisions antérieures

A. *Cour du Banc de la Reine du Nouveau-Brunswick*

(1) *Mackin c. Nouveau-Brunswick (Ministre des Finances)* (1998), 202 R.N.-B. (2e) 324

8 Le juge Deschênes rappelle d'abord les trois conditions essentielles (la sécurité financière, l'inamovibilité et l'indépendance administrative) ainsi que

dimensions (individual and institutional) of judicial independence as set out by this Court in *Valente v. The Queen*, [1985] 2 S.C.R. 673, and in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 ("*Provincial Court Judges Reference*"), in particular. He also mentioned that the judges, whether appointed before or after the creation of the position of supernumerary judge, had definitely developed certain expectations because of the existence of the position. Thus, they were able to plan their professional and financial future accordingly and the facts show that some of them acted in this way. He therefore concluded that, like their pension plan, the existence of the position of supernumerary judge constituted a genuine financial benefit for the judges of the Provincial Court.

9 On the other hand, he was of the opinion that the office of supernumerary judge also had elements that related to the condition of security of tenure, especially in the sense that a supernumerary judge continued to enjoy the same financial benefits as a full-time judge and was forced to take mandatory retirement at the age of 75. On the basis of the test developed in *Valente*, *supra*, at p. 698 — namely, that security of tenure requires "tenure . . . that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner" —, Deschênes J. considered, however, that the legislative abolition of the position of supernumerary judge was not equivalent, strictly speaking, to a dismissal of the supernumerary judges then in office. Consequently, the individual dimension of the condition of security of tenure had not been infringed. However, he added that in terms of both security of tenure and financial security, the issue was institutional in nature rather than individual. Thus, it is not so much the content of the impugned legislation as the process surrounding its enactment that was constitutionally dubious.

10 Starting with the finding that the office of supernumerary judge constituted a financial benefit for the judges of the Provincial Court, Deschênes J. was of the view that the Legislative Assembly of New Brunswick should have submitted its decision to abolish this position to an independent, effective and

les deux dimensions (individuelle et institutionnelle) de l'indépendance de la magistrature, telles qu'exposées par notre Cour, notamment dans *Valente c. La Reine*, [1985] 2 R.C.S. 673, et le *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1997] 3 R.C.S. 3 (« *Renvoi : Juges de la Cour provinciale* »). Il mentionne ensuite que les juges nommés tant avant qu'après la création du poste de juge surnuméraire avaient certainement fondé certaines attentes sur son existence. Aussi pouvaient-ils planifier leur avenir professionnel et financier en conséquence, et les faits démontrent que certains l'ont fait. Il conclut donc qu'au même titre que leur régime de pension, l'existence du poste de juge surnuméraire constituait un important avantage financier pour les juges de la Cour provinciale.

D'autre part, il est d'avis que le statut de juge surnuméraire comportait aussi des éléments liés à l'inamovibilité, notamment en ce qu'un juge surnuméraire continuait de bénéficier des mêmes avantages financiers qu'un juge à temps plein et qu'il était soumis à la retraite obligatoire à l'âge de 75 ans. Le juge Deschênes, se fondant sur le critère élaboré dans *Valente*, p. 698, selon lequel l'inamovibilité requiert « que la charge soit à l'abri de toute intervention discrétionnaire ou arbitraire de la part de l'exécutif ou de l'autorité responsable des nominations », considère cependant que l'abolition par la législature du statut de surnuméraire n'équivalait pas à proprement parler à une révocation des juges surnuméraires alors en fonction. Par conséquent, la dimension individuelle de la condition d'inamovibilité n'avait pas été atteinte. Cependant, il ajoute que, tant pour l'inamovibilité que pour la sécurité financière, la question se situe au niveau institutionnel plutôt qu'individuel. Aussi n'est-ce pas tant le contenu de la législation contestée que le processus de son adoption qui est constitutionnellement douteux.

Ayant conclu que le poste de juge surnuméraire constituait un avantage financier pour les juges de la Cour provinciale, le juge Deschênes est d'avis que la législature du Nouveau-Brunswick devait soumettre sa décision d'abolir ce poste à une commission indépendante, efficace et objective conformément à

objective commission in accordance with what was prescribed in the *Provincial Court Judges Reference*. In fact, the decision was political in nature in two respects. First, it was informed by classic objectives of general public policy: spending cuts and a more efficient administration of justice. It also raised the spectre of interference by the legislative branch in the independence of the judiciary by means of financial manipulation. As a result, approval by a commission became necessary in order to ensure that the judiciary would not let itself — or appear to let itself — be dragged onto the political stage and at the same time jeopardize its independence. In fact, if the situation were otherwise, a reasonable person informed of all the circumstances would conclude that there was an insufficient degree of independence.

Moreover, Deschênes J. was of the opinion that this violation of the constitutional guarantees of independence could not be justified under s. 1 of the *Charter*. Because the violation consisted of a failure to refer the matter to an independent, effective and objective commission, this failure itself must be demonstrably justified. The government merely raised a defence of the reasonably justified nature of the legislation. Whether the legislation was justified or not, Deschênes J. felt that the amendment had been made arbitrarily without any real consultation with the judges affected. Finally, he mentioned that the lack of a grandfather clause was unfair to the judges of the Provincial Court generally, on the one hand, and even more unfair to those judges who sat as supernumeraries, on the other.

Consequently, Deschênes J. declared that s. 2 of the *Act to Amend the Provincial Court Act* was unconstitutional, ordered that the question of the abolition of the office of supernumerary judge be referred immediately to the existing salary commission and suspended the declaration of unconstitutionality until the commission had issued a report on the question.

On the other hand, Deschênes J. refused to award damages to Judge Mackin for the violation of judicial independence by the provincial legislature. First, he noted that s. 24(1) of the *Charter* did not apply because Judge Mackin had not been the

ce que prescrit le *Renvoi : Juges de la Cour provinciale*. En effet, cette décision était de nature politique, et ce à deux égards. D'abord elle visait des objectifs classiques de politique générale d'intérêt public : la réduction des dépenses et une meilleure efficacité de l'administration de la justice. Ensuite, elle évoquait le spectre de l'ingérence du pouvoir législatif dans l'indépendance de la magistrature par le biais de la manipulation financière. De ce fait, le passage par une commission devenait nécessaire afin d'éviter que le judiciaire ne se laisse — ou ne paraisse se laisser — entraîner sur la scène politique et ne mette du même coup son indépendance en péril. En effet, s'il en était autrement, une personne raisonnable informée de toutes les circonstances conclurait à un degré insuffisant d'indépendance.

11 Par ailleurs, le juge Deschênes est d'avis que cette atteinte aux garanties constitutionnelles d'indépendance ne peut être justifiée en vertu de l'article premier de la *Charte*. Puisque l'atteinte consiste à ne pas avoir eu recours à une commission indépendante, efficace et objective, c'est cette omission qui doit être raisonnablement justifiée. Le gouvernement s'est contenté d'invoquer en défense le caractère raisonnablement justifié de la législation. Que la loi soit justifiée ou non, le juge Deschênes considère que la modification a été faite de manière arbitraire, sans véritable consultation des juges affectés. Enfin, il mentionne que l'absence d'une clause de droits acquis était injuste pour l'ensemble des juges de la Cour provinciale et encore plus injuste pour les juges surnuméraires.

12 Par conséquent, le juge Deschênes déclare inconstitutionnel l'art. 2 de la *Loi modifiant la Loi sur la Cour provinciale*, ordonne que la question de l'abolition du poste de juge surnuméraire soit immédiatement soumise à la commission de la rémunération existante, et suspend la déclaration d'inconstitutionnalité jusqu'au dépôt de son rapport sur la question.

13 Par ailleurs, le juge Deschênes refuse d'accorder des dommages-intérêts au juge Mackin pour l'atteinte portée à l'indépendance judiciaire par la législature provinciale. D'abord, il souligne que le par. 24(1) de la *Charte* est inapplicable, parce que

victim of a violation or infringement of his rights or freedoms protected by the *Charter*. Second, the general rule of public law, as set out in *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347, states that damages will not be awarded for the enactment of legislation that is subsequently declared to be unconstitutional, except in the event of bad faith or other wrongful conduct on the part of government institutions.

14 Finally, on the question of costs, Deschênes J. stated that notwithstanding the use of disputed means, Judge Mackin was advancing the legitimate cause of protecting the independence of the judiciary and that he had been partially vindicated in this regard. He accordingly ordered that he be reimbursed for his costs on a party-and-party basis.

(2) *Rice v. New Brunswick*, [1998] N.B.J. No. 226 (QL)

15 Deschênes J. applied the same reasoning to the situation of Judge Rice. He also rejected Judge Rice's argument to the effect that the legislation abolishing the office of supernumerary had been enacted for ulterior or wrongful reasons.

B. *New Brunswick Court of Appeal*

(1) *Rice v. New Brunswick* (1999), 235 N.B.R. (2d) 1

(a) *Ryan J.A.*

16 Ryan J.A. viewed the actions of the provincial government as a violation of the concept of judicial independence. He began by finding that the office of supernumerary judge was a genuinely separate judicial office as opposed to a mere status or position. He then expressed the view that the elimination of the position of supernumerary judge had violated both the condition of financial security and that of security of tenure.

17 According to Ryan J.A., financial security was violated in both its individual and institutional dimensions. With respect to judges who were performing supernumerary duties at the time, their

le juge Mackin n'a pas été victime d'une violation ou d'une négation de ses droits ou libertés garantis par la *Charte*. Ensuite, la règle générale de droit public énoncée dans *Guimond c. Québec (Procureur général)*, [1996] 3 R.C.S. 347, dit qu'il n'y a pas lieu d'accorder des dommages-intérêts en raison de l'adoption d'une loi subséquemment déclarée inconstitutionnelle, sauf en cas de mauvaise foi ou autre conduite fautive de la part des institutions gouvernementales.

Enfin, sur la question des dépens, le juge Deschênes mentionne que, malgré l'utilisation de moyens contestés, le juge Mackin poursuivait la cause légitime de la protection de l'indépendance judiciaire et que raison lui a partiellement été donnée à cet égard. Il ordonne donc que ses dépens lui soient remboursés sur la base des frais entre parties.

(2) *Rice c. Nouveau-Brunswick*, [1998] A.N.-B. nº 226 (QL)

Le juge Deschênes applique le même raisonnement à la situation du juge Rice. Il rejette aussi son argument selon lequel la législation abolissant le poste de surnuméraire aurait été adoptée pour des motifs détournés ou fautifs.

B. *Cour d'appel du Nouveau-Brunswick*

(1) *Rice c. Nouveau-Brunswick* (1999), 235 R.N.-B. (2e) 1

(a) *Le juge Ryan*

Le juge Ryan voit dans les agissements du gouvernement provincial une atteinte à la notion d'indépendance judiciaire. Il commence par déclarer que le poste de juge surnuméraire constitue une véritable charge judiciaire distincte par opposition à un simple « statut » ou « poste ». Il exprime ensuite l'opinion que l'élimination du poste de juge surnuméraire a atteint à la fois la condition de sécurité financière et celle d'inamovibilité.

Selon le juge Ryan, la sécurité financière a été atteinte tant dans sa dimension individuelle qu'institutionnelle. Dans le cas des juges surnuméraires en poste, la sécurité financière a été touchée dans

financial security was affected in its individual dimension whereas in respect of the other judges of the Provincial Court, it was affected in its institutional dimension. He also concluded that there was in fact political interference as a result of financial manipulation. By contrast, he asserted that the guarantee of security of tenure was affected only in its individual dimension because, for the supernumerary judges in office at that time, the abolition of their positions was equivalent to an arbitrary and premature removal.

Since there was a violation of financial security, Ryan J.A. agreed with the trial judge in stating that the case should at the very least have been submitted to an independent, effective and objective commission. However, given his further findings concerning the violation of the condition of security of tenure, he felt that a referral to the existing commission would not be sufficient and that the Act quite simply had to be declared invalid. In any event, he added that the jurisdiction of this commission — which was limited to examining salaries, pension, vacation and sick leave benefits (s. 22.03(1) of the *Provincial Court Act*) — did not extend to the question of the abolition of the position of supernumerary judge.

Moreover, Ryan J.A. felt that the legislation could not be justified under s. 1. First, he maintained that judicial independence went beyond the provisions of the *Charter* and that an attack on an institution that was so fundamental to the Canadian constitutional system was well and truly unjustifiable. He then referred to the arbitrary and unfair nature of the government's actions. Finally, he noted that the lack of a grandfather clause for the benefit of the supernumerary judges and the other judges of the Provincial Court precluded any claim that the violation of judicial independence was minimal.

Concerning the awarding of damages, Ryan J.A. noted that the case related to an exceptional situation involving a veritable attack by the legislative and executive branches against the judiciary. The government of the time could not have been oblivious to what it was doing and must have been aware of the effects its decision would have on the independence of the judiciary. He concluded accordingly

sa dimension individuelle, alors que dans le cas des autres juges de la Cour provinciale, elle a été touchée dans sa dimension institutionnelle. Il conclut aussi qu'il y a eu en fait interférence politique par le biais de la manipulation financière. En revanche, il affirme que la garantie d'inamovibilité n'a été altérée que dans sa dimension individuelle, c'est-à-dire que, dans le cas des juges surnuméraires alors en fonction, l'abolition de leur poste équivalait à une révocation arbitraire et avant terme.

18 Comme il y a eu atteinte à la sécurité financière, le juge Ryan s'accorde avec le juge de première instance pour dire que l'affaire aurait à tout le moins dû être soumise à une commission indépendante, efficace et objective. Cependant, vu ses conclusions supplémentaires quant à l'atteinte à la condition d'inamovibilité, il estime qu'un renvoi à la commission existante ne suffit pas et que la Loi doit être déclarée invalide. De toute façon, ajoute-t-il, la compétence de cette commission se limite à l'examen des salaires, pensions, vacances et congés de maladie (par. 22.03(1) de la *Loi sur la Cour provinciale*) et ne s'étend pas à la question de l'élimination du poste de juge surnuméraire.

19 Par ailleurs, le juge Ryan considère que la législation ne saurait être justifiée en vertu de l'article premier. D'abord, il soutient que l'indépendance judiciaire va au-delà des dispositions de la *Charte* et que l'attaque d'une institution si fondamentale au système constitutionnel canadien est totalement injustifiable. Puis il parle du caractère arbitraire et injuste des mesures gouvernementales. Enfin, il note que l'absence de clause de droits acquis bénéficiant aux juges surnuméraires et aux autres juges de la Cour provinciale réfute tout argument que l'atteinte à l'indépendance judiciaire est minimale.

20 Quant à l'octroi de dommages-intérêts, le juge Ryan souligne qu'il s'agit en l'espèce d'une situation exceptionnelle, mettant en cause une véritable attaque des pouvoirs législatif et exécutif contre le judiciaire. Le gouvernement de l'époque savait certainement ce qu'il faisait et devait être conscient des effets de sa décision sur l'indépendance de la magistrature. Il conclut qu'il convient de mettre

that it was necessary to set aside the principle of qualified government immunity referred to in *Guimond*, *supra*. Consequently, neither negligence nor bad faith necessarily had to be established. Furthermore, there was a direct causal link between the violation of the rights of judges and the harm sustained. Thus, damages could be awarded under s. 24(1) of the *Charter*, or because of the duty of mutual respect owed by the different branches of government to one another. In the alternative, Ryan J.A. considered that the failure of the then-Minister of Justice to keep the promise made to the provincial judges to refer the legislation eliminating the office of supernumerary judge to the Law Amendments Committee constituted sufficient evidence of bad faith justifying the award of damages. However, he decided to refer the question of determining the appropriate amount back to the trial judge.

21 Finally, Ryan J.A. ordered that Judge Rice be paid his legal costs on a solicitor-client basis.

(b) *Drapeau J.A.*

22 Drapeau J.A. concurred with Ryan J.A. He nevertheless made a number of comments of his own on the question of damages. He began by expressing his agreement with Ryan J.A. that evidence of bad faith was not required in order for damages to be awarded in this case. The individual dimension of judicial independence was at issue and both the public and the supernumerary judges personally bore the cost of the provincial government's decision unilaterally to abolish the office of supernumerary judge. He added that the legislation was enacted despite a clear awareness of its effects on the independence of the judiciary and on the supernumerary judges. He accordingly concurred with Ryan J.A. in finding that the traditional rules concerning the award of damages in constitutional proceedings should be set aside. Damages should be awarded not only to compensate the supernumerary judges but also to discourage any other attempt at legislative interference with judicial independence.

de côté le principe de l'immunité gouvernementale qualifiée mentionné dans *Guimond*, précité. Par conséquent, ni la négligence ni la mauvaise foi ne devaient nécessairement être démontrées. De plus, il existe un lien causal direct entre l'atteinte aux droits des juges et le préjudice subi. On peut donc accorder des dommages-intérêts en vertu du par. 24(1) de la *Charte*, ou encore en raison de l'obligation de respect mutuel que se doivent les différentes branches du gouvernement. Subsidiairement, le juge Ryan considère que le manquement du ministre de la Justice de l'époque à la promesse faite aux juges provinciaux de soumettre la législation éliminant le poste de juge surnuméraire au Comité de modification des lois constitue une preuve suffisante de mauvaise foi justifiant l'octroi de dommages-intérêts. Il décide toutefois de renvoyer la question de la détermination du montant approprié au juge de première instance.

Enfin, le juge Ryan ordonne l'adjudication au juge Rice des frais entre avocat et client.

(b) *Le juge Drapeau*

Le juge Drapeau souscrit à l'opinion du juge Ryan. Il offre néanmoins quelques commentaires de son cru sur la question des dommages-intérêts. Dans un premier temps, il est d'accord avec le juge Ryan pour dire qu'une preuve de mauvaise foi n'était pas requise pour l'octroi de dommages-intérêts en l'espèce. La dimension individuelle de l'indépendance judiciaire a été touchée, et tant le public que les juges surnuméraires personnellement ont fait les frais de la décision du gouvernement provincial d'abolir unilatéralement le poste de juge surnuméraire. Il ajoute que la législation a été adoptée malgré une connaissance manifeste de ses effets sur l'indépendance judiciaire et sur les juges surnuméraires. Il s'accorde donc avec le juge Ryan pour conclure que les règles traditionnelles relatives à l'octroi de dommages-intérêts en matière constitutionnelle devraient être écartées. Des dommages-intérêts devraient être alloués non seulement pour compenser les juges surnuméraires, mais également pour décourager toute autre tentative d'ingérence législative dans l'indépendance judiciaire.

(c) *Daigle C.J.N.B., dissenting*

Daigle C.J.N.B. examined each of the first two conditions of judicial independence in order to determine whether they were violated by the enactment of Bill 7. His analysis focused first on the question of financial security. In his opinion, it was compromised in that the abolition of the office of supernumerary judge was likely to affect the judges' planning of the conditions for their retirement. Thus, although the situation did not involve a reduction as such in their net salary — since they retained the possibility of earning the equivalent of a full-time salary — the fact remained that the judges of the Provincial Court could legitimately rely on the existence of such a position in order to make certain plans of an economic and financial nature.

According to Daigle C.J.N.B., however, the guarantee of financial security was affected only in its institutional dimension. According to the principles set out in *Provincial Court Judges Reference*, *supra*, the Legislative Assembly of New Bunswick had a duty to refer the question of the elimination of the office of supernumerary judge to an independent, effective and objective commission. However, he noted that there was no evidence in the case to suggest that there might have been any attempt at economic interference on the part of the legislature at the expense of the judges of the Provincial Court.

Daigle C.J.N.B. was, moreover, of the view that the constitutional guarantees of security of tenure were not infringed since it was possible for the supernumerary judges to resume their duties full time. An analysis of the *Provincial Court Act* supported him in this conclusion. First, he noted that s. 1 of the Act defined "judge" as including both a judge and a supernumerary judge. He added that s. 6 provided that a judge should hold office during good behaviour and could be removed from office only for misconduct, neglect of duty or inability to perform his duties. He also noted that a judge did not have to retire in order to become supernumerary. Rather, a supernumerary judge continued to exercise his duties as a judge of the Provincial Court until retiring. In short, Daigle C.J.N.B. found that there was no separate judicial office relating to the

(c) *Le juge en chef Daigle, dissident*

23 Le juge en chef Daigle examine chacune des deux premières conditions de l'indépendance judiciaire, afin de déterminer si elles ont été violées par l'adoption de la Loi 7. Son analyse se porte d'abord sur la question de la sécurité financière. À son avis, elle a été compromise en ce que l'abolition du poste de juge surnuméraire était susceptible d'altérer la planification par les juges des conditions de leur retraite. Bien qu'il ne s'agisse pas là à proprement parler d'une réduction de leur salaire net, puisqu'ils conservaient la possibilité de recevoir l'équivalent d'un traitement à temps plein, il demeure que les juges de la Cour provinciale pouvaient légitimement compter sur l'existence d'un tel poste dans leurs planifications d'ordre économique et financier.

24 Selon le juge en chef Daigle, toutefois, la garantie de sécurité financière a été touchée dans sa dimension institutionnelle uniquement. Suivant les enseignements du *Renvoi : Juges de la Cour provinciale*, il était du devoir de la législature du Nouveau-Brunswick de soumettre la question de l'élimination du poste de juge surnuméraire à une commission indépendante, efficace et objective. Il souligne cependant qu'aucune preuve en l'espèce ne permet de croire qu'il y a eu tentative d'ingérence économique de la part du législatif aux dépens des juges de la Cour provinciale.

25 Le juge en chef Daigle est par ailleurs d'avis que les garanties constitutionnelles d'inamovibilité n'ont pas été touchées puisque les juges surnuméraires pouvaient reprendre leurs fonctions à temps plein. L'analyse de la *Loi sur la Cour provinciale* le conforte dans cette conclusion. Il mentionne d'abord que l'art. 1 de cette loi définissait le terme « juge » comme désignant un juge et un juge surnuméraire. Il ajoute que son art. 6 énonce qu'un juge reste en fonction « tant qu'il en est digne et ne peut en être démis que pour inconduite, négligence de ses devoirs ou inaptitude d'exercer ses fonctions ». Il fait par ailleurs remarquer qu'un juge n'avait pas à prendre sa retraite pour devenir surnuméraire. Le juge surnuméraire continuait à exercer ses fonctions de juge de la Cour provinciale jusqu'à ce qu'il prenne sa retraite. Somme toute, le juge en

office of supernumerary judge. Consequently, the abolition of this position was of no consequence in terms of the security of tenure of the judges of the Provincial Court.

26 He was of the opinion, moreover, that the violation of the institutional guarantees of financial security was not justified under s. 1 of the *Charter*, since the government did not direct its argument to the legitimacy of its decision to ignore its duty to refer the question to an independent, effective and objective commission.

27 On the subject of damages, Daigle C.J.N.B. proceeded to apply the general rules governing the liability in tort of government institutions for enacting legislation that is subsequently declared unconstitutional. Thus, he was of the view that in such cases, damages would be awarded only in very rare instances, including where an act was passed in bad faith or for unworthy reasons. A bare allegation of unconstitutionality could not, on the other hand, justify an award of damages. In this case, not only was the refusal of the Minister of Justice to honour his promise to submit the legislative amendments to the Law Amendments Committee not alleged in the pleadings but, moreover, it does not support a finding of bad faith.

28 Daigle C.J.N.B. added that any relief under s. 24(1) of the *Charter* constituted a personal right that could be exercised only by a person whose fundamental rights had been violated. In this situation, only the institutional dimension of judicial independence was at issue. Furthermore, judicial independence exists for the benefit of the litigants and not for that of the judges. Finally, and in any event, he was of the opinion that a claim for damages could not succeed because the province enacted the legislation in good faith and in accordance with the constitutional teachings of the time. In fact, when Bill 7 came into force, the decision in *Provincial Court Judges Reference*, *supra*, had not yet been rendered.

chef Daigle constate qu'il n'existait pas de charge judiciaire distincte s'attachant au poste de juge surnuméraire. Par conséquent l'abolition de ce poste n'était d'aucune conséquence sur l'inamovibilité des juges de la Cour provinciale.

Il est par ailleurs d'avis que l'atteinte aux garanties institutionnelles de la sécurité financière ne saurait être justifiée en vertu de l'article premier de la *Charte*, puisque le gouvernement n'a pas présenté d'argument sur la légitimité de sa décision de passer outre son obligation de soumettre la question à une commission indépendante, efficace et objective.

Quant à l'octroi de dommages-intérêts, le juge en chef Daigle procède à une application des règles générales de la responsabilité délictuelle des institutions gouvernementales pour l'adoption d'une loi subséquemment déclarée inconstitutionnelle. Il estime que des dommages-intérêts ne seront accordés qu'en de très rares cas, notamment lorsqu'une loi aura été adoptée de mauvaise foi ou pour des raisons indues. Une simple allégation d'inconstitutionnalité ne saurait par contre justifier l'attribution de dommages-intérêts. Or, en l'espèce, non seulement le refus du ministre de la Justice d'honorer sa promesse de soumettre les modifications législatives au Comité de modification des lois n'a-t-il pas été allégué dans les procédures, mais il ne permet pas, au surplus, de conclure à la présence de mauvaise foi.

Le juge en chef Daigle ajoute que toute réparation en vertu du par. 24(1) de la *Charte* constitue un droit personnel qui ne peut être exercé que par une personne dont les droits fondamentaux ont été violés. Or, dans la présente situation, seule la dimension institutionnelle de l'indépendance judiciaire est en cause. En outre, l'indépendance judiciaire existe pour le bénéfice des justiciables et non pour celui des juges. Enfin, il est d'avis de toute façon qu'une demande de dommages-intérêts ne pourrait réussir parce que la province a adopté la législation de bonne foi et en conformité avec les paramètres constitutionnels de l'époque. En effet, au moment de l'entrée en vigueur de la Loi 7, la décision dans le *Renvoi : Juges de la Cour provinciale* n'avait pas encore été rendue.

Because of the infringement of the institutional dimension of financial security, Daigle C.J.N.B. declared Bill 7 to be unconstitutional. However, he ordered a suspension of this declaration for a period of six months to allow the province to correct its approach. He refrained from referring the matter to the existing salary commission since the province could rectify the problem by other means.

Finally, he agreed with the trial judge's opinion that the award of costs as between solicitor and client was quite simply not appropriate in this case. As far as the appeal proceedings were concerned, since each party should, in his view, be successful in part, he would have ordered that they pay their own costs.

(2) *Mackin v. New Brunswick (Minister of Justice)* (1999), 40 C.P.C. (4th) 107

All three judges in the Court of Appeal adopted their reasoning in *Rice* for the decision in *Mackin*.

IV. Relevant Statutory Provisions

Provincial Court Act, R.S.N.B. 1973, c. P-21 (as of March 30, 1995)

4.1(1) A judge appointed under subsection 2(1) may elect to become a supernumerary judge upon meeting the requirements under this Act.

4.1(2) Where a judge appointed under subsection 2(1) intends to become supernumerary, the judge shall give notice to the Minister of election two months prior to the effective date specified in the notice, being a day on which the judge will be eligible to so elect, and the judge shall, effective on that day, be deemed to have elected and given notice on that day.

4.1(3) Where a judge appointed under subsection 2(1) has notified the Minister of the judge's election to give up regular judicial duties and hold office only as a supernumerary judge, the judge shall upon the effective date hold the office of supernumerary judge and shall be paid the salary annexed to that office until the judge ceases to hold office.

4.1(4) A judge appointed under subsection 2(1) may elect to hold office as a supernumerary judge upon

29 À cause de l'atteinte à la dimension institutionnelle de la sécurité financière, le juge en chef Daigle déclare la Loi 7 inconstitutionnelle. Il ordonne cependant une suspension de cette déclaration pour une période de six mois afin de permettre à la province de prendre des mesures correctives. Il s'abstient de renvoyer la question à la commission de la rémunération existante parce que la province pourrait corriger la situation par d'autres moyens.

30 Enfin, il est d'accord avec le juge de première instance que l'adjudication des dépens entre avocat et client n'est tout simplement pas appropriée en l'espèce. Quant aux procédures en appel, comme chaque partie devrait selon lui avoir partiellement gain de cause, il aurait ordonné qu'elles supportent leurs dépens respectifs.

(2) *Mackin c. Nouveau-Brunswick (Ministre de la Justice)* (1999), 40 C.P.C. (4th) 107

31 Les trois juges de la Cour d'appel adoptent leur raisonnement dans l'affaire *Rice* afin de résoudre l'affaire *Mackin*.

IV. Les dispositions législatives

32 *Loi sur la Cour provinciale*, L.R.N.-B. 1973, ch. P-21 (au 30 mars 1995)

4.1(1) Un juge nommé en vertu du paragraphe 2(1) peut choisir de devenir juge surnuméraire en satisfaisant aux conditions prévues par la présente loi.

4.1(2) Lorsqu'un juge nommé en vertu du paragraphe 2(1) a l'intention de devenir juge surnuméraire, il doit en donner avis au Ministre deux mois avant la date de prise d'effet indiquée dans l'avis, celle-ci étant la date à laquelle le juge peut faire son choix, et le juge doit, à partir de ce jour, être réputé avoir choisi et donné avis à cette date.

4.1(3) Lorsqu'un juge nommé en vertu du paragraphe 2(1) a avisé le Ministre de sa décision d'abandonner ses fonctions judiciaires normales et d'occuper seulement le poste de juge surnuméraire, il doit à la date de prise d'effet occuper le poste de juge surnuméraire et recevoir le traitement attaché à ce poste jusqu'à ce qu'il cesse d'occuper son poste.

4.1(4) Un juge nommé en vertu du paragraphe 2(1) peut choisir d'occuper un poste de juge surnuméraire lorsqu'il

(a) attaining the age of sixty-five years and having continued in judicial office for at least fifteen years,

(a.1) attaining the age of sixty years and having continued in judicial office for at least twenty-five years, or

(b) attaining the age of seventy years and having continued in judicial office for at least ten years.

4.1(5) A judge appointed under subsection 2(1) who has elected to hold the office of supernumerary judge shall be available to perform such judicial duties as may be assigned to the judge from time to time by the chief judge or associate chief judge.

6. Subject to this Act, a judge holds office during good behaviour and may be removed from office only for misconduct, neglect of duty or inability to perform his duties.

An Act to Amend the Provincial Court Act, S.N.B. 1995, c. 6

1 Subsection 1(1) of the Provincial Court Act, chapter P-21 of the Revised Statutes, 1973, is amended in the definition "judge" by striking out "and a supernumerary judge".

2 Section 4.1 of the Act is repealed.

9(1) A judge who is a supernumerary judge under the Provincial Court Act immediately before the commencement of this section shall elect, before April 1, 1995, whether to resume the duties of judicial office on a full-time basis or to retire.

9(2) An election by a judge under subsection (1) shall be in writing to the Minister of Justice and shall be effective as of April 1, 1995, if no date is specified in the election, or upon the date specified in the election, whichever is the earlier.

9(3) If a judge fails to make an election under subsection (1) or if the Minister of Justice fails to receive a notice in writing before April 1, 1995, from a judge pursuant to subsection (2), the judge shall be deemed to have resumed the duties of judicial office on a full-time basis in accordance with the Provincial Court Act, effective April 1, 1995.

V. Issues

33 On December 12, 2000, the following constitutional questions were stated:

a) atteint l'âge de soixante-cinq ans et a exercé une fonction judiciaire d'une façon continue pendant au moins quinze ans,

a.1) atteint l'âge de soixante ans et a exercé une fonction judiciaire d'une façon continue pendant au moins vingt-cinq ans, ou

b) atteint l'âge de soixante-dix ans et a exercé une fonction judiciaire d'une façon continue pendant au moins dix ans.

4.1(5) Un juge nommé en vertu du paragraphe 2(1) qui a choisi d'exercer les fonctions de juge surnuméraire doit être disponible pour exercer les fonctions judiciaires qui peuvent lui être assignées à l'occasion par le juge en chef ou le juge en chef associé.

6. Sous réserve de la présente loi, un juge reste en fonction tant qu'il en est digne et ne peut en être démis que pour inconduite, négligence de ses devoirs ou inaptitude d'exercer ses fonctions.

Loi modifiant la Loi sur la Cour provinciale, L.N.-B. 1995, ch. 6

1 Le paragraphe 1(1) de la Loi sur la Cour provinciale, chapitre P-21 des Lois revisées de 1973, est modifié à la définition « juge » par la suppression des mots « , un juge surnuméraire, ».

2 L'article 4.1 de la Loi est abrogé.

9(1) Un juge qui est juge surnuméraire en vertu de la Loi sur la Cour provinciale immédiatement avant l'entrée en vigueur du présent article doit choisir, avant le 1er avril 1995, s'il va reprendre ses fonctions de juge à plein temps ou s'il va prendre sa retraite.

9(2) Le choix d'un juge prévu au paragraphe (1) doit se faire par écrit au ministre de la Justice et prend effet à compter du 1er avril 1995, si aucune date n'a été stipulée dans le choix ou à la date stipulée dans le choix, selon la date qui survient en premier.

9(3) Si un juge ne fait pas le choix prévu au paragraphe (1) ou si le ministre de la Justice ne reçoit pas l'avis écrit d'un juge conformément au paragraphe (2) avant le 1er avril 1995, le juge est réputé avoir repris ses fonctions de juge à plein temps conformément à la Loi sur la Cour provinciale, à compter du 1er avril 1995.

V. Questions en litige

Les questions constitutionnelles suivantes sont formulées le 12 décembre 2000 :

1. Does *An Act to Amend the Provincial Court Act*, S.N.B. 1995, c. 6, which repealed the supernumerary scheme for Provincial Court judges in New Brunswick, interfere with the judicial tenure and financial security of members of the Provincial Court and thereby violate in whole or in part the principle of judicial independence as guaranteed by:

   (a) the Preamble of the *Constitution Act, 1867*, or

   (b) s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*?

2. Does *An Act to Amend the Provincial Court Act*, S.N.B. 1995, c. 6, which repealed the supernumerary scheme for Provincial Court judges in New Brunswick, and which was enacted without reference to an independent remuneration commission, thereby violate in whole or in part the principle of judicial independence as guaranteed by:

   (a) the Preamble of the *Constitution Act, 1867*, or

   (b) s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*?

3. If the answer to question 1(b) or question 2(b) is yes, is the Act demonstrably justified as a reasonable limit prescribed by law under s. 1 of the *Charter*?

VI. Analysis

A. *Constitutional Questions*

(1) Introduction: Judicial Independence

Judicial independence is essential to the achievement and proper functioning of a free, just and democratic society based on the principles of constitutionalism and the rule of law. Within the Canadian Constitution, this fundamental value has its source in s. 11(*d*) of the *Charter* and in the Preamble to the *Constitution Act, 1867*, which states that the Constitution of Canada shall be "similar in Principle to that of the United Kingdom". It was in *Provincial Court Judges Reference*, *supra*, at paras. 82 *et seq.*, that this Court explained in detail the constitutional foundations and scope of judicial independence.

1. La *Loi modifiant la Loi sur la Cour provinciale*, L.N.-B. 1995, ch. 6, qui a abrogé le système surnuméraire des juges de la Cour provinciale du Nouveau-Brunswick, porte-t-elle atteinte au mandat judiciaire et à la sécurité financière des membres de la Cour provinciale et, en conséquence, contrevient-elle en totalité ou en partie au principe de l'indépendance judiciaire garanti, selon le cas, par :

   (a) le préambule de la *Loi constitutionnelle de 1867*,

   (b) l'alinéa 11*d*) de la *Charte canadienne des droits et libertés*?

2. La *Loi modifiant la Loi sur la Cour provinciale*, L.N.-B. 1995, ch. 6, qui a abrogé le système surnuméraire des juges de la Cour provinciale du Nouveau-Brunswick, et qui a été adoptée sans référence à une commission indépendante de rémunération, en conséquence, contrevient-elle en totalité ou en partie au principe de l'indépendance judiciaire garanti, selon le cas, par :

   (a) le préambule de la *Loi constitutionnelle de 1867*,

   (b) l'alinéa 11*d*) de la *Charte canadienne des droits et libertés*?

3. Si la réponse à la question 1(b) ou à la question 2(b) est oui, s'agit-il d'une Loi dont la justification peut se démontrer en tant que limite raisonnable prévue par une règle de droit en vertu de l'article premier de la *Charte*?

VI. Analyse

A. *Questions constitutionnelles*

(1) Introduction : l'indépendance judiciaire

34 L'indépendance judiciaire est essentielle à la réalisation et au bon fonctionnement d'une société libre, juste et démocratique, fondée sur les principes du constitutionnalisme et de la primauté du droit. Au sein de la Constitution canadienne, cette valeur fondamentale trouve sa source dans l'al. 11*d*) de la *Charte* ainsi que dans le préambule de la *Loi constitutionnelle de 1867*, qui énonce que la Constitution du Canada « repos[e] sur les mêmes principes que celle du Royaume-Uni ». C'est dans le *Renvoi : Juges de la Cour provinciale*, par. 82 et suiv., que notre Cour a explicité davantage les assises et la portée constitutionnelles de l'indépendance judiciaire.

35 Generally speaking, the expanded role of the judge as an adjudicator of disputes, interpreter of the law and guardian of the Constitution requires that he or she be completely independent of any other entity in the performance of his or her judicial functions. Such a view of the concept of independence may be found in art. 2.02 of the *Universal Declaration on the Independence of Justice* (reproduced in S. Shetreet and J. Deschênes, eds., *Judicial Independence: The Contemporary Debate* (1985), 447, at p. 450), which states:

> Judges individually shall be free, and it shall be their duty, to decide matters before them impartially, in accordance with their assessment of the facts and their understanding of the law without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason. [Emphasis added.]

The adoption of a broad definition of judicial independence by this Court was confirmed, moreover, in *Provincial Court Judges Reference*, *supra*, at para. 130, where Lamer C.J., for the majority, stated the following:

> Finally, although I have chosen to emphasize that judicial independence flows as a consequence of the separation of powers, because these appeals concern the proper constitutional relationship among the three branches of government in the context of judicial remuneration, I do not wish to overlook the fact that judicial independence also operates to insulate the courts from interference by parties to litigation and the public generally: *Lippé*, *supra*, at pp. 152 *et seq.*, *per* Gonthier J. [Emphasis added.]

36 On the other hand, in order for a judge to remain as far as possible sheltered from pressure and interference from all sources, he or she "should be removed from financial or business entanglement likely to affect or rather to seem to affect him in the exercise of his judicial functions" (S. Shetreet, "Judicial Independence: New Conceptual Dimensions and Contemporary Challenges", in Shetreet and Deschênes, *op. cit.*, 590, at p. 599).

37 The concept of independence accordingly refers essentially to the nature of the relationship between a court and others. This relationship must be marked by a form of intellectual separation that allows the judge to render decisions based solely

De façon générale, le rôle élargi du juge en tant qu'arbitre des litiges, interprète du droit et gardien de la Constitution exige qu'il soit complètement indépendant de toute autre entité dans l'exercice de ses fonctions judiciaires. L'on retrouve notamment une telle conception de la notion d'indépendance à l'art. 2.02 de la *Déclaration universelle sur l'indépendance de la justice* (dans S. Shetreet et J. Deschênes, dir., *Judicial Independence : The Contemporary Debate* (1985), 462, p. 465) qui énonce :

> Le juge est libre et tenu de régler les affaires dont il est saisi en toute impartialité, selon son interprétation des faits et de la loi, sans être soumis à des restrictions, des influences, des incitations, des pressions, des menaces ou des ingérences, directes ou indirectes, de quelque origine que ce soit. [Je souligne.]

Notre Cour confirme l'adoption d'une définition large de l'indépendance judiciaire dans le *Renvoi : Juges de la Cour provinciale*, par. 130, où le juge en chef Lamer, écrivant pour la majorité, précise :

> Enfin, même si j'ai choisi d'insister sur le fait que l'indépendance de la magistrature est une conséquence de la séparation des pouvoirs, comme les présents pourvois concernent les rapports constitutionnels que doivent entretenir les trois pouvoirs de l'État relativement à la rémunération des juges, je ne voudrais pas faire abstraction du fait que l'indépendance de la magistrature protège également les tribunaux contre l'ingérence des parties aux litiges dont ils sont saisis et du public en général : *Lippé*, précité, aux pp. 152 et suiv., le juge Gonthier. [Je souligne.]

D'autre part, pour demeurer autant que possible à l'abri des pressions et ingérences de toute origine, le juge [TRADUCTION] « doit être tenu à l'écart des démêlés financiers ou d'affaires susceptibles d'influer, ou plutôt de sembler influer, sur lui dans l'exercice de ses fonctions judiciaires » (S. Shetreet, « Judicial Independence : New Conceptual Dimensions and Contemporary Challenges », dans Shetreet et Deschênes, *op. cit.*, 590, p. 599).

La notion d'indépendance se rapporte donc essentiellement à la nature de la relation entre un tribunal et toute autre entité. Cette relation doit être caractérisée par une forme de séparation intellectuelle qui permet au juge de rendre des décisions que seules

on the requirements of the law and justice. The legal standards governing judicial independence, which are the sources governing the creation and protection of the independent status of judges and the courts, serve to institutionalize this separation. Moreover, the Preamble to the *Constitution Act, 1867* and s. 11(*d*) of the *Charter* give them a fundamental status by placing them at the highest level of the legal hierarchy.

The general test for the presence or absence of independence consists in asking whether a reasonable person who is fully informed of all the circumstances would consider that a particular court enjoyed the necessary independent status (*Valente*, *supra*, at p. 689; *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369). Emphasis is placed on the existence of an independent status, because not only does a court have to be truly independent but it must also be reasonably seen to be independent. The independence of the judiciary is essential in maintaining the confidence of litigants in the administration of justice. Without this confidence, the Canadian judicial system cannot truly claim any legitimacy or command the respect and acceptance that are essential to it. In order for such confidence to be established and maintained, it is important that the independence of the court be openly "communicated" to the public. Consequently, in order for independence in the constitutional sense to exist, a reasonable and well-informed person should not only conclude that there is independence in fact, but also find that the conditions are present to provide a reasonable perception of independence. Only objective legal guarantees are capable of meeting this double requirement.

As was explained in *Valente*, *supra*, at p. 687, and in the *Provincial Court Judges Reference*, *supra*, at paras. 118 *et seq.*, the independence of a particular court includes an individual dimension and an institutional dimension. The former relates especially to the person of the judge and involves his or her independence from any other entity, whereas the latter relates to the court to which the judge belongs and involves its independence from the executive

les exigences du droit et de la justice inspirent. Les normes juridiques relatives à l'indépendance judiciaire, sources de la création et de la protection du statut indépendant des juges et des tribunaux, servent à institutionnaliser cette séparation. Le préambule de la *Loi constitutionnelle de 1867* et l'al. 11*d*) de la *Charte* leur confèrent par ailleurs un statut fondamental en les plaçant au plus haut niveau de la hiérarchie juridique.

38 Le test général de la présence ou de l'absence d'indépendance consiste à se demander si une personne raisonnable et bien informée de toutes les circonstances considérerait qu'un tribunal donné jouit du statut indépendant requis (*Valente*, précité, p. 689; *Committee for Justice and Liberty c. Office national de l'énergie*, [1978] 1 R.C.S. 369). L'accent est mis sur l'existence d'un statut indépendant, car non seulement faut-il qu'un tribunal soit effectivement indépendant, il faut aussi qu'on puisse raisonnablement le percevoir comme l'étant. L'indépendance de la magistrature est essentielle au maintien de la confiance du justiciable dans l'administration de la justice. Sans cette confiance, le système judiciaire canadien ne peut véritablement prétendre à la légitimité, ni commander le respect et l'acceptation qui lui sont essentiels. Afin que cette confiance soit établie et assurée, il importe que l'indépendance des tribunaux soit notoirement « communiquée » au public. Par conséquent, pour qu'il y ait indépendance au sens constitutionnel, il faut qu'une personne raisonnable et bien informée puisse conclure non seulement à l'existence de l'indépendance dans les faits, mais également constater l'existence de conditions suscitant une perception raisonnable d'indépendance. Seules des garanties juridiques objectives sont en mesure de satisfaire à cette double exigence.

39 Comme l'expliquent l'arrêt *Valente*, p. 687, et le *Renvoi : Juges de la Cour provinciale*, par. 118 et suiv., l'indépendance d'un tribunal donné comprend une dimension individuelle et une dimension institutionnelle. La première s'attache plus particulièrement à la personne du juge et intéresse son indépendance vis-à-vis de toute autre entité, alors que la seconde s'attache au tribunal auquel il appartient et intéresse son indépendance vis-à-vis

and legislative branches of the government. The rules relating to these dimensions result from somewhat different imperatives. Individual independence relates to the purely adjudicative functions of judges — the independence of a court is necessary for a given dispute to be decided in a manner that is just and equitable — whereas institutional independence relates more to the status of the judiciary as an institution that is the guardian of the Constitution and thereby reflects a profound commitment to the constitutional theory of the separation of powers. Nevertheless, in each of its dimensions, independence is designed to prevent any undue interference in the judicial decision-making process, which must be based solely on the requirements of law and justice.

40 Within these two dimensions will be found the three essential characteristics of judicial independence set out in *Valente*, *supra*, namely financial security, security of tenure and administrative independence. Together, these characteristics create the relationship of independence that must exist between a court and any other entity. Their maintenance also contributes to the general perception of the court's independence. Moreover, these three characteristics must also be seen to be protected. In short, the constitutional protection of judicial independence requires both the existence in fact of these essential characteristics and the maintenance of the perception that they exist. Thus, each of them must be institutionalized through appropriate legal mechanisms.

41 This being the case, it remains for me to determine whether the elimination of the office of supernumerary judge in the Provincial Court of New Brunswick violates judicial independence by breaching one or more of its essential characteristics in either of its dimensions.

(2) Elimination of the Office of Supernumerary Judge and Judicial Independence

(a) *Security of Tenure*

42 In *Valente*, *supra*, at p. 695-96, it was found that in its individual dimension, the security of tenure provided for provincial court judges in Canada generally

des pouvoirs exécutif et législatif du gouvernement. Les règles attachées à ces deux dimensions découlent d'ailleurs d'impératifs quelque peu différents. L'indépendance individuelle s'attache aux fonctions purement juridictionnelles des juges, car le tribunal doit être indépendant pour trancher un litige donné de façon juste et équitable, alors que l'indépendance institutionnelle s'attache davantage au statut du judiciaire en tant qu'institution gardienne de la Constitution et reflète par le fait même un profond engagement envers la théorie constitutionnelle de la séparation des pouvoirs. Néanmoins, dans chacune de ses dimensions, l'indépendance vise à empêcher toute ingérence indue dans le processus de décision judiciaire, lequel ne doit être inspiré que par les exigences du droit et de la justice.

Au sein de ces deux dimensions s'inscrivent les trois caractéristiques essentielles à l'indépendance judiciaire énoncées dans *Valente*, soit la sécurité financière, l'inamovibilité et l'indépendance administrative. Ensemble, elles établissent la relation d'indépendance qui doit exister entre un tribunal et toute autre entité. Leur maintien conforte également la perception générale d'indépendance du tribunal. D'ailleurs, ces trois caractéristiques doivent elles aussi être perçues comme étant garanties. En somme, la protection constitutionnelle de l'indépendance judiciaire requiert à la fois l'existence en fait de ces caractéristiques essentielles et le maintien de la perception qu'elles existent. Ainsi chacune d'elles doit être institutionnalisée au travers de mécanismes juridiques appropriés.

Cela étant, il me reste à déterminer si l'élimination du poste de juge surnuméraire à la Cour provinciale du Nouveau-Brunswick viole l'indépendance judiciaire par l'atteinte à l'une ou à plusieurs de ses caractéristiques essentielles dans l'une ou l'autre de ses dimensions.

(2) L'élimination du poste de juge surnuméraire et l'indépendance judiciaire

(a) *L'inamovibilité*

L'arrêt *Valente*, précité, p. 695-696, constate que, dans sa dimension individuelle, l'inamovibilité conférée aux juges de cours provinciales au Canada

required that they may not be dismissed by the executive before the age of retirement except for misconduct or disability, following a judicial inquiry. Similarly, in New Brunswick, s. 4.2 of the *Provincial Court Act* provides that a judge shall retire at the age of 75 and ss. 6.1 to 6.13 provide that a judicial inquiry shall be held in order to adjudicate on the merits of a recommendation that a judge be removed from office.

It was stated further that, in order for the individual dimension of security of tenure to be constitutionally protected, it was sufficient that a judge could be removed from office only for a reason relating to his or her capacity to perform his or her judicial duties (*Valente*, *supra*, at p. 697). Any arbitrary removal is accordingly prohibited. In this context, s. 6 of the *Provincial Court Act* seems to create adequate protection for judges of the Provincial Court of New Brunswick by indicating that "a judge holds office during good behaviour and may be removed from office only for misconduct, neglect of duty or inability to perform his duties".

In the first place, therefore, it is necessary to determine whether the elimination of the office of supernumerary judge constituted an arbitrary removal of the respondent judges from office. To this end, the nature of their office must be examined and defined on the basis of the relevant legislation.

In order to find that there was a removal from office, the judges in the majority in the Court of Appeal relied first on the proposition that the functions of the supernumerary judge constituted a genuine separate judicial office, as opposed to a mere status. Therefore, according to Ryan J.A., the characteristic of security of tenure would apply separately to this office and consequently, a supernumerary judge could not be removed from office otherwise than for a reason linked to his or her ability to perform the duties of that office and following a judicial inquiry. Since the respondents had their offices as supernumerary judges abolished by legislation with no reason given that related to their ability to perform their duties and without any form of inquiry, not only was there a removal from office but

signifie généralement qu'ils ne peuvent être révoqués par l'exécutif avant l'âge de la retraite que pour mauvaise conduite ou invalidité, après enquête judiciaire. Ainsi, au Nouveau-Brunswick, l'art. 4.2 de la *Loi sur la Cour provinciale* établit qu'un juge doit prendre sa retraite à l'âge de 75 ans et les art. 6.1 à 6.13 prévoient la tenue d'une enquête judicaire afin de statuer sur le bien-fondé d'une recommandation de révocation d'un juge.

43 On ajoute que, pour que la dimension individuelle de l'inamovibilité soit constitutionnellement protégée, il suffit qu'un juge ne puisse être révoqué que pour un motif lié à sa capacité d'exercer les fonctions judiciaires (*Valente*, p. 697). Toute révocation arbitraire est donc proscrite. À cet égard, l'art. 6 de la *Loi sur la Cour provinciale* paraît établir une protection adéquate pour les juges de la Cour provinciale du Nouveau-Brunswick en énonçant qu' « un juge reste en fonction tant qu'il en est digne et ne peut en être démis que pour inconduite, négligence de ses devoirs ou inaptitude d'exercer ses fonctions ».

44 Il s'agit donc à prime abord de déterminer si l'élimination du poste de juge surnuméraire constituait une révocation arbitraire des juges intimés. Pour ce faire, la nature de leur charge doit être examinée et définie à partir de la législation pertinente.

45 Afin de conclure à la présence d'une révocation, les juges majoritaires en Cour d'appel se fondent d'abord sur la proposition selon laquelle les fonctions de juge surnuméraire constituent une véritable charge judiciaire distincte, par opposition à un simple statut. De ce fait, selon le juge Ryan, la caractéristique d'inamovibilité s'appliquerait distinctement à cette charge et par conséquent un juge surnuméraire ne pourrait être révoqué que pour un motif lié à sa capacité d'exercer les fonctions de sa charge, après enquête judiciaire. Comme les intimés ont vu leurs charges de juges surnuméraires abolies par voie législative en l'absence de motif lié à leur capacité d'exercer leurs fonctions et en l'absence de toute forme d'enquête, non seulement y a-t-il eu révocation,

this removal was arbitrary and unconstitutional in nature.

46 With the greatest respect, it is my opinion that this reasoning is ill-founded to the extent that the interpretation of the relevant legislation as a whole does not support its essential premise. In my judgment, there was simply no removal from the judicial office held by the respondent judges in this case.

47 First, s. 1 of the *Provincial Court Act* defined "judge" as including both a judge and a supernumerary judge. This means that, in electing to become a supernumerary, a judge nevertheless remained a judge of the Provincial Court. This finding is supported by the fact that a judge did not previously have to retire in order to become supernumerary. Rather, the judge decided to exercise his or her duties as a judge of the Provincial Court under different terms until he or she retired. Finally, it must be borne in mind that s. 9(1) of Bill 7 gave the supernumerary judges the possibility of resuming their duties full time. Obviously, therefore, there simply was no separate office linked to the position of supernumerary judge. Essentially, this position merely involved a reorganization of the workload of a judge of the Provincial Court. Consequently, there never was a real removal from office in this case and Judges Mackin and Rice at all times retained their security of tenure as judges of the Provincial Court.

48 Moreover, it was suggested that the possibility of sitting as a supernumerary judge was an integral part of the office of Provincial Court judge so that the elimination of this position could affect its integrity. The security of tenure of all provincial judges appointed before Bill 7 came into force would therefore have been infringed since the conditions applying to their office would have been fundamentally altered. Here again, I cannot accept such an argument. It seems to me to be a clear exaggeration to suggest that the possibility that a judge of the Provincial Court can sit as a supernumerary is an integral part of his main office and that the elimination of this possibility is therefore equivalent to

mais cette révocation était arbitraire et inconstitutionnelle.

Avec le plus grand respect, je suis d'avis que ce raisonnement est mal fondé, dans la mesure où sa proposition essentielle ne survit pas à une interprétation de l'ensemble de la législation pertinente. Selon moi, il n'y a tout simplement pas eu révocation de la charge judiciaire occupée par les juges intimés en l'espèce.

D'abord, l'art. 1 de la *Loi sur la Cour provinciale* définissait le terme « juge » comme incluant à la fois un juge et un juge surnuméraire. Cela signifie qu'un juge, en choisissant de devenir surnuméraire, demeurait néanmoins un juge de la Cour provinciale. Cette constatation est confortée par le fait qu'un juge n'était pas préalablement tenu de prendre sa retraite pour devenir surnuméraire. Il décidait plutôt d'exercer ses fonctions de juge de la Cour provinciale, selon des modalités différentes, jusqu'à ce qu'il prenne sa retraite. Enfin, il faut garder à l'esprit que le par. 9(1) de la Loi 7 donnait la possibilité aux juges surnuméraires de reprendre leurs fonctions à temps plein. À l'évidence, donc, il n'existait tout simplement pas de charge distincte attachée au poste de juge surnuméraire. Essentiellement, ce poste ne comportait qu'un réaménagement de la charge de travail de juge de la Cour provinciale. Par conséquent, il n'y a jamais eu de véritable révocation en l'espèce et les juges Mackin et Rice sont en tout temps demeurés inamovibles en tant que juges de la Cour provinciale.

On a par ailleurs suggéré que la possibilité de siéger comme juge surnuméraire faisait partie intégrante de la charge de juge de la Cour provinciale, de sorte que son élimination pouvait altérer l'intégrité de cette charge. L'inamovibilité de tous les juges provinciaux nommés avant l'entrée en vigueur de la Loi 7 aurait donc été atteinte, en ce que les conditions s'attachant à leur charge auraient été fondamentalement remaniées. Là encore, je ne peux me résoudre à accepter une telle proposition. Il me paraît clairement exagéré de laisser entendre que la possibilité pour un juge de la Cour provinciale de siéger comme surnuméraire est partie intégrante de sa charge principale et que par conséquent

removal from office. As I noted earlier, I view the definition of the duties of a supernumerary judge as pertaining to the office of a judge of the Provincial Court and not to a separate judicial office. The question as to whether, in certain circumstances, the conditions applying to a particular judicial office can be changed to the point where they are equivalent to a removal from office does not therefore arise in this case.

Finally, it was argued that the elimination of the position of supernumerary judge was contrary to security of tenure in that a judge able to perform 40 percent of the usual duties but unable to work full time could be forced to take early retirement. In my opinion, such a possibility should be classified as an inability to perform the duties of a Provincial Court judge rather than as a removal of that judge from office. Security of tenure within the meaning of the Constitution is therefore not affected. In short, the elimination of the duties of supernumerary judges affects first and foremost the definition of the duties of Provincial Court judges and must accordingly be treated as a question relating to the protection of financial security rather than security of tenure.

(b) *Financial Security*

(i) Overview

In *Valente*, *supra*, only the individual dimension of financial security was considered in connection with the determination of salaries by the executive branch. It was determined at that time that the constitutional requirements in this regard were limited to ensuring that the judges' salaries were provided for by law and that the executive could not arbitrarily encroach upon this right in a manner that affected the independence of the courts. In *Beauregard v. Canada*, [1986] 2 S.C.R. 56, it was confirmed that this obligation also applied to the legislative branch.

In the *Provincial Court Judges Reference*, *supra*, at para. 121, it was clearly indicated that the financial security of provincial court judges also had an institutional dimension, shaping the relationships between the judiciary, on the one hand, and the executive and legislative branches, on the other.

l'élimination de cette possibilité équivaut à révocation. Comme je le note précédemment, je conçois la définition des fonctions de juge surnuméraire comme se rattachant au poste de juge de la Cour provinciale et non comme une charge judiciaire distincte. La question de savoir si, en certaines circonstances, les modalités d'exercice d'une charge judiciaire donnée peuvent être modifiées au point d'équivaloir à une révocation ne se pose donc pas en l'espèce.

49 Enfin, on plaide que l'élimination du poste de juge surnuméraire contrevient au principe d'inamovibilité en ce qu'un juge capable de remplir 40 p. 100 des fonctions habituelles mais incapable de travailler à temps complet pourrait se voir forcé de prendre sa retraite prématurément. À mon avis, il vaut mieux caractériser une telle éventualité comme une incapacité de remplir les fonctions de juge de la Cour provinciale plutôt que comme une révocation. L'inamovibilité au sens de la Constitution n'est donc pas touchée. En somme, l'élimination des fonctions de juge surnuméraire affecte d'abord et avant tout la définition des tâches incombant aux juges de la Cour provinciale et doit par conséquent être traitée comme une question relevant de la protection de la sécurité financière plutôt que de l'inamovibilité.

(b) *La sécurité financière*

(i) Aperçu

50 Dans *Valente*, précité, seule la dimension individuelle de la sécurité financière est abordée, en rapport avec la fixation des traitements par le pouvoir exécutif. Cet arrêt détermine que les exigences constitutionnelles à cet égard se limitent à ce que le traitement des juges soit prévu par la loi et à ce que l'exécutif ne puisse arbitrairement empiéter sur ce droit de façon à affecter l'indépendance des tribunaux. *Beauregard c. Canada*, [1986] 2 R.C.S. 56, confirme que cette obligation s'applique aussi au pouvoir législatif.

51 Le *Renvoi : Juges de la Cour provinciale*, précité, par. 121, précise clairement que la sécurité financière des juges des cours provinciales a aussi une dimension institutionnelle, façonnant les relations entre la magistrature, d'une part, et les pouvoirs exécutif et législatif d'autre part.

52 Although it is a creation of the legislature, the provincial judiciary has important constitutional functions to perform, especially in terms of what it may do: ensure respect for the primacy of the Constitution under s. 52 of the *Constitution Act, 1982*; provide relief for violations of the *Charter* under s. 24; apply ss. 2 and 7 to 14 of the *Charter*; ensure compliance with the division of powers within Confederation under ss. 91 and 92 of the *Constitution Act, 1867*; and render decisions concerning the rights of the aboriginal peoples protected by s. 35(1) of the *Constitution Act, 1982*. In short, given the position occupied by the provincial courts within the Canadian legal system, the Constitution requires them to remain financially independent of the other political branches (*Provincial Court Judges Reference*, *supra*, at paras. 124-30).

53 We are here dealing with a situation in which the New Brunswick legislature decided to make changes in the organization of its judiciary by means of a statute applying to all the judges of the Provincial Court. Such an exercise of power affects interactions of a purely institutional nature between the legislative and judicial branches and is accordingly likely to be subject to the requirements of the institutional dimension of financial security. A violation of the institutional aspect of financial security will, furthermore, have a concrete impact on the financial security of all judges of the Provincial Court.

54 As was stated in *Provincial Court Judges Reference*, *supra*, at para. 131, each of the elements of financial independence at the institutional level results from the constitutional imperative that, as far as possible, the relationship between the judiciary and the other two branches of government should be depoliticized. This imperative makes it necessary for the judiciary to be protected against political interference from the other branches through financial manipulation and for it to be seen to be so protected. Furthermore, one must ensure that it does not become involved in political debates concerning the remuneration of persons paid out of public funds. In fact, the judge's role as a constitutional adjudicator requires that it be isolated therefrom and be seen to be so.

Bien qu'elle soit de création législative, la magistrature provinciale est investie d'importantes fonctions constitutionnelles, notamment en ce qu'elle est habilitée à faire : respecter la primauté de la Constitution en application de l'art. 52 de la *Loi constitutionnelle de 1982*; accorder réparation pour violation de la *Charte*, en vertu de l'art. 24; appliquer les art. 2, et 7 à 14 de la *Charte*; veiller au respect du partage des pouvoirs au sein de la fédération en vertu des art. 91 et 92 de la *Loi constitutionnelle de 1867*; et rendre des décisions relatives aux droits des peuples autochtones protégés par le par. 35(1) de la *Loi constitutionnelle de 1982*. En somme, vu la place occupée par les cours provinciales au sein du système juridique canadien, la Constitution exige qu'elles demeurent financièrement indépendantes des autres pouvoirs politiques (*Renvoi : Juges de la Cour provinciale*, par. 124-130).

Nous sommes confrontés ici à une situation où la législature du Nouveau-Brunswick a décidé de modifier son organisation judiciaire au moyen d'une loi s'appliquant à tous les juges de la Cour provinciale. Un tel exercice de pouvoir touche les interactions d'ordre purement institutionnel entre les pouvoirs législatif et judiciaire et est donc susceptible d'être assujetti aux exigences liées à la dimension institutionnelle de la sécurité financière. Une atteinte à l'aspect institutionnel de la sécurité financière aura, du reste, des retombées concrètes sur la sécurité financière de tous les juges de la Cour provinciale.

Comme l'énonce le *Renvoi : Juges de la Cour provinciale*, par. 131, les éléments de l'indépendance financière au niveau institutionnel découlent chacun de l'impératif constitutionnel qui veut que, autant que possible, les rapports entre le judiciaire et les deux autres pouvoirs de l'État soient dépolitisés. Cet impératif commande que la magistrature soit protégée contre l'ingérence politique des autres pouvoirs par le biais de la manipulation financière et qu'elle soit perçue comme telle. En outre, il faut veiller à ce qu'elle ne soit pas mêlée à des débats politiques sur la rémunération des personnes payées sur les fonds publics. En effet, son rôle d'arbitre constitutionnel requiert que la magistrature en soit et en paraisse isolée.

On the other hand, one must seek to enhance the impartiality of judges as well as the perception of such impartiality by minimizing their involvement in questions concerning their own remuneration while preventing the other branches of government from using their control of public funds in order to interfere with their adjudicative independence.

In the *Provincial Court Judges Reference*, *supra*, at paras. 133-35, three elements or principles were found to be essential to the institutional dimension of financial security.

First, the salaries of provincial court judges may generally be reduced, increased or frozen but in order to do this, governments must resort to a body (usually called a "salary commission") that is independent, effective and objective, and that will make recommendations. The provincial governments have a constitutional duty to make use of this process. The existence of such a body makes it possible for the legislative or executive branch to determine the level of remuneration while allaying the possibility of interference by way of financial manipulation or the perception that such a possibility of interference exists. The recommendations of this commission are not binding on the executive or the legislature. However, they may not be ignored lightly. If a decision is made to ignore them, the decision must be justified, if necessary, in a court of law on the basis of a simple rationality test. Such a process accordingly promotes the impartiality of the judiciary and its appearance by ensuring that the financial security of judges will not be at the mercy of political meddling.

Further, any negotiation — in the sense of trade-offs — concerning the salaries of the judges between a member or representative of the judiciary, on the one hand, and a member or representative of the executive or legislative branch, on the other hand, is prohibited. Such negotiations are fundamentally inconsistent with the independence of the judiciary. First, they are inevitably political as a result of the intrinsic nature of the question of salaries paid from the public purse. Second, the holding of such negotiations would undermine the perception of the

55 D'autre part, il faut chercher à favoriser l'impartialité des juges, ainsi que l'image d'impartialité, en réduisant au minimum leur participation aux débats concernant leur propre rémunération, tout en empêchant les autres branches du gouvernement d'utiliser leur contrôle des finances publiques pour s'immiscer dans leur indépendance juridictionnelle.

56 Dans le *Renvoi : Juges de la Cour provinciale*, par. 133-135, trois éléments, ou principes, sont jugés essentiels à la dimension institutionnelle de la sécurité financière.

57 D'abord, les traitements des juges des cours provinciales peuvent généralement être réduits, augmentés ou bloqués, mais pour ce faire les gouvernements doivent avoir recours à un organisme (généralement appelé « commission de la rémunération ») indépendant, efficace et objectif, qui offrira ses recommendations. Les gouvernements provinciaux ont l'obligation constitutionnelle de recourir à ce processus. La présence d'un tel organisme permet en effet la fixation du niveau de rémunération par le législatif ou l'exécutif, tout en neutralisant la possibilité d'ingérence par la manipulation financière ou la perception qu'une telle possibilité d'ingérence existe. Les recommandations de cette commission ne lient pas l'exécutif ou la législature. Cependant, elles ne doivent pas être écartées à la légère. S'il est décidé de les écarter, cette décision doit être justifiée, au besoin devant une cour de justice, sur la base d'un critère de simple rationalité. Un tel processus favorise donc l'impartialité et l'image d'impartialité de la magistrature, en assurant que la sécurité financière des juges n'est pas à la merci des ingérences politiques.

58 Ensuite, toute négociation, au sens de marchandage, concernant le traitement des juges entre un membre ou représentant de la magistrature, d'une part, et un membre ou représentant de l'exécutif ou du législatif, d'autre part, est interdite. De telles négociations sont fondamentalement incompatibles avec l'indépendance de la magistrature. D'abord, elles sont immanquablement politiques, de par la nature intrinsèque de la question des rémunérations versées sur les fonds publics. De plus, la tenue de telles négociations minerait l'image d'indépendance

independence of the judiciary since the jurisdiction of the provincial courts entails that the government is frequently a party to disputes before those courts and salary negotiations are likely to give rise to certain obvious fears concerning the independence of the judiciary arising from the attitude of the parties to these negotiations.

59 Finally, reductions in the salaries of judges must not result in lowering these below the minimum required by the office of judge. Public trust in the independence of the judiciary would be weakened if the salaries paid to judges were so low that they led people to think that the judges were vulnerable to political or other pressures through financial manipulation. In order to counter the possibility that government inaction could function as a means of financial manipulation because the salaries of judges in constant dollars would be allowed to decline as a result of inflation and also to counter the possibility that these salaries would fall below the minimum required to ensure the independence of the judiciary, the salary commission must convene when a specified period has passed since its last report was submitted in order to examine the adequacy of the judges' salaries in light of the cost of living and other relevant factors.

60 Thus, the need to ensure that the process is depoliticized imposes negative and positive obligations on the legislative and executive branches because not only must they refrain from using their financial powers to influence judges in the performance of their duties, but they must also actively protect the independence of the judiciary by enacting appropriate legislative and institutional instruments.

61 The *Provincial Court Judges Reference*, *supra*, at para. 136, also indicates that these principles apply to the pensions and other benefits given to judges. Hence, any measure taken by government that affects any aspect of the remuneration conditions of judges will automatically trigger the application of the principles relating to the institutional dimension of financial security.

62 It is now necessary to examine whether the functions of supernumerary judges and their abolition

de la magistrature, étant donné que la compétence des tribunaux provinciaux fait que l'État est fréquemment partie aux litiges dont ils sont saisis et que des négociations salariales pourraient faire naître certaines craintes évidentes quant à l'indépendance de la magistrature, du fait de l'attitude des parties à ces négociations.

Enfin, les réductions des traitements des juges ne doivent pas avoir pour effet d'abaisser ces traitements au dessous du minimum requis par la charge de juge. La confiance du public dans l'indépendance de la magistrature serait affaiblie si les traitements versés aux juges étaient si bas qu'ils donneraient à penser que les juges sont vulnérables aux pressions politiques ou autres par le biais de la manipulation financière. Afin de parer à la possibilité que l'inaction du gouvernement puisse servir de moyen de manipulation financière en permettant la dégradation des traitements des juges en dollars constants, à cause de l'inflation, ainsi qu'à la possibilité que ces traitements tombent sous le minimum requis pour assurer l'indépendance de la magistrature, les commissions de la rémunération doivent se réunir après une période déterminée suivant la présentation de leur dernier rapport, afin d'étudier le caractère adéquat des traitements des juges à la lumière du coût de la vie et d'autres facteurs pertinents.

Ainsi, l'impératif de dépolitisation fait peser des obligations négatives et positives sur les pouvoirs législatif et exécutif. Car non seulement doivent-ils s'abstenir d'utiliser leurs pouvoirs financiers pour influencer les juges dans l'exercice de leurs fonctions, ils doivent, au surplus, protéger activement l'indépendance de la magistrature par l'adoption d'instruments législatifs et institutionnels appropriés.

Le *Renvoi : Juges de la Cour provinciale*, par. 136, précise également que ces principes s'appliquent aux pensions et autres avantages accordés aux juges. Donc, toute mesure gouvernementale affectant quelque aspect des conditions de rémunération des juges déclenchera automatiquement l'application des principes liés à la dimension institutionnelle de la sécurité financière.

Il faut donc examiner maintenant si les fonctions de juge surnuméraire et leur abolition ont une

have an impact on the financial security of judges of the Provincial Court.

(ii) Application to the Instant Case

1. *Does the Elimination of the Office of Supernumerary Judge Violate the Financial Security of the Judges of the Provincial Court?*

It appears that when it was created, the office of supernumerary judge was thought to provide a certain flexibility within the organization of the provincial judicial system. On the other hand, it enabled the government to benefit from the expertise of experienced judges while paying only the difference between a full salary and the pension that would in any event have been paid to a judge who had elected to retire. Hence, the conditions of eligibility for the office of supernumerary judge have always accurately reflected those of eligibility for a retirement pension. Moreover, these duties have already been described as creating a "useful bridge towards retirement" (M. L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (1995), at p. 46 (emphasis added)).

For a judge of the Provincial Court of New Brunswick who had met certain conditions of age and seniority, the possibility of becoming a supernumerary judge was added to those of retiring and receiving a pension, on the one hand, and continuing to sit full time, on the other hand. Clearly, the only way to make such a position attractive was to offer conditions that were more advantageous than those linked to retirement or full-time duties.

Normally, a judge of the Provincial Court of New Brunswick who became a supernumerary judge enjoyed a substantial reduction in his or her workload while receiving a full salary. However, the *Provincial Court Act* was silent concerning the relative size of this reduction and, in s. 4.1(5), merely left this decision to the Chief Judge of the Court. In theory, therefore, this reduction could have been minimal or even non-existent. That was, in fact, what happened in the case of Judge Rice, who had to sit full time despite his supernumerary status because of the shortage of judges. However,

incidence sur la sécurité financière des juges de la Cour provinciale.

(ii) Application à l'espèce

1. *L'élimination du poste de juge surnuméraire porte-t-elle atteinte à la sécurité financière des juges de la Cour provinciale?*

63 Il appert qu'au moment de son instauration on pensait que le poste de juge surnuméraire procurerait une certaine flexibilité dans l'organisation du système judiciaire provincial. D'autre part, cela permettait au gouvernement de profiter de l'expertise de juges expérimentés, tout en défrayant uniquement la différence entre un plein traitement et la pension qui devait de toute façon être payée à un juge ayant opté pour la retraite. Ainsi, les conditions d'admissibilité au statut de surnuméraire ont toujours parfaitement reflété les conditions d'admissibilité à une pension de retraite. Par ailleurs, ces fonctions ont été décrites comme une « période transitoire utile avant la retraite » (M. L. Friedland, *Une place à part : l'indépendance et la responsabilité de la magistrature au Canada* (1995), p. 53 (je souligne)).

64 Pour un juge de la Cour provinciale du Nouveau-Brunswick ayant rempli certaines conditions d'âge et d'ancienneté, l'option de devenir juge surnuméraire s'ajoutait donc à celles de prendre sa retraite et toucher sa pension, d'une part, et de continuer à siéger à temps plein, d'autre part. Évidemment, la seule façon de rendre un tel poste attrayant était d'offrir des conditions plus avantageuses que celles de la retraite ou des fonctions à temps plein.

65 Normalement, un juge de la Cour provinciale du Nouveau-Brunswick devenant juge surnuméraire bénéficiait d'une réduction substantielle de sa charge de travail tout en conservant un plein traitement. Cependant la *Loi sur la Cour provinciale* est muette quant à l'importance relative de cette réduction; son par. 4.1(5) laissait simplement cette décision au juge en chef de la cour. En théorie donc, cette réduction aurait pu être minime, voire inexistante. C'est d'ailleurs ce qui est arrivé au juge Rice, qui a dû siéger à temps plein malgré son statut de surnuméraire en raison du manque d'effectifs. Cependant, la nor-

if such a practice had been widespread, it would almost certainly have eliminated access to the office of supernumerary judge as a reasonable choice for a judge who met the conditions of eligibility. The government of New Brunswick would then have been deprived of the benefits of flexibility and expertise contemplated when it created this office. Consequently, I do not believe that it is possible to examine the nature of the office of supernumerary judge on the basis of such an abstract reading of s. 4.1(5) of the Act that we end up completely ignoring the factual and legal contexts in which this provision was enacted. Moreover, by its very wording, which indicates that a supernumerary judge "shall be available to perform such judicial duties as may be assigned to the judge from time to time by the chief judge or associate chief judge"(emphasis added), the Act appears to suggest a reduced workload.

66 In my opinion, therefore, it is necessary to take into account the uncontradicted evidence showing that it was understood by everyone that a supernumerary judge had to perform approximately 40 percent of the usual workload of a judge of the Provincial Court. The retirement pension received by a judge of the Provincial Court was equivalent to 60 percent of the full salary. The reasoning behind this understanding was accordingly that it was logical for a judge who was eligible for a pension equivalent to 60 percent of his or her full salary to be given an opportunity to perform 40 percent of his or her former duties in return for a full salary.

67 In light of what has been said above, it is my view that the system of supernumerary judges constituted an undeniable economic benefit for all the judges of the Provincial Court appointed before Bill 7 came into force and for eventual candidates for the position of judge in the court. In other words, this type of benefit was certainly taken into consideration both by sitting judges and by candidates for the office of judge in planning their economic and financial affairs. Thus, it seems to me to be wrong to suggest that the abolition of the office of supernumerary judge did not violate the collective dimension of the financial security of the Provincial Court of New Brunswick. At the very least, this office provided a right to a potential benefit of a reduced

malisation d'une telle pratique aurait presque assurément éliminé le choix du statut de juge surnuméraire comme choix raisonnable offert à un juge remplissant les conditions d'admissibilité. Le gouvernement du Nouveau-Brunswick aurait alors été privé des avantages de flexibilité et d'expertise envisagés lors de la création de ces fonctions. Par conséquent, je ne crois pas que l'on puisse procéder à un examen de la nature du poste de juge surnuméraire à partir d'une lecture si abstraite du par. 4.1(5) de la Loi que l'on finisse par faire totalement abstraction des contextes factuel et juridique dans lesquels cette disposition s'inscrivait. D'ailleurs, son texte même, énonçant qu'un juge surnuméraire « doit être disponible pour exercer les fonctions judiciaires qui peuvent lui être assignées à l'occasion par le juge en chef ou le juge en chef associé » (je souligne), paraissait suggérer une charge de travail réduite.

Il faut donc, à mon avis, tenir compte de la preuve non-contredite selon laquelle il était entendu par tous qu'un juge surnuméraire devait accomplir environ 40 p. 100 de la charge habituelle de travail d'un juge de la Cour provinciale. La pension de retraite d'un juge de la Cour provinciale équivalait à 60 p. 100 du plein traitement. L'entente générale sur cette interprétation venait du raisonnement selon lequel il était logique qu'un juge admissible à une pension équivalent à 60 p. 100 de son plein traitement se voit offrir la possibilité de remplir 40 p. 100 de ses anciennes fonctions en contrepartie d'un plein traitement.

À la lumière de ce qui précède, je suis d'avis que le système de juges surnuméraires constituait un avantage économique indéniable pour tous les juges de la Cour provinciale nommés avant l'entrée en vigueur de la Loi 7 ainsi que pour d'éventuels candidats au poste de juge de cette cour. Autrement dit, ce genre d'avantage était certainement pris en considération tant par les juges en fonction que par des postulants au poste de juge dans la planification de leurs affaires économiques et financières. Aussi m'apparaît-il malvenu de suggérer que l'abolition du poste de juge surnuméraire ne portait pas atteinte à la dimension collective de la sécurité financière de la Cour provinciale du Nouveau-Brunswick. Pour le moins, ce poste créait un droit à l'avantage potentiel

workload, the extent of which was established by the Chief Judge, that is by judicial authority independent of the Executive or other government authority. Its abolition constituted a change in the conditions of office which were advantageous to the judges by denying them the option of being eligible for a less demanding workload to be determined in a manner respectful of the institutional independence of the court. This benefit was likely to be substantial, impacting the quality and style of life of judges in their latter years. The issue here is not whether this benefit is a sufficient guarantee of financial security or judicial independence, as was the issue in *Valente* to which my colleague Binnie J. refers, but whether the supernumerary status provided a substantial benefit pertaining to financial security likely to give rise to negotiation and politicization.

In my opinion, there is no distinction in principle between a straight salary cut and the elimination of offices that offer a clear economic benefit. Both give rise to the political aspects mentioned in the *Provincial Court Judges Reference*, *supra*, that is to say they raise controversial questions of public policy and resource allocation and raise the possibility of interference by the other branches of government in the independence of the judiciary by means of financial manipulation. Indeed, as my colleague Binnie J. states, supernumerary status was adopted in New Brunswick after lengthy discussions between the government and the Provincial Court judges. Thus, the elimination of the office of supernumerary judge violates the institutional dimension of the financial security of judges of the Provincial Court of New Brunswick. A similar conclusion was drawn, moreover, by Parrett J. in *British Columbia (Provincial Court Judge) v. British Columbia* (1997), 40 B.C.L.R. (3d) 289 (S.C.), at pp. 314-15.

In short, I consider that the opinion stated by this Court in the *Provincial Court Judges Reference*, *supra*, requires that any change made to the remuneration conditions of judges at any given time must necessarily pass through the institutional filter of an independent, effective and objective

d'une charge de travail réduite dans la mesure que choisissait le juge en chef, c'est-à-dire un pouvoir judiciaire indépendant de l'exécutif ou autre pouvoir de l'État. Son abolition a modifié des conditions de travail avantageuses pour les juges en les privant de l'option d'être admissibles à une charge de travail moins exigeante qui serait déterminée dans le respect de l'indépendance institutionnelle de la cour. Cet avantage pouvait être substantiel et avoir des incidences sur la qualité et le style de vie des juges à la fin de leur carrière. La question en l'espèce n'est pas de savoir si cet avantage est une garantie suffisante de la sécurité financière ou de l'indépendance de la magistrature, comme la question examinée dans *Valente* dont parle mon collègue le juge Binnie, mais si le statut de surnuméraire conférait un avantage substantiel relativement à la sécurité financière susceptible de donner lieu à négociation et politisation.

68 À mon avis, il n'y a pas de distinction de principe entre une réduction de salaire pure et simple et l'élimination de postes présentant un avantage économique clair. L'une et l'autre revêtent les deux aspects politiques mentionnés dans le *Renvoi : Juges de la Cour provinciale*, c'est-à-dire qu'elles suscitent des questions controversées d'intérêt public et d'allocation des ressources et font naître la possibilité d'une ingérence des autres pouvoirs de l'État dans l'indépendance du judiciaire par le biais de la manipulation financière. Mon collègue le juge Binnie déclare d'ailleurs que le statut de surnuméraire a été adopté au Nouveau-Brunswick après de longs pourparlers entre le gouvernement et les juges de la Cour provinciale. Ainsi, l'élimination du poste de juge surnuméraire porte atteinte à la dimension institutionnelle de la sécurité financière des juges de la Cour provinciale du Nouveau-Brunswick. Une conclusion similaire est d'ailleurs tirée par le juge Parrett dans *British Columbia (Provincial Court Judge) c. British Columbia* (1997), 40 B.C.L.R. (3d) 289 (C.S.), p. 314-315.

69 En somme, je considère que l'opinion offerte par notre Cour dans le *Renvoi : Juges de la Cour provinciale*, précité, impose que toute modification apportée aux conditions de rémunération des juges à quelque moment que ce soit doit obligatoirement passer par le crible institutionnel d'un organisme

body so that the relationship between the judiciary, on the one hand, and the executive and legislative branches, on the other, remain depoliticized as far as possible. That is a structural requirement of the Canadian Constitution resulting from the separation of powers and the rule of law. By failing to refer the question of the elimination of the office of supernumerary judge to such a body, the government of New Brunswick breached this fundamental duty. The lack of a grandfather clause in favour of the supernumerary judges in office and the judges of the Provincial Court appointed before Bill 7 came into force also aggravates this initial violation. Consequently, Bill 7 must be declared invalid.

indépendant, efficace et objectif, afin que les relations entre le judiciaire, d'une part, et l'exécutif et le législatif, d'autre part, demeurent aussi dépolitisées que possible. C'est là une exigence structurelle de la Constitution canadienne découlant de la séparation des pouvoirs et de la primauté du droit. En omettant de renvoyer la question de l'élimination du poste de juge surnuméraire à un tel organisme, le gouvernement du Nouveau-Brunswick a failli à cette obligation fondamentale. L'absence de clause de droits acquis en faveur des juges surnuméraires en fonction et des juges de la Cour provinciale nommés avant l'entrée en vigueur de la Loi 7 vient aggraver cette première atteinte. Par conséquent, la Loi 7 doit être déclarée invalide.

70 However, the foregoing reasoning must not be interpreted as negating or ossifying the exercise by the provinces of their legislative jurisdiction under s. 92(14) of the *Constitution Act, 1867*. While the provincial legislative assemblies have exclusive jurisdiction over "[t]he Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction", that jurisdiction must nevertheless be exercised in accordance with the structural principles of the Canadian Constitution, including the independence of the judiciary. In other words, the New Brunswick government was pursuing a perfectly legitimate purpose in trying to make certain changes to the organization of its judiciary for reasons of efficiency, flexibility and cost savings. In light of the impact of the elimination of the position of supernumerary judge on the financial security of Provincial Court judges, it should however have exercised its legislative jurisdiction while complying with the process of review by an independent, effective and objective body prescribed by the Constitution.

Il faudra néanmoins se garder d'interpréter le raisonnement qui précède comme niant ou paralysant à l'excès l'exercice par les provinces de leur compétence législative en vertu du par. 92(14) de la *Loi constitutionnelle de 1867*. Car, si les assemblées législatives provinciales sont investies d'une compétence exclusive en regard de « [l]'administration de la justice dans la province, y compris la création, le maintien et l'organisation de tribunaux de justice pour la province, ayant juridiction civile et criminelle », il n'en demeure pas moins que cette compétence doit être exercée en conformité avec les principes structurels de la Constitution canadienne, dont l'indépendance de la magistrature. Autrement dit, le gouvernement du Nouveau-Brunswick poursuivait une fin parfaitement légitime en voulant apporter certains changements à son organisation judiciaire pour des motifs d'efficacité, de flexibilité et d'économie. Vu les incidences de l'élimination du poste de juge surnuméraire sur la sécurité financière des juges de la Cour provinciale, il devait cependant exercer sa compétence législative en respectant le processus d'examen par un organisme indépendant, efficace et objectif prescrit par la Constitution.

2. *Justification and Section 1 of the Charter*

2. *La justification et l'article premier de la Charte*

71 As I indicated at the beginning of my analysis, judicial independence is protected by both the Preamble to the *Constitution Act, 1867* and s. 11(*d*) of the *Charter*. Thus, not only is it a right enjoyed

Comme je le mentionne en début d'analyse, l'indépendance judiciaire est protégée à la fois par le préambule de la *Loi constitutionnelle de 1867* et par l'al. 11*d*) de la *Charte*. Ainsi, non seulement

by a party subject to the threat of criminal proceedings but it is also a fundamental element underlying the very operations of the administration of justice. In other words, judicial independence functions as a prerequisite for giving effect to a litigant's rights including the fundamental rights guaranteed in the *Charter*.

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

Since it had been decided in the *Provincial Court Judges Reference*, *supra*, to resolve the questions in dispute solely on the basis of s. 11(*d*) of the *Charter*, the question as to whether the violation of this provision could be justified under s. 1 was examined (paras. 277 *et seq.*). In this process, it was stated: (i) that the government had to adduce evidence to justify the violation; and (ii) that it was the fact that the independent, effective and objective process had been circumvented that had to be justified and not the content of the government measures. Although in my opinion a s. 1 analysis alone is not adequate to resolve the question as to whether the violation is justified, these principles remain applicable to the more demanding analysis required by the fundamental nature of judicial independence. In this case, the appellant did not adduce any evidence tending to show that its constitutional shortcomings were justified. Furthermore, in my judgment, the lack of a grandfather clause in Bill 7 aggravates the violation of judicial independence.

s'agit-il d'un droit conféré à un justiciable visé par des poursuites pénales, mais elle constitue au surplus un élément fondamental qui sous-tend le fonctionnement même de l'administration de la justice. Autrement dit, l'indépendance judiciaire est une condition préalable à la mise en œuvre des droits du justiciable dont, notamment, les droits fondamentaux garantis par la *Charte*.

72 Vu le rôle vital de l'indépendance judiciaire au sein de la structure constitutionnelle canadienne, l'application usuelle de l'article premier de la *Charte* ne saurait à elle seule en justifier l'atteinte. Un fardeau plus contraignant s'impose au gouvernement. Ainsi, le *Renvoi : Juges de la Cour provinciale* précise que les éléments de la dimension institutionnelle de la sécurité financière n'avaient pas à être suivis en cas de crise financière exceptionnellement grave provoquée par des circonstances extraordinaires, telles que le déclenchement d'une guerre ou une faillite imminente (par. 137). Or, en l'espèce, il est manifeste que de telles circonstances n'existaient pas au Nouveau-Brunswick à l'époque de l'adoption de la Loi 7. Aucune argumentation n'a d'ailleurs été présentée par l'appelante à cet égard.

73 Puisque le *Renvoi : Juges de la Cour provinciale* décide de résoudre les questions litigieuses sur la seule base de l'al. 11*d*) de la *Charte*, il examine la question de savoir si l'atteinte à cette disposition peut être justifiée en vertu de l'article premier (par. 277 et suiv.). Dans cette analyse, la Cour déclare : (i) qu'il incombe au gouvernement de présenter une preuve justificative de l'atteinte; et (ii) que c'est le fait d'avoir contourné le processus indépendant, efficace et objectif qui doit faire l'objet de la justification et non le contenu des mesures gouvernementales. Même si je suis d'avis qu'une analyse selon l'article premier n'est pas à elle seule apte à résoudre la question de la justification de l'atteinte, ces principes demeurent applicables à l'analyse plus exigeante requise par le caractère fondamental de l'indépendance judiciaire. En l'espèce, l'appelante n'a présenté aucune preuve tendant à justifier ses manquements constitutionnels. De plus, je suis d'avis que l'absence de clause de droits acquis dans la Loi 7 aggrave l'atteinte à l'indépendance judiciaire.

3. *Appropriate Relief*

74 Some of the interveners suggested that the appellant did not breach its constitutional obligations set out in the *Provincial Court Judges Reference*, *supra*, simply because under the directives issued by this Court on the rehearing in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1998] 1 S.C.R. 3, these obligations did not acquire their full effect until September 18, 1998 while Bill 7 came into force on April 1, 1995.

75 It is true that in order to ensure continuity in the proper administration of justice, the Court decided in the rehearing of the *Provincial Court Judges Reference*, to suspend all aspects of the requirement relating to the judges' salary commission, including any reimbursement for past salary reductions for one year following the date of the judgment in the first reference (para. 18). This order was designed to permit the courts whose independence was at issue to function nevertheless, while the governments proceeded to establish and implement the process of review by a commission required by the first *Provincial Court Judges Reference*. According to the order, the requirement relating to the judges' salary commission applied for the future, effective September 18, 1998. Lamer C.J. added at para. 20:

> I note that the prospectiveness of the judicial compensation requirement does not change the retroactivity of the declarations of invalidity made in this case. . . . In the rare cases in which this Court makes a prospective ruling, it has always allowed the party bringing the case to take advantage of the finding of unconstitutionality. [Emphasis added.]

76 A similar solution is appropriate in this case. The respondents instituted their legal proceedings before the *Provincial Court of Judges Reference*, *supra*, was rendered. An injustice would be perpetuated if they were not allowed to take advantage of the finding of unconstitutionality in the same way as the parties to the *Provincial Court Judges Reference*, *supra*, solely on the basis of this sequence of events. As I indicated in the preceding paragraph, the suspension of the requirement for a commission was

3. *La réparation appropriée*

Certains intervenants ont suggéré que l'appelante n'a pas manqué aux obligations constitutionnelles énoncées dans le *Renvoi : Juges de la Cour provinciale*, du simple fait qu'en vertu de directives données par notre Cour dans sa décision suivant la nouvelle audition du *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1998] 1 R.C.S. 3, ces obligations avaient pris plein effet le 18 septembre 1998 alors que la Loi 7 est entrée en vigueur le 1er avril 1995.

Il est vrai qu'afin d'assurer le maintien de la bonne administration de la justice, la Cour a décidé lors de la nouvelle audition du Renvoi de suspendre tous les aspects de l'exigence concernant la commission de la rémunération des juges, y compris tout remboursement pour réduction antérieure de traitement, pendant une année à compter de la date du jugement initial (par. 18). Cette ordonnance visait à permettre aux tribunaux dont l'indépendance était en cause de fonctionner malgré tout, pendant que les gouvernements procédaient à l'établissement et à la mise en œuvre du processus d'examen par une commission requis par le premier Renvoi. Selon l'ordonnance, l'exigence relative à la commission de la rémunération des juges s'appliquait pour l'avenir, à compter du 18 septembre 1998. Le juge en chef Lamer ajoute au par. 20 :

> Je souligne que le caractère prospectif de l'exigence relative à la rémunération des juges ne modifie pas la rétroactivité des déclarations d'invalidité prononcées dans la présente affaire [. . .] Dans les rares cas où notre Cour a rendu une décision applicable pour l'avenir, elle a toujours permis à la partie qui a porté l'affaire devant le tribunal de profiter de la conclusion d'inconstitutionnalité. [Je souligne.]

Une solution similaire est appropriée en l'espèce. Les intimés ont commencé leurs procédures judiciaires avant la décision dans le *Renvoi : Juges de la Cour provinciale*. Il serait injuste de ne pas leur permettre de profiter de la conclusion d'inconstitutionnalité au même titre que les parties dans le *Renvoi : Juges de la Cour provinciale*, sur la seule base de la séquence des événements. Comme je le mentionne au paragraphe précédent, la suspension de l'exigence de la commission a été ordonnée

ordered solely on the basis of necessity, in order to permit the provincial courts to operate in the meantime in the absence of the required level of independence. However, it was certainly not a case of a blanket suspension of the constitutional obligations explained in the *Provincial Court Judges Reference*, *supra* (see *Newfoundland Assn. of Provincial Court Judges v. Newfoundland* (2000), 191 D.L.R. (4th) 225 (Nfld. C.A.), at pp. 266-80 (*per* Green J.A.)). Also, in all fairness, I consider that the declaration of invalidity must benefit the respondents who are, for all practical purposes, in the same position as the successful parties in the *Provincial Court Judges Reference*, *supra*.

Moreover, this declaration applies to both the elimination of the office of supernumerary judge and its replacement by a new panel of part-time judges paid on a *per diem* basis since it is impossible for all practical purposes to dissociate both these aspects of Bill 7 (*Schachter v. Canada*, [1992] 2 S.C.R. 679, at pp. 710-11; *Attorney-General for Alberta v. Attorney-General for Canada*, [1947] A.C. 503 (P.C.), at p. 518). However, in order to fill the legal vacuum that would be created by a simple declaration of invalidity, the declaration will initially be suspended *erga omnes* for a period of six months to allow the government of New Brunswick to provide a solution that meets its constitutional obligations (*Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721). However, 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. It is also the responsibility of the government to decide whether the existing judges' salary commission established by ss. 22.01 *et seq.* of the *Provincial Court Act* may validly consider the question of the abolition of the office of supernumerary judge.

B. *Other Questions*

(1) Damages

According to a general rule of public law, absent conduct that is clearly wrong, in bad faith or an abuse of power, the courts will not award damages

uniquement pour des raisons de nécessité, afin de permettre aux tribunaux provinciaux de continuer à fonctionner en l'absence du niveau d'indépendance requis. Toutefois il ne s'agissait certainement pas d'une suspension généralisée des obligations constitutionnelles explicitées par le *Renvoi : Juges de la Cour provinciale* (voir *Newfoundland Assn. of Provincial Court Judges c. Newfoundland* (2000), 191 D.L.R. (4th) 225 (C.A.T.-N.), p. 266-280 (le juge Green)). Aussi, en toute équité, je suis d'avis que la déclaration d'invalidité doit profiter aux intimés, qui se trouvent, à toutes fins pratiques, dans la même situation que les parties ayant eu gain de cause dans le *Renvoi : Juges de la Cour provinciale*.

77 Par ailleurs, cette déclaration vise à la fois l'élimination du poste de juge surnuméraire et son remplacement par un tableau de juges à temps partiel payés sur une base journalière, puisqu'il est pratiquement impossible de dissocier ces deux aspects de la Loi 7 (*Schachter c. Canada*, [1992] 2 R.C.S. 679, p. 710-711; *Attorney-General for Alberta c. Attorney-General for Canada*, [1947] A.C. 503 (C.P.), p. 518). Cependant, afin de pallier au vide juridique que créerait une pure déclaration d'invalidité, la déclaration sera initialement suspendue *erga omnes* pour une période de six mois, afin de permettre au gouvernement du Nouveau-Brunswick d'apporter une solution conforme à ses obligations constitutionnelles (*Renvoi relatif aux droits linguistiques au Manitoba*, [1985] 1 R.C.S. 721). Toutefois la Cour ne devrait pas dicter la marche à suivre pour remédier à la situation. En effet, comme il y a plus d'une façon d'y parvenir, il appartient au gouvernement de déterminer celle qui lui convient. Il appartient aussi au gouvernement de décider si l'actuelle commission sur la rémunération des juges mise en place par les art. 22.01 et suiv. de la *Loi sur la Cour provinciale* peut validement se saisir de la question de l'élimination des fonctions de juge surnuméraire.

B. *Autres questions*

(1) Les dommages-intérêts

78 Selon un principe général de droit public, en l'absence de comportement clairement fautif, de mauvaise foi ou d'abus de pouvoir, les tribunaux

for the harm suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional (*Welbridge Holdings Ltd. v. Greater Winnipeg*, [1971] S.C.R. 957; *Central Canada Potash Co. v. Government of Saskatchewan*, [1979] 1 S.C.R. 42). In other words "[i]nvalidity of governmental action, without more, clearly should not be a basis for liability for harm caused by the action" (K. C. Davis, *Administrative Law Treatise* (1958), vol. 3, at p. 487). In the legal sense, therefore, both public officials and legislative bodies enjoy limited immunity against actions in civil liability based on the fact that a legislative instrument is invalid. With respect to the possibility that a legislative assembly will be held liable for enacting a statute that is subsequently declared unconstitutional, R. Dussault and L. Borgeat confirmed in their *Administrative Law: A Treatise* (2nd ed. 1990), vol. 5, at p. 177, that:

> In our parliamentary system of government, Parliament or a legislature of a province cannot be held liable for anything it does in exercising its legislative powers. The law is the source of duty, as much for citizens as for the Administration, and while a wrong and damaging failure to respect the law may for anyone raise a liability, it is hard to imagine that either Parliament or a legislature can as the lawmaker be held accountable for harm caused to an individual following the enactment of legislation. [Footnotes omitted.]

79 However, as I stated in *Guimond v. Quebec (Attorney General)*, *supra*, since the adoption of the *Charter*, a plaintiff is no longer restricted to an action in damages based on the general law of civil liability. In theory, a plaintiff could seek compensatory and punitive damages by way of "appropriate and just" remedy under s. 24(1) of the *Charter*. The limited immunity given to government is specifically a means of creating a balance between the protection of constitutional rights and the need for effective government. In other words, this doctrine makes it possible to determine whether a remedy is appropriate and just in the circumstances. Consequently, the reasons that inform the general principle of public law are also relevant in a *Charter* context. Thus, the government and its representatives are required to exercise their powers in good faith and to respect the "established and indisputable" laws that define

n'accorderont pas de dommages-intérêts pour le préjudice subi à cause de la simple adoption ou application d'une loi subséquemment déclarée inconstitutionnelle (*Welbridge Holdings Ltd. c. Greater Winnipeg*, [1971] R.C.S. 957; *Central Canada Potash Co. c. Gouvernement de la Saskatchewan*, [1979] 1 R.C.S. 42). Autrement dit, [TRADUCTION] « l'invalidité n'est pas le critère de la faute et ne devrait pas être le critère de la responsabilité » (K. C. Davis, *Administrative Law Treatise* (1958), vol. 3, p. 487). Ainsi, au sens juridique, tant les fonctionnaires que les institutions législatives bénéficient d'une immunité restreinte vis-à-vis des actions en responsabilité civile dont le fondement serait l'invalidité d'un texte législatif. Quant à la possibilité qu'une assemblée législative soit tenue responsable pour l'adoption d'une loi subséquemment déclarée inconstitutionnelle, R. Dussault et L. Borgeat confirment dans leur *Traité de droit administratif* (2e éd. 1989), t. III, p. 959, que :

> Dans notre régime parlementaire, il est impensable que le Parlement puisse être déclaré responsable civilement en raison de l'exercice de son pouvoir législatif. La loi est la source des devoirs, tant des citoyens que de l'Administration, et son inobservation, si elle est fautive et préjudiciable, peut pour quiconque faire naître une responsabilité. Il est difficilement imaginable cependant que le législateur en tant que tel soit tenu responsable du préjudice causé à quelqu'un par suite de l'adoption d'une loi. [Notes infrapaginales omises.]

Toutefois, comme je le mentionne dans *Guimond c. Québec (Procureur général)*, précité, depuis l'adoption de la *Charte* un demandeur n'est plus limité uniquement à une action en dommages-intérêts fondée sur le droit général de la responsabilité civile. Il pourrait, en théorie, solliciter des dommages-intérêts compensatoires et punitifs à titre de réparation « convenable et juste » en vertu du par. 24(1) de la *Charte*. Or, l'immunité restreinte accordée à l'État constitue justement un moyen d'établir un équilibre entre la protection des droits constitutionnels et la nécessité d'avoir un gouvernement efficace. Autrement dit, cette doctrine permet de déterminer si une réparation est convenable et juste dans les circonstances. Par conséquent les raisons qui sous-tendent le principe général de droit public sont également pertinentes dans le contexte de la *Charte*. Ainsi, l'État et ses représentants sont tenus d'exercer

the constitutional rights of individuals. However, if they act in good faith and without abusing their power under prevailing law and only subsequently are their acts found to be unconstitutional, they will not be liable. Otherwise, the effectiveness and efficiency of government action would be excessively constrained. Laws must be given their full force and effect as long as they are not declared invalid. Thus it is only in the event of conduct that is clearly wrong, in bad faith or an abuse of power that damages may be awarded (*Crown Trust Co. v. The Queen in Right of Ontario* (1986), 26 D.L.R. (4th) 41 (Ont. Div. Ct.)).

leurs pouvoirs de bonne foi et de respecter les règles de droit « établies et incontestables » qui définissent les droits constitutionnels des individus. Cependant, s'ils agissent de bonne foi et sans abuser de leur pouvoir eu égard à l'état du droit, et qu'après coup seulement leurs actes sont jugés inconstitutionnels, leur responsabilité n'est pas engagée. Autrement, l'effectivité et l'efficacité de l'action gouvernementale seraient exagérément contraintes. Les lois doivent être appliquées dans toute leur force et effet tant qu'elles ne sont pas invalidées. Ce n'est donc qu'en cas de comportement clairement fautif, de mauvaise foi ou d'abus de pouvoir que des dommages-intérêts peuvent être octroyés (*Crown Trust Co. c. The Queen in Right of Ontario* (1986), 26 D.L.R. (4th) 41 (C. div. Ont.)).

Thus, it is against this backdrop that we must read the following comments made by Lamer C.J. in *Schachter*, *supra*, at p. 720:

> An individual remedy under s. 24(1) of the *Charter* will rarely be available in conjunction with an action under s. 52 of the *Constitution Act, 1982*. Ordinarily, where a provision is declared unconstitutional and immediately struck down pursuant to s. 52, that will be the end of the matter. No retroactive s. 24 remedy will be available. [Emphasis added.]

80 C'est sur cette toile de fond qu'il faut lire les commentaires du juge en chef Lamer dans *Schachter*, précité, p. 720, selon lesquels :

> Il y aura rarement lieu à une réparation en vertu du par. 24(1) de la *Charte* en même temps qu'une mesure prise en vertu de l'art. 52 de la *Loi constitutionnelle de 1982*. Habituellement, si une disposition est déclarée inconstitutionnelle et immédiatement annulée en vertu de l'art. 52, l'affaire est close. Il n'y aura pas lieu à une réparation rétroactive en vertu de l'art 24. [Je souligne.]

In short, although it cannot be asserted that damages may never be obtained following a declaration of unconstitutionality, it is true that, as a rule, an action for damages brought under s. 24(1) of the *Charter* cannot be combined with an action for a declaration of invalidity based on s. 52 of the *Constitution Act, 1982*.

81 En somme, même s'il est impossible d'affirmer que des dommages-intérêts ne peuvent jamais être obtenus à la suite d'une déclaration d'inconstitutionnalité, il est exact que, en règle générale, une action en dommages-intérêts présentée en vertu du par. 24(1) de la *Charte* ne peut être jumelée à une action en déclaration d'invalidité fondée sur l'art. 52 de la *Loi constitutionnelle de 1982*.

Applying these principles to the situation before us, it is clear that the respondents are not entitled to damages merely because the enactment of Bill 7 was unconstitutional. On the other hand, I do not find any evidence that might suggest that the government of New Brunswick acted negligently, in bad faith or by abusing its powers. Its knowledge of the unconstitutionality of eliminating the office of supernumerary judge has never been established. On the contrary, Bill 7 came into force on April 1, 1995, more than two years before this Court expressed its opinion in the *Provincial Court Judges*

82 Lorsqu'on applique ces principes à la présente situation, il est évident que les intimés n'ont pas droit à des dommages-intérêts en raison simplement du caractère inconstitutionnel de l'adoption de la Loi 7. Par ailleurs, je ne trouve aucun élément de preuve qui puisse indiquer que le gouvernement du Nouveau-Brunswick a agi négligemment, de mauvaise foi, ou en abusant de ses pouvoirs. Il n'a jamais été démontré qu'il savait que l'élimination du poste de juge surnuméraire était inconstitutionnelle. Bien au contraire, la Loi 7 est entrée en vigueur le 1er avril 1995, soit plus de deux années avant l'opinion rendue par

Reference, *supra*, which, it must be recognized, substantially altered the situation in terms of the institutional independence of the judiciary. Consequently, it may not reasonably be suggested that the government of New Brunswick displayed negligence, bad faith or wilful blindness with respect to its constitutional obligations at that time.

83 Furthermore, I cannot accept the statement of Ryan J.A. of the Court of Appeal that the failure of the Minister of Justice to keep his promise to refer Bill 7 to the Law Amendments Committee was an instance of bad faith that justified the awards of damages. Even if admitted to be true, such evidence is far from establishing a negligent or unreasonable attitude on the part of government. In fact, it has no probative value as to whether, in the circumstances, the legislation was enacted wrongly, for ulterior motives or with knowledge of its unconstitutionality.

84 The claim of the respondent judges for damages is accordingly dismissed.

(2) Costs

85 Although the appeal is allowed in part, the fact remains that the respondents are successful on the principal issue, namely the constitutional invalidity of the legislation in question. I would accordingly award their costs throughout.

86 At trial, the respondents were awarded party-and-party costs. In the Court of Appeal, this decision was reversed and it was decided that the government's conduct justified the award of solicitor-client costs. It is established that the question of costs is left to the discretion of the trial judge. The general rule in this regard is that solicitor-client costs are awarded only on very rare occasions, for example when a party has displayed reprehensible, scandalous or outrageous conduct (*Young v. Young*, [1993] 4 S.C.R. 3, at p. 134). Reasons of public interest may also justify the making of such an order (*Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at p. 80).

cette Cour dans le *Renvoi : Juges de la Cour provinciale*, qui, il faut le reconnaître, changeait considérablement la donne en matière d'indépendance institutionnelle de la magistrature. De ce fait, on ne peut raisonnablement suggérer que le gouvernement néo-brunswickois a fait preuve de négligence, de mauvaise foi ou d'aveuglement volontaire à l'égard de ses obligations constitutionnelles d'alors.

En outre, je ne puis accepter la proposition du juge Ryan de la Cour d'appel, selon laquelle le non-respect par le ministre de la Justice de sa promesse de soumettre le projet de Loi 7 au Comité de modification des lois constituait un acte de mauvaise foi justifiant l'octroi de dommages-intérêts. Même en admettant sa véracité, une telle preuve est loin de démontrer une attitude négligente ou abusive de la part du gouvernement. En fait, elle n'a aucune valeur probante quant à savoir si, dans les circonstances, la loi a été adoptée de manière fautive, pour des motifs détournés ou avec la connaissance de son inconstitutionnalité.

La demande des juges intimés en dommages-intérêts est donc rejetée.

(2) Les dépens

Même si l'appel est accueilli en partie, il demeure que les intimés ont eu gain de cause sur la principale question en litige, soit l'inconstitutionnalité de la loi contestée. Je leur accorderais donc les dépens devant toutes les cours.

En première instance, les intimés ont obtenu des dépens entre parties. En Cour d'appel, cette décision a été infirmée et il a été décidé que le comportement du gouvernement justifiait l'octroi de dépens entre avocat et client. Il est établi que la question des dépens est laissée à la discrétion du juge de première instance. La règle générale en la matière veut que des dépens entre avocat et client ne soient accordés qu'en de rares occasions, par exemple lorsqu'une partie a fait preuve d'une conduite répréhensible, scandaleuse ou outrageante (*Young c. Young*, [1993] 4 R.C.S. 3, p. 134). Des raisons d'intérêt public peuvent également fonder une telle ordonnance (*Friends of the Oldman River Society c. Canada (Ministre des Transports)*, [1992] 1 R.C.S. 3, p. 80).

Although judicial independence is a noble cause that deserves to be firmly defended, it is not appropriate in my opinion to grant such a form of costs to the respondents in this case. I would accordingly award them their costs on a party-and-party basis.

VII. Disposition

The appeal is allowed in part. The *Act to Amend the Provincial Court Act* (Bill 7) is declared unconstitutional because it violates the institutional guarantees of judicial independence contained in s. 11(*d*) of the *Charter* and the Preamble to the *Constitution Act, 1867*. Except with respect to the respondents, however, this declaration of unconstitutionality is suspended for a period of six months from the date of this judgment* to allow the government of New Brunswick to rectify the situation in accordance with its constitutional obligations as described in this decision and in the *Provincial Court Judges Reference*, *supra*. Accordingly, the constitutional questions are answered as follows:

Answer to question 1: Yes, with respect to financial security.

Answer to question 2: Yes.

Answer to question 3: No.

The respondents' claim for damages is dismissed.

However, since the respondents were successful on the main issue, they are entitled to their costs throughout.

The reasons of Binnie and LeBel JJ. were delivered by

BINNIE J. (dissenting) — I have had the benefit of reading the reasons of my colleague Gonthier J. I agree with his statement of the broad principles of judicial independence but, with respect, I do not agree that supernumerary status as defined in the

*On June 17, 2002, the period of suspension was extended to February 14, 2003. On January 24, 2003, the period of suspension was further extended to August 14, 2003.

87 Bien que l'indépendance judiciaire constitue une noble cause méritant d'être défendue ardemment, il n'est pas à mon avis approprié d'accorder une telle forme de dépens aux intimés en l'espèce. Je leur accorderais donc leurs dépens entre parties.

VII. Dispositif

88 L'appel est accueilli en partie. La *Loi modifiant la Loi sur la Cour provinciale* (Loi 7) est déclarée inconstitutionnelle comme portant atteinte aux garanties institutionnelles d'indépendance judiciaire contenues à l'al. 11*d*) de la *Charte* et au préambule de la *Loi constitutionnelle de 1867*. Sauf à l'égard des intimés, cette déclaration d'inconstitutionnalité est toutefois suspendue pour une période de six mois à partir de la date du présent jugement* afin de permettre au gouvernement du Nouveau-Brunswick de remédier à la situation en conformité avec ses obligations constitutionnelles telles que décrites au présent arrêt ainsi que dans le *Renvoi : Juges de la Cour provinciale*. Les questions constitutionnelles reçoivent donc les réponses suivantes :

Question 1 : Oui, à l'égard de la sécurité financière.

Question 2 : Oui.

Question 3 : Non.

89 La demande de dommages-intérêts des intimés est rejetée.

90 Ayant eu gain de cause sur la question principale en litige, les intimés ont droit à leurs dépens dans toutes les cours.

Version française des motifs des juges Binnie et LeBel rendus par

91 LE JUGE BINNIE (dissident) — J'ai eu l'avantage de lire les motifs de mon collègue le juge Gonthier. Je suis d'accord avec son exposé des principes généraux de l'indépendance judiciaire mais je ne peux souscrire à l'opinion que

*Le 17 juin 2002, la période de suspension a été prorogée jusqu'au 14 février 2003. Le 24 janvier 2003, la période de suspension a été prorogée de nouveau jusqu'au 14 août 2003.

New Brunswick *Provincial Court Act*, R.S.N.B. 1973, c. P-21, constituted an economic benefit protected by the Constitution. The respondents' expectation that they would work only 40 percent of the time for 100 percent of the pay of a full-time judge was neither spelled out in the Act nor otherwise put in a legally enforceable form.

92 My colleague notes "the uncontradicted evidence showing that it was understood by everyone that a supernumerary judge had to perform approximately 40 percent of the usual workload of a judge of the Provincial Court" (para. 66 (emphasis added)). I do not doubt it. It seems clear that it was thus understood by both judges and government officials. The question, however, is whether the doctrine of judicial independence protects "understandings" about specific financial benefits that are pointedly not written into the governing legislation.

93 My colleague says that judicial independence must be protected by "objective legal guarantees" (para. 38). I agree. What we have here, however, is neither objective nor a guarantee. As my colleague notes (para. 65) the repealed provision of the New Brunswick *Provincial Court Act* defined the workload of a supernumerary judge only in terms of being "available to perform such judicial duties as may be assigned to the judge from time to time by the chief judge or associate chief judge" (s. 4.1(5)). The problem is not simply that the extent of the discretionary benefit was not specified in the Act. The more fundamental problem is that, as I read it, the legislation *guaranteed* no benefit at all.

94 We are not dealing here with the broad unwritten principles of the Constitution. There is no general constitutional entitlement for judges to work 40 percent of the time for a 100 percent salary. What is at issue is the claim to a particular supernumerary benefit said to be voluntarily conferred by the legislature in the 1988 Act, and thereafter unconstitutionally withdrawn in 1995. The argument is that once conferred, a benefit becomes wrapped

le statut de juge surnuméraire défini dans la *Loi sur la Cour provinciale* du Nouveau-Brunswick, L.R.N.-B. 1973, ch. P-21, était un avantage économique protégé par la Constitution. L'expectative des intimés de ne travailler que 40 p. 100 du temps en contrepartie de la pleine rémunération de juge à temps plein n'était ni inscrite dans la Loi ni autrement prescrite sous une forme légalement exécutoire.

Mon collègue note « la preuve non-contredite selon laquelle il était entendu par tous qu'un juge surnuméraire devait remplir environ 40 p. 100 de la charge habituelle de travail d'un juge de la Cour provinciale » (par. 66 (je souligne)). Je n'en doute pas. Il semble clair que cela était entendu par les juges et les représentants du gouvernement. La question est toutefois de savoir si le principe de l'indépendance judiciaire protège des « ententes » sur des avantages financiers précis qui, fait significatif, ne figurent pas dans la loi applicable.

Mon collègue affirme que l'indépendance judiciaire doit être protégée par « des garanties juridiques objectives » (par. 38). Je suis d'accord. Toutefois, ce dont il s'agit en l'espèce n'est ni objectif ni garanti. Comme mon collègue le souligne (par. 65), la disposition abrogée de la *Loi sur la Cour provinciale* du Nouveau-Brunswick définissait la charge de travail du juge surnuméraire en disant uniquement qu'il « doit être disponible pour exercer les fonctions judiciaires qui peuvent lui être assignées à l'occasion par le juge en chef ou le juge en chef associé » (par. 4.1(5)). Le problème n'est pas simplement que l'étendue de l'avantage discrétionnaire n'était pas stipulée dans la Loi. Selon mon interprétation, le problème plus fondamental est que le texte législatif ne *garantissait* absolument aucun avantage.

Il ne s'agit pas ici des principes constitutionnels généraux non écrits. Il n'existe aucun droit constitutionnel général habilitant des juges à travailler 40 p. 100 du temps en contrepartie d'une pleine rémunération. Le litige vise un avantage particulier que l'on dit avoir été volontairement conféré aux juges surnuméraires par la législature dans la loi de 1988 et inconstitutionnellement abrogé en 1995. L'argument veut que l'avantage, une fois conféré, jouit de la

in constitutional protection and beyond legislative recall except in accordance with the independent, objective and effective procedure mandated by the *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 ("*Provincial Court Judges Reference*").

In this case, however, the New Brunswick legislature refused to make a reduced workload commitment in framing the supernumerary provisions of the 1988 amendments. (No one argues that such refusal was itself contrary to unwritten constitutional guarantees.) The omission of any guarantee of a reduced workload in the original 1988 amendments was plain for all to see from the outset. The legislature thereafter refused to make sufficient funds available to fund a number of new judicial appointments to permit the supernumerary scheme to work as the judges had anticipated. The budget allocation fell well short of the earlier expectations raised by government officials, but it was consistent with the legislature's refusal throughout to provide any sort of a legislated guarantee of a reduced workload. The result was that, while a judge on supernumerary status was required by law to do whatever judicial duties were assigned by the Chief Judge, the Chief Judge was prevented by a shortage of judges from giving effect in most cases to the expectations of the judges who elected supernumerary status.

As the Provincial Court judges were given no guarantee in the Act, it follows that the anticipated reduced workload attaching to supernumerary status contended for by the respondents formed no part of the constitutional guarantee of judicial independence of the court of which they were members. The repeal of a potential benefit voluntarily conferred by the legislature, that was wholly discretionary as to whether in practice it produced any benefit at all, could not and in my view did not undermine their institutional independence. I would therefore allow the appeal.

Facts

Supernumerary status was introduced in New Brunswick by the 1987 amendments to the Act, which came into force January 1, 1988. From

protection constitutionnelle et ne peut être abrogé par le législateur sauf en conformité avec le processus indépendant, efficace et objectif prévu dans le *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1997] 3 R.C.S. 3 (« *Renvoi : Juges de la Cour provinciale* »).

95 Cependant la législature du Nouveau-Brunswick a refusé d'inscrire dans les modifications de 1988 applicables aux juges surnuméraires tout engagement de réduire la charge de travail. (Personne ne prétend que ce refus contrevenait en soi à des garanties constitutionnelles non écrites.) L'omission de garantir une réduction de la charge de travail dans les modifications de 1988 était évidente pour tous dès le départ. La législature a par la suite refusé de fournir des fonds suffisants pour financer la nomination d'un certain nombre de juges pour permettre que le régime des juges surnuméraires fonctionne comme les juges l'avaient prévu. L'enveloppe budgétaire était bien inférieure aux attentes antérieures suscitées par les fonctionnaires, mais elle était compatible avec le refus constant de la législature de garantir dans la loi une réduction de la charge de travail. Il en a résulté qu'un juge surnuméraire devait, en vertu de la loi, exécuter les fonctions judiciaires que lui assignait le juge en chef, mais que ce dernier, en raison de la pénurie de juges, ne pouvait répondre dans la plupart des cas aux expectatives des juges qui avaient choisi de devenir surnuméraires.

96 Puisque la Loi ne donnait aux juges de la Cour provinciale aucune garantie, la réduction prévue de la charge de travail attachée, selon les intimés, au statut de juge surnuméraire, ne faisait pas partie de la garantie constitutionnelle d'indépendance judiciaire de la cour dont ils étaient membres. L'abrogation d'un avantage potentiel conféré volontairement par la législature, dont la réalisation dépendait en pratique d'un pouvoir entièrement discrétionnaire, ne pouvait pas miner leur indépendance institutionnelle et ne l'a pas fait à mon avis. Je suis donc d'avis d'accueillir le pourvoi.

Les faits

97 Le statut de juge surnuméraire est créé au Nouveau-Brunswick par des modifications en 1987 de la Loi, entrées en vigueur le 1er janvier 1988.

then until its repeal seven years later, six Provincial Court judges elected supernumerary status. Their varied work histories illustrate the basic flaw in the respondents' legal argument, namely the absence of *any* guaranteed benefit — let alone a 40 percent workload benefit — attaching to supernumerary status under the legislative scheme.

98 The respondent, Judge Douglas Rice, elected supernumerary status on April 30, 1993 after more than 21 years on the bench. His workload was not reduced to 40 percent of what it had been. It seems not to have been reduced significantly between 1993 and his eventual retirement.

99 In the companion case the respondent, Judge Ian Mackin elected to become supernumerary on August 15, 1988 after 25 years on the bench. In the initial period his workload did not reduce appreciably either but thereafter he eased off, travelled extensively, and for at least five years prior to 1995 was able to winter for six months or so in Australia while drawing 100 percent of the salary of a Provincial Court judge on regular status.

100 Judge James D. Harper, one of the other judges who elected supernumerary status continued, like Judge Rice, more or less at full throttle. Some of the supernumerary judges he thought did "little or no work", i.e., much less than a 40 percent workload. Others he thought worked "very hard indeed". On November 7, 1994 Judge Harper wrote to Chief Judge Hazen Strange:

> Naturally, I have been well aware that many of the supernumeraries had not been pulling their weight and were receiving full pay for little or no work. As you well know, however, there are at least two such Judges who work very hard indeed.

101 The uneven workload was caused by many factors, including both the receptiveness and/or professionalism of supernumerary judges and, more importantly, the severe resource constraints confronting the Provincial Court as a whole. There were only six supernumerary judges and, as stated, the government failed to appoint judges to replace at least two of them, namely Judge Rice and Judge

Entre leur entrée en vigueur et leur abrogation sept ans plus tard, six juges de la Cour provinciale ont choisi ce statut. Leur expérience professionnelle diversifiée illustre bien la lacune fondamentale de l'argumentation des intimés, le fait que le texte législatif ne garantissait *aucun* avantage — sans même parler de charge de travail réduite à 40 p. 100 — au statut de surnuméraire.

Le juge Douglas Rice, intimé, choisit de devenir juge surnuméraire le 30 avril 1993 après plus de 21 ans dans la magistrature. Sa charge de travail n'est pas réduite à 40 p. 100 de ce qu'elle était. Elle semble ne pas diminuer beaucoup entre 1993 et son départ à la retraite.

Dans le pourvoi connexe, le juge Ian Mackin, intimé, choisit de devenir surnuméraire le 15 août 1988, après 25 ans de magistrature. Initialement, sa charge de travail ne diminue pas beaucoup non plus, mais par la suite, il ralentit et commence à beaucoup voyager; en fait, au moins pendant les cinq années antérieures à 1995, il passe ses hivers en Australie et y reste six mois environ, tout en continuant de toucher son plein traitement de juge.

Le juge James D. Harper, un autre juge qui a choisi de devenir surnuméraire, a continué de travailler plus ou moins à plein régime, comme le juge Rice. À son avis, certains juges surnuméraires fournissaient « peu ou pas de travail », c.-à-d. bien moins que 40 p. 100 de la charge normale, tandis que d'autres travaillaient « très fort ». Le 7 novembre 1994, le juge Harper écrit au juge en chef Hazen Strange :

> [TRADUCTION] Je suis bien conscient du fait que beaucoup de juges surnuméraires ne faisaient pas leur part et recevaient plein salaire pour peu ou pas de travail. Cependant, comme vous le savez bien, il y a au moins deux juges surnuméraires qui travaillent très fort.

Les fluctuations de la charge de travail résultent de plusieurs facteurs dont la réceptivité et le professionnalisme des juges surnuméraires et, fait encore plus important, la grave pénurie de ressources dans l'ensemble de la Cour provinciale. Il n'y avait que six juges surnuméraires et, on l'a dit, le gouvernement n'avait pas nommé de remplaçants pour au moins deux d'entre eux, les juges Rice et Harper.

Harper. As the Chief Judge explained in his testimony:

A. The most difficult administrative responsibility and the one that took the most time was assigning judges around the Province. At some stages we had more courts sitting on a given day, almost, than we had judges, and we had a number of satellite courts — I think at one stage 21 — I think we had at one stage 24 permanent courts and we only had something like 23 judges. So the most difficult part of my job, really, was to assign judges to courts so that they wouldn't go empty.

Q. Okay.

A. And that was true for ten years.

The administrative troubles of the Chief Judge did not end on March 3, 1995, when royal assent was given to *An Act to Amend the Provincial Court Act*, S.N.B. 1995, c. 6 repealing the provisions permitting supernumerary status. By law, each of the six incumbent judges on supernumerary status was required to elect by April 1, 1995 whether to retire or to work full-time as a member of the court. Each of them did so except the respondent Judge Mackin who refused to elect one way or the other, apparently taking the view that to make an election would be to give the 1995 repeal undeserved credibility. In his view the repeal was unlawful, and on April 25, 1995, he gave notice to the Crown of his intention to challenge in court its constitutionality.

The following day, April 26, 1995, without waiting for his constitutional challenge to proceed, Judge Mackin entered a courtroom that was not in session in the provincial courthouse at Moncton and in the presence of a couple of Crown attorneys and other members of the bar declared that he would no longer "sit, hear and decide cases under the duress of these amendments".

By letter dated May 17, 1995 he was ordered back to work by his Chief Judge. Judge Mackin declined to comply. In his view he could no longer be considered "independent" within the meaning of s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*.

Comme l'explique le juge en chef dans son témoignage :

[TRADUCTION] R. La responsabilité administrative la plus difficile et celle qui prenait le plus de temps était d'assigner des juges à travers la province. À certains moments, nous avions pratiquement plus de séances un jour donné que de juges, et nous avions plusieurs tribunaux satellites — à un moment donné, 21 je crois — je pense qu'à un moment, nous avions 24 cours permanentes et seulement quelque chose comme 23 juges. Réellement, la plus difficile de mes tâches était d'assigner les juges aux diverses cours de façon qu'elles ne restent pas vides.

Q. D'accord.

R. Cette situation a duré dix ans.

102 Les tracas administratifs du juge en chef ne prennent pas fin le 3 mars 1995, avec la sanction royale de la *Loi modifiant la Loi sur la Cour provinciale*, L.N.-B. 1995, ch. 6, qui abroge les dispositions régissant le statut de surnuméraire. Aux termes de la loi, chacun des six juges surnuméraires doit choisir, avant le 1er avril 1995, entre prendre sa retraite ou reprendre ses fonctions à temps plein. Tous font un choix, sauf le juge Mackin, intimé, qui refuse de se prononcer dans un sens ou dans l'autre, estimant apparemment que cela conférerait une crédibilité injustifiée à l'abrogation de 1995. Selon lui, l'abrogation est illégale et, par avis en date du 25 avril 1995, il informe le procureur général de son intention d'en contester judiciairement la constitutionnalité.

103 Le lendemain, le 26 avril 1995, avant même que procède la contestation constitutionnelle, le juge Mackin entre dans une salle d'audience de la Cour provinciale à Moncton, qui n'est pas en séance, et, en présence d'avocats de la Couronne et d'autres avocats, déclare que dorénavant il refusera de [TRADUCTION] « siéger, instruire et juger sous la contrainte de ces modifications ».

104 Par lettre en date du 17 mai 1995, le juge en chef lui donne l'ordre de retourner au travail. Le juge Mackin refuse d'obtempérer. Il estime ne plus pouvoir être considéré comme « indépendant » au sens de l'al. 11*d*) de la *Charte canadienne des droits et libertés*.

105 On June 16, 1995 Judge Mackin's application for an injunction to restrain the Chief Judge from "assigning, designating or otherwise requiring [him] to perform Judicial . . . duties" was dismissed by Russell J. of the Court of Queen's Bench.

106 The Chief Judge took the view that Judge Mackin's constitutional objection had been overruled by a superior court, and that public confidence in the judiciary would suffer unless Judge Mackin accepted that legal result unless and until it was overturned by a higher court. Thus, on July 19, 1995, although he appeared to share Judge Mackin's view of the invalidity of the legislation repealing supernumerary status, the Chief Judge wrote to Judge Mackin to say "I believe you have had sufficient time to study the decision by Justice RUSSELL". He then reiterated his insistence that Judge Mackin return to work. Judge Mackin's response was to declare himself on sick leave. This was eventually supported by a one-sentence "report" from a Dr. Paul Doucet dated August 2, 1995 advising that Judge Mackin would not be returning to work for "an undetermined period of time because of medical reasons". When asked by the Chief Judge for an explanation from Dr. Doucet of the "medical reasons", Judge Mackin had his lawyers respond that it was "entirely possible" that the Chief Judge's request for an explanation was in contravention of the provincial *Human Rights Act*. The legal basis for such a curious suggestion was not disclosed.

107 Eventually a pattern developed whereby Judge Mackin, when he worked at all, would go into court and frequently either adjourn matters for lengthy periods of time or enter a stay of proceedings. As Chief Judge Strange testified:

> What was happening — there was one case, particularly — it was a rather terrible one where the alleged victim was a young person, a sexual assault — that was just put over for a month or two or three or four. Witnesses were showing up; the Crown was bringing witnesses in, sometimes from far away, sometimes from right there. It would just be adjourned, adjourned, adjourned, and it was making a farce of the situation; it

Le 16 juin 1995, le juge Russell de la Cour du Banc de la Reine rejette la demande d'injonction du juge Mackin visant à empêcher le juge en chef [TRADUCTION] « de l'assigner, de le désigner ou de lui demander autrement d'exercer des fonctions judiciaires ».

Le juge en chef estime que la contestation constitutionnelle du juge Mackin a été écartée par une cour supérieure et que la confiance du public dans la magistrature sera diminuée si le juge Mackin n'accepte pas ce résultat juridique, du moins tant qu'il n'est pas infirmé en appel. En conséquence, le 19 juillet 1995, le juge en chef, bien qu'il ait paru partager le point de vue du juge Mackin sur l'invalidité de la loi abrogeant le statut de surnuméraire, lui écrit en ces termes : [TRADUCTION] « Je pense que vous avez eu suffisamment de temps pour examiner la décision du juge RUSSELL ». Il réitère ensuite qu'il exige qu'il retourne à son travail. La réponse du juge Mackin est de prendre un congé de maladie. Ce congé est justifié par la suite dans un « rapport » d'une phrase daté du 2 août 1995 dans lequel le D^r^ Paul Doucet précise que le juge Mackin ne retournera pas au travail [TRADUCTION] « pendant une période indéterminée, pour des raisons médicales ». Lorsque le juge en chef demande au D^r^ Doucet une explication des « raisons médicales », le juge Mackin fait répondre par ses avocats qu'il est [TRADUCTION] « très possible » que sa demande contrevienne à la *Loi sur les droits de la personne* de la province. On n'a pas révélé le fondement juridique de cet argument curieux.

Par la suite, le juge Mackin, quand il travaille, adopte l'habitude de se présenter en salle d'audience et, fréquemment, de déclarer des ajournements de longue durée ou d'ordonner l'arrêt des procédures. Selon le témoignage du juge en chef Strange :

> [TRADUCTION] Ce qui se passait — je pense à une affaire en particulier, une affaire assez terrible dans laquelle la victime présumée était une jeune personne, un cas d'agression sexuelle — il se contentait de reporter d'un, deux, trois ou quatre mois. Les témoins se présentaient; le ministère public assignait des témoins qui venaient parfois de loin, parfois de près. Le procès était simplement ajourné, ajourné, ajourné, ce qui rendait

wasn't fair to the accused; it wasn't fair to the prosecutors; it wasn't fair to the witnesses, and simply nothing was going ahead in his court . . . .

la situation grotesque; ce n'était pas équitable pour l'accusé; ce n'était pas équitable pour la poursuite; ce n'était pas équitable pour les témoins, et tout simplement rien n'avançait dans les affaires confiées au juge Mackin . . .

On November 14, 1995, the Chief Judge obtained from the Court of Queen's Bench a *mandamus* order requiring Judge Mackin "to hold sittings at the places and on the days designated by the Chief Judge of the Provincial Court of New Brunswick and to hear and determine cases properly brought before him during such sittings". Judge Mackin's appeal from this order was dismissed (with a variation in costs) on April 12, 1996.

108 Le 14 novembre 1995, le juge en chef obtient de la Cour du Banc de la Reine une ordonnance de mandamus enjoignant au juge Mackin de [TRADUCTION] « siéger aux endroits et dates fixés par le juge en chef de la Cour provinciale du Nouveau-Brunswick et d'entendre et juger les affaires régulièrement portées devant lui au cours de ces audiences ». Le 12 avril 1996, l'appel du juge Mackin est rejeté (avec une modification dans les dépens).

In the meantime Judge Mackin had continued with his policy of granting a stay of proceedings to any accused who requested it. This had the effect of preventing the further prosecution of some quite serious criminal charges. In *R. v. McCully* on February 13, 1996, for example, the following exchange took place in Judge Mackin's court:

109 Dans l'intervalle, le juge Mackin continue sa pratique d'accorder l'arrêt des procédures à tout accusé qui le demande, ce qui a pour effet de mettre fin à des poursuites dans le cas de certaines accusations criminelles graves. Par exemple, le 13 février 1996, dans l'affaire *R. c. McCully*, l'échange suivant a lieu devant le juge Mackin :

[Crown Attorney]: . . . I wish the record to indicate clearly that the Crown was prepared to proceed. Our witnesses, who are present, we had nothing to give notice of any motion [i.e. for a stay of proceedings].

[TRADUCTION] [Avocat de la Couronne] : . . . Je veux que le dossier indique clairement que le ministère public était disposé à procéder. Nos témoins sont présents, il n'y avait pas matière à avis de requête [c.-à-d. pour un arrêt des procédures].

Court: Yeah, so the — this case is stayed due to the non-structural independence of the Provincial Court.

Cour : Oui, alors — l'arrêt des procédures est ordonné en raison de l'absence d'indépendance structurelle de la Cour provinciale.

[Crown Attorney]: Might I presume, Your Honour, that in all cases in which you're going to be sitting, you'll be staying proceedings?

[Avocat de la Couronne] : Votre Honneur, dois-je supposer que vous allez ordonner l'arrêt des procédures dans toutes les affaires dont vous êtes saisi?

Court: If anybody requests it.

Cour : Si quelqu'un me le demande.

[Crown Attorney]: As long as someone makes the request?

[Avocat de la Couronne] : Dans la mesure où quelqu'un le demande?

Court: Yeah.

Cour : Oui.

[Crown Attorney]: Okay.

[Avocat de la Couronne] : D'accord.

Court: Well, that's my decision.

Cour : Bien, c'est là ma décision.

As regularly as Judge Mackin granted a stay of proceedings in these cases his decision was reversed by the New Brunswick Court of Appeal. On June 26, 1996 it reversed Judge Mackin in *R. v. Woods* (1996), 179 N.B.R. (2d) 153. On February 12, 1997

110 Tout aussi régulièrement que le juge Mackin prononce l'arrêt des procédures, la Cour d'appel du Nouveau-Brunswick infirme sa décision. C'est ce qui arrive dans *R. c. Woods* (1996), 179 R.N.-B. (2e) 153, le 26 juin 1996, et dans *R. c. Lapointe*, [1997]

he was again corrected in *R. v. Lapointe*, [1997] N.B.J. No. 57 (QL) (C.A.). On June 23, 1997 the Court of Appeal had to repeat again its disapproval of the entry of a stay of proceedings in similar circumstances in *R. v. Leblanc* (1997), 190 N.B.R. (2d) 70.

111 On April 10, 1996, the New Brunswick Minister of Justice complained about Judge Mackin's conduct to the Judicial Council of New Brunswick. About a week later, on April 19, 1996, Judge Mackin retaliated with a letter to the provincial Solicitor General requesting that contempt proceedings be brought against the provincial Minister of Justice. The province eventually rejected Judge Mackin's demand based on an opinion from the Deputy Attorney General of Alberta.

112 On June 5, 1996 the Judicial Council took the view that it ought not to take action in Judge Mackin's case until the various court proceedings had been "finally dealt with" and concluded that "the present complaint is premature".

113 Those who were required to appear in Judge Mackin's court bore the brunt of the difficulties. A number of extracts from the testimony of Chief Judge Strange (who, as stated, continued to express support for the constitutional challenge itself) gives the flavour of the situation in which members of the public found themselves:

> This was causing a terrible situation. We had witnesses showing up, sometimes on relatively serious matters, sometimes from a great distance, and lawyers showing up, prosecutors showing up and so on, and matters were simply being stayed or more likely adjourned over to a lengthy date. And it was reaching the stage where it was simply upsetting the whole court system down there.
>
> . . .
>
> [Judge Mackin's] going to the courtroom and he's adjourning cases in 90 percent of the time. I was getting calls constantly that he wouldn't do any cases. He would adjourn them, adjourn them, and this has continued right up until — well, as recently I know is last December

A.N.-B. nº 57 (QL) (C.A.), le 12 février 1997. Le 23 juin 1997, dans *R. c. Leblanc* (1997), 190 R.N.-B. (2e) 70, la Cour d'appel doit encore réitérer qu'elle désapprouve l'inscription d'un arrêt des procédures dans des circonstances semblables.

Le 10 avril 1996, le ministre de la Justice du Nouveau-Brunswick se plaint de la conduite du juge Mackin auprès du Conseil de la magistrature du Nouveau-Brunswick. Environ une semaine plus tard, le 19 avril 1996, le juge Mackin contre-attaque avec une lettre au Solliciteur général de la province demandant que soit intentée une procédure pour outrage au tribunal contre le ministre provincial de la Justice. La province rejette finalement la demande du juge Mackin en se fondant sur un avis du sous-procureur général de l'Alberta.

Le 5 juin 1996, le Conseil de la magistrature décide de ne pas prendre de mesures dans le dossier du juge Mackin jusqu'à ce qu'il soit [TRADUCTION] « disposé de façon définitive » des diverses procédures judiciaires et conclut que [TRADUCTION] « la plainte est prématurée ».

Ce sont les personnes appelées à comparaître devant le juge Mackin qui subissent la plus grande part des difficultés. Plusieurs passages du témoignage du juge en chef Strange (qui, je le rappelle, continuait d'appuyer la contestation constitutionnelle) illustrent la situation de certains membres du public :

> [TRADUCTION] Cela créait une situation terrible. Nous avions des témoins venant parfois de très loin, qui se présentaient, parfois dans des affaires relativement sérieuses; des avocats se présentaient, des poursuivants se présentaient et ainsi de suite; on prononçait alors tout simplement l'arrêt des procédures ou encore plus vraisemblablement l'ajournement à une date éloignée. On en était arrivé au point où cette situation bouleversait tout simplement l'ensemble du système judiciaire à cet endroit.
>
> . . .
>
> [Le juge Mackin] se rendait à l'audience et ajournait l'audition des dossiers dans 90 p. 100 des cas. Je recevais constamment des appels disant qu'il n'allait plus entendre de litiges. Il allait ordonner des ajournements, des ajournements; cela s'est poursuivi

[1997] when there were 112 charges adjourned to one afternoon on December 15th. I mean that was not conducive to putting cases properly through the court and it was not conducive to treating people properly.

In these circumstances, the Chief Judge and his colleagues ultimately decided not to ask Judge Mackin to take on cases of any importance, as the Chief Judge explained in evidence:

I didn't want, as Chief Judge, any big cases where victims would be humbled or hurt or witnesses would show up and be sent home. I didn't want anything like that going in there. We'd had enough of that and it was wrong.

The respondent Judge Douglas Rice carried his full work load through to the date of his retirement on October 15, 1997. No replacement judge was named until after his departure. Judge Harper died in office. No replacement judge was named until after his death. The respondent Judge Ian Mackin reached mandatory retirement age on April 7, 2000.

Analysis

Judicial independence is a cornerstone of constitutional government. Financial security is one of the essential conditions of judicial independence. Yet, unless these principles are interpreted in light of the public interests they were intended to serve, there is a danger that their application will wind up hurting rather than enhancing public confidence in the courts.

In *Valente v. The Queen*, [1985] 2 S.C.R. 673, this Court made the fundamental point that the guarantee of judicial independence was for the benefit of the judged, not the judges. Its purpose was not only to ensure that justice is done in individual cases, but to ensure public confidence in the court system as a whole. Le Dain J. stated at p. 689:

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

jusque récemment — je sais qu'au mois de décembre dernier [1997], 112 accusations ont été ajournées au 15 décembre, dans l'après-midi. Je tiens à préciser que cette situation n'était pas propice à l'audition régulière des dossiers par la cour ni au bon traitement des personnes.

114 Compte tenu de ces circonstances, le juge en chef et ses collègues décident en fin de compte de ne pas confier au juge Mackin des dossiers ayant une importance quelconque. Voici ce que dit le juge en chef :

[TRADUCTION] Comme juge en chef, je ne voulais pas de gros dossiers dans lesquels les victimes seraient humiliées ou offensées ou dans lesquels des témoins se présenteraient et devraient repartir chez eux. Je ne voulais rien de cela. C'était arrivé trop souvent et c'était inadmissible.

115 L'intimé le juge Douglas Rice s'est acquitté de sa pleine charge de travail jusqu'à son départ à la retraite le 15 octobre 1997. Aucun juge suppléant n'a été nommé avant son départ. Le juge Harper était encore en fonction quand il est décédé. Aucun juge suppléant n'a été nommé avant son décès. L'intimé le juge Ian Mackin a atteint l'âge de la retraite obligatoire le 7 avril 2000.

Analyse

116 L'indépendance judiciaire est une pierre angulaire du gouvernement constitutionnel. La sécurité financière est une des conditions essentielles de l'indépendance judiciaire. Cependant, à moins que ces principes ne soient interprétés en fonction des intérêts d'ordre public qu'ils visent à servir, il y a danger que leur application compromette la confiance du public dans les tribunaux, au lieu de l'accroître.

117 Dans *Valente c. La Reine,* [1985] 2 R.C.S. 673, la Cour énonce le principe fondamental selon lequel la garantie d'indépendance de la magistrature a été établie au profit des justiciables et non des juges. Elle vise non seulement à ce que justice soit rendue dans des cas individuels, mais aussi à assurer la confiance du public dans l'ensemble du système judiciaire. Le juge Le Dain dit à la p. 689 :

Sans cette confiance, le système ne peut commander le respect et l'acceptation qui sont essentiels à son fonctionnement efficace. Il importe donc qu'un tribunal soit perçu comme indépendant autant qu'impartial et

and that the test for independence should include that perception.

118 A similar note was struck by Lamer C.J. in *R. v. Lippé*, [1991] 2 S.C.R. 114, at p. 139:

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

It should be stated that neither Judge Rice nor Judge Mackin suggest that the 1995 repeal affected in any way their impartiality. Nor, I think can the repeal be said to have undermined their individual independence because their full salary and security of tenure were not affected. Their argument is that it undermined the *institutional* independence of the court of which they were members.

119 In the *Provincial Court Judges Reference*, *supra*, Lamer C.J. returned to the need for a purposive interpretation of the guarantee of judicial independence at para. 156 where he adopted this proposition:

> Financial security is an essential condition of judicial independence. It must not, however, be considered abstractly. It must be considered in relation to its purpose, which is, ultimately, to protect the judiciary from economic manipulation by the legislature or executive.

120 Lamer C.J. emphasized the point again at para. 193:

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

121 The solution mandated in the *Provincial Court Judges Reference*, *supra*, was to erect an institutional barrier (an "independent, effective and objective process") between the legislature and executive

que le critère de l'indépendance comporte cette perception . . .

Le juge en chef Lamer exprime une opinion analogue dans *R. c. Lippé*, [1991] 2 R.C.S. 114, p. 139 :

> La garantie d'indépendance judiciaire vise dans l'ensemble à assurer une perception raisonnable d'impartialité; l'indépendance judiciaire n'est qu'un « moyen » pour atteindre cette « fin ». Si les juges pouvaient être perçus comme « impartiaux » sans l'« indépendance » judiciaire, l'exigence d'« indépendance » serait inutile. Cependant, l'indépendance judiciaire est essentielle à la perception d'impartialité qu'a le public. L'indépendance est la pierre angulaire, une condition préalable nécessaire, de l'impartialité judiciaire.

Il faut préciser que ni le juge Rice ni le juge Mackin ne laissent entendre que l'abrogation de 1995 a de quelque façon touché leur impartialité. On ne peut pas dire non plus que l'abrogation a miné leur indépendance individuelle puisqu'ils conservaient leur plein traitement et l'inamovibilité. Leur argumentation consiste à dire qu'elle a sapé l'indépendance *institutionnelle* de la cour dont ils étaient membres.

Dans le *Renvoi : Juges de la Cour provinciale*, précité, le juge en chef Lamer revient sur la nécessité d'une interprétation téléologique de la garantie d'indépendance judiciaire en adoptant au par. 156 la proposition suivante :

> [TRADUCTION] La sécurité financière est une condition essentielle de l'indépendance de la magistrature. Cependant, cet élément doit être considéré non pas dans l'abstrait, mais plutôt en relation avec son objet qui est, en définitive, de protéger le judiciaire contre la manipulation financière du législatif ou de l'exécutif.

Le juge en chef Lamer fait de nouveau ressortir ce point au par. 193 :

> Je veux qu'il soit bien clair que le fait de garantir un traitement minimal ne vise pas à avantager les juges. La sécurité financière est plutôt un moyen d'assurer l'indépendance de la magistrature et, de ce fait, elle est à l'avantage du public. Comme l'a dit le professeur Friedland, en tant que citoyen concerné, une telle mesure est « dans notre propre intérêt » . . .

La solution imposée dans le *Renvoi : Juges de la Cour provinciale* était d'ériger un rempart institutionnel (un « processus indépendant, efficace et objectif ») entre la législature et

on the one hand and the judiciary on the other to deal with matters related to the judges' financial security. The constitutional requirement was to "depoliticize" the relationship. This appeal does not put in issue the merits of the solution. It does put in issue the boundaries of what may fairly be described as matters related to the guarantee of financial security.

The need for a purposive approach was acknowledged by the New Brunswick Court of Appeal in these cases, *per* Ryan J.A.:

> The *Re Provincial Court Judges* case focused on the independence of the judiciary, a concept frequently misunderstood because its purpose is a protection to the public, not a benefit to judges. [Emphasis added.]
>
> ((1999), 235 N.B.R. (2d) 1, at para. 25)

In light of the history of this litigation it would not be surprising if the witnesses and parties and members of the public in Judge Mackin's court from 1995 onwards "misunderstood" the concept of judicial independence in so far as it is said to be for their benefit, and not for the benefit of the judges.

The legislature *could* have provided (but did not) that a supernumerary judge was obliged to work no more than 100 of the 251 court sitting days per year. In that event, I would have agreed with my colleague Gonthier J. that legislative repeal of such a significant fixed benefit without a prior review by an independent, effective and objective process (such as a remuneration commission) would be unconstitutional. Nothing in these reasons should be read as dissenting in any way from the process mandated in the *Provincial Court Judges Reference* to depoliticize the adjustment of judicial compensation.

My disagreement with my colleague is therefore quite narrow, and proceeds in the following steps:

(i) the essentials of judicial independence, including financial security, necessarily reside in

l'exécutif, d'un côté, et la magistrature, de l'autre, pour les questions relatives à la sécurité financière des juges. L'exigence constitutionnelle était de « dépolitiser » les rapports. Le présent pourvoi ne remet pas en question le bien-fondé de la solution. Il met en cause les limites de ce que l'on peut qualifier équitablement de questions touchant la garantie de sécurité financière.

122 Dans sa décision en l'espèce, la Cour d'appel du Nouveau-Brunswick, sous la plume du juge Ryan, reconnaît la nécessité d'une interprétation téléologique :

> [TRADUCTION] L'arrêt *Renvoi : juges de la Cour provinciale* portait sur l'indépendance de la magistrature, un concept souvent mal compris car son objet est de protéger le public, et non d'avantager les juges. [Je souligne.]
>
> ((1999), 235 R.N.-B. (2e) 1, par. 25)

Compte tenu de l'historique du présent litige, il ne serait pas étonnant que les témoins, les parties et les membres du public des audiences présidées par le juge Mackin après 1995 « comprennent mal » le concept de l'indépendance judiciaire dans la mesure où l'on dit qu'il est à leur avantage et non à celui des juges.

123 La législature *aurait pu* prévoir qu'un juge surnuméraire n'était pas tenu de siéger plus de 100 jours sur les 251 jours de séance par année, mais elle ne l'a pas fait. Dans ce cas, j'aurais été d'accord avec mon collègue le juge Gonthier pour dire qu'il serait inconstitutionnel d'abroger un avantage prescrit si important sans examen préalable dans le cadre d'un processus indépendant, efficace et objectif (comme une commission sur la rémunération). Rien dans les présents motifs ne doit être interprété comme un désaccord avec la procédure imposée dans le *Renvoi : Juges de la Cour provinciale* en vue de dépolitiser la détermination du traitement des juges.

124 Mon désaccord avec mon collègue est donc assez restreint et suit le cheminement suivant :

(i) les aspects essentiels de l'indépendance judiciaire, dont la sécurité financière, résident

objective and enforceable guarantees established in the governing law;

(ii) Provincial Court judges on supernumerary status in New Brunswick were guaranteed a full-time salary. The guarantee was honoured;

(iii) Provincial Court judges on supernumerary status were guaranteed security of tenure. The guarantee was honoured;

(iv) Provincial Court judges on supernumerary status were not guaranteed a 40 percent workload in exchange for full pay, or indeed any reduction in workload of an enforceable nature;

(v) a constitutional rule that provided that any decrease or increase in an undefined judicial workload could only be initiated through a remuneration commission would be unworkable;

(vi) the existence (or repeal) of discretionary benefits does not threaten judicial independence;

(vii) the disappointed expectations of the Provincial Court judges, however understandable, do not justify a finding of unconstitutionality.

I propose to deal with each of these points in turn.

(i) *The essentials of judicial independence, including financial security, necessarily reside in objective and enforceable guarantees established in the governing law*.

125 The bedrock of judicial independence, whether in relation to the individual judge or to the court of which he or she is a member, is the requirement of objective non-discretionary guarantees. Thus in *Valente*, Le Dain J. referred at p. 688 to the test adopted in that case by the Ontario Court of Appeal, namely whether the alleged deficiencies in "the status of [the judges of the Ontario Provincial Court] gave rise to a reasonable apprehension that the tribunal lacked the capacity to adjudicate in an independent manner". Le Dain J. added, "[t]his I take to be

nécessairement dans des garanties objectives et exécutoires établies dans la loi applicable;

(ii) une garantie de plein traitement a été donnée aux juges surnuméraires de la Cour provinciale du Nouveau-Brunswick et elle a été respectée;

(iii) une garantie d'inamovibilité a été donnée aux juges surnuméraires de la Cour provinciale et elle a été respectée;

(iv) aucune garantie n'a été donnée aux juges surnuméraires de la Cour provinciale d'une réduction de la charge de travail à 40 p. 100 en contrepartie d'un plein traitement, ni d'aucune réduction de nature exécutoire;

(v) une règle constitutionnelle prévoyant qu'une charge de travail indéfinie ne peut être augmentée ou réduite que par une commission sur la rémunération serait impraticable;

(vi) l'existence (ou l'abrogation) d'avantages discrétionnaires ne menace pas l'indépendance judiciaire;

(vii) les expectatives déçues des juges de la Cour provinciale, si compréhensibles soient-elles, ne justifient pas une conclusion d'inconstitutionnalité.

J'examinerai successivement chacun de ces points.

(i) *Les aspects essentiels de l'indépendance judiciaire, dont la sécurité financière, résident nécessairement dans des garanties objectives et exécutoires établies dans la loi applicable.*

L'exigence de garanties objectives non discrétionnaires est l'assise de l'indépendance de la magistrature, tant pour le juge pris individuellement que pour la cour dont il fait partie. Ainsi, dans *Valente*, précité, p. 688, le juge Le Dain cite le critère adopté par la Cour d'appel de l'Ontario, à savoir que les lacunes reprochées « au statut de juge de cour provinciale faisaient naître une crainte raisonnable que le tribunal n'ait pas la capacité de statuer d'une manière indépendante ». Il poursuit : « Je pense que c'est là plus précisément une référence au statut

more clearly a reference to the objective status or relationship of judicial independence, which in my opinion is the primary meaning to be given to the word 'independent' in s. 11(*d*)" (emphasis added). Thus, he concluded, "judicial independence is a status or relationship resting on objective conditions or guarantees" (p. 689).

The essential guarantees of judicial independence (both individual and constitutional) are security of tenure, financial security and administrative independence in relation to adjudicative matters.

For present purposes, the discussion in *Valente* of financial security is instructive. According to Le Dain J., the salaries of superior court judges, "fixed" in a federal statute pursuant to s. 100 of the *Constitution Act, 1867*, represent "the highest degree of constitutional guarantee of security of tenure and security of salary and pension" (p. 693), but this is not essential. While Ontario Provincial Court judges' salaries were not "fixed" by legislation, they were guaranteed by regulation. "The essential point", Le Dain J. said, "is that the right to salary of a provincial court judge is established by law, and there is no way in which the Executive could interfere with that right in a manner to affect the independence of the individual judge" (p. 706).

The situation here is very different. There were no guarantees of reduced workload in the Act. As the respondent Judge Rice testified, "If the Chief Judge asked me to do something, I did it". The rule that security of tenure, financial security and administrative independence in relation to adjudicative matters must be guaranteed in the law in *explicit non-discretionary terms*, was endorsed in *Beauregard v. Canada*, [1986] 2 S.C.R. 56, at p. 75, and *Lippé*, at p. 143. Thus, if a measure is essential to judicial independence it cannot be left up in the air as a matter of discretion.

In the *Provincial Court Judges Reference*, Lamer C.J. pointed out at para. 112 that "the objective guarantees define th[e] status" of independence

objectif ou à la relation d'indépendance judiciaire, qui, à mon avis, est le premier sens qu'il faut donner au terme "indépendant" de l'al. 11*d*) » (je souligne). Il conclut donc que « l'indépendance judiciaire est un statut ou une relation reposant sur des conditions ou des garanties objectives » (p. 689).

126 Les garanties essentielles de l'indépendance judiciaire (tant individuelle qu'institutionnelle) sont l'inamovibilité, la sécurité financière et l'indépendance administrative en matières juridictionnelles.

127 Aux fins du pourvoi, l'analyse de la sécurité financière dans *Valente* est intéressante. Selon le juge Le Dain, le fait que les traitements des juges des cours supérieures sont « fixés » dans une loi fédérale, conformément à l'art. 100 de la *Loi constitutionnelle de 1867*, représente « le plus haut degré de garantie constitutionnelle d'inamovibilité et de sécurité de traitement et de pension » (p. 693), mais ce n'est pas essentiel. Même si les traitements des juges de la Cour provinciale de l'Ontario n'étaient pas « fixés » par une loi, ils étaient garantis par règlement. Selon le juge Le Dain, « [l]'essentiel [. . .] est que le droit du juge de cour provinciale à un traitement soit prévu par la loi et qu'en aucune manière l'exécutif ne puisse empiéter sur ce droit de façon à affecter l'indépendance du juge pris individuellement » (p. 706).

128 La situation en l'espèce est très différente. La Loi ne garantit aucune réduction de la charge de travail. Le juge Rice, intimé, dit dans son témoignage : [TRADUCTION] « Si le juge en chef me demandait de faire quelque chose, je le faisais ». La règle que l'inamovibilité, la sécurité financière et l'indépendance administrative pour les matières juridictionnelles doivent être garanties dans la loi en des *termes explicites non discrétionnaires* a été adoptée dans *Beauregard c. Canada*, [1986] 2 R.C.S. 56, p. 75, et *Lippé*, p. 143. En conséquence, si une mesure est essentielle à l'indépendance judiciaire, elle ne peut être laissée en suspens à titre de question discrétionnaire.

129 Dans le *Renvoi : Juges de la Cour provinciale*, le juge en chef Lamer fait remarquer que « les garanties objectives définissent [le] statut »

(emphasis in original). In that case statutory provisions that lacked concrete guarantees were held insufficient to ensure judicial independence. Thus an Alberta statutory provision that said the government *may* set judicial salaries for provincial judges was declared unconstitutional even though a regulation subsequently made under the same Act made it mandatory (paras. 221-22). A Manitoba statutory provision withdrawing provincial court staff as a cost cutting measure on specific days ("Filmon Fridays") was declared unconstitutional because the Court refused to "read down" the legislation to eliminate the objection. Lamer C.J. stated that "to read down the legislation to its proper [i.e. constitutional] scope would amount to reading in those objective conditions and guarantees" (para. 276). This, he said, was not permissible.

d'indépendance ((par. 112) souligné dans l'original). Dans ce renvoi, des dispositions législatives ne comportant pas de garanties concrètes sont jugées insuffisantes pour assurer l'indépendance judiciaire. Ainsi, est déclarée inconstitutionnelle une disposition législative de l'Alberta indiquant que le gouvernement *peut* fixer les traitements des juges de la Cour provinciale même si un règlement pris ultérieurement en vertu de la même loi en fait une obligation (par. 221-222). Une disposition législative au Manitoba prévoyant, à titre de mesure de réduction des dépenses, le retrait du personnel de la cour provinciale certains jours (les « vendredis de Filmon ») est déclarée inconstitutionnelle parce que la Cour refuse de donner une « interprétation atténuée » au texte de loi pour éliminer l'objection. Selon le juge en chef Lamer, « le fait d'interpréter de façon atténuée le texte de loi pour lui donner son champ d'application approprié [c.-à-d. constitutionnel] reviendrait à considérer qu'il comporte ces conditions et garanties objectives » (par. 276), ce qui n'est pas permis.

130 In this case we are asked to read specific guarantees of workload reduction into the *Provincial Court Act* in order that we can declare their repeal to be unconstitutional.

En l'espèce, on nous demande de tenir pour incluses dans la *Loi sur la Cour provinciale* des garanties précises de réduction de la charge de travail afin de pouvoir déclarer leur abrogation inconstitutionnelle.

131 It is only by reading in such guarantees that repeal of the statutory provisions could be said to require recourse to a remuneration commission. If, as I believe, there is no guarantee in the legislation of workload reduction, there is nothing to repeal that could be said to entail one of the objective guarantees that "define" the status of judicial independence (*Provincial Court Judges Reference*, *supra*, at para. 112).

Il faut tenir ces garanties pour incluses dans la loi pour pouvoir dire que l'abrogation des dispositions législatives exige le recours à une commission sur la rémunération. Si, comme je le crois, la loi ne contient aucune garantie de réduction de la charge de travail, il n'y a rien à abroger que l'on pourrait considérer comme touchant une des garanties objectives qui « définissent » le statut de l'indépendance de la magistrature (*Renvoi : Juges de la Cour provinciale*, par. 112).

132 Perhaps the closest analogy to the case now before us is provided by one of the provisions struck down in *Valente*, *supra*. It authorized the reappointment of retired Ontario Provincial Court judges to sit "at pleasure" (p. 699). The evidence accepted by the Court was that by *tradition* these appointments were as secure as the tenure of regular Provincial Court judges who held office during good

L'une des dispositions invalidées dans *Valente*, précité, offre peut-être l'analogie la plus proche du présent pourvoi. Cette disposition autorisait la nouvelle nomination à titre amovible des juges de la Cour provinciale de l'Ontario à la retraite. Notre Cour a accepté la preuve que, *traditionnellement*, ces nominations étaient aussi protégées que la charge des juges titulaires de cour provinciale

behaviour. The existence and strength of this tradition was accepted by the Ontario Court of Appeal as sufficient to guarantee judicial independence. Le Dain J. noted that "Howland C.J.O. placed considerable emphasis on the role of tradition as an objective condition or safeguard of judicial independence" (p. 699). Howland C.J.O. had cited, inter alia, P. W. Hogg, *Constitutional Law of Canada* (1977), at p. 120:

> The independence of the judiciary has since become such a powerful tradition in the United Kingdom and Canada that there may be little point in a fine analysis of the language of the provisions by which it is formally guaranteed.

This Court disagreed. The "fine analysis of the language of the provisions" was thought to be very important indeed. Le Dain J., speaking for a unanimous Court, ruled that traditions and expectations, however strongly observed, "cannot supply essential conditions of independence for which specific provision of law is necessary" (p. 702 (emphasis added)). This is particularly the case where the terms of the law are at odds with the alleged expectation. The Ontario law provided, contrary to the alleged tradition, that retired judges would on reappointment hold office "at pleasure" (p. 699). Here the law simply provided that the judge on supernumerary status would be available to perform whatever judicial duties were assigned. To read a specific workload limitation into such a provision would be to amend the legislation.

In my view, with respect, there must be a specific provision of law to guarantee a judge full-time pay for part-time work if it is sought (as here) to make that guarantee part of the bulwark of judicial independence.

The lesson from these cases is that traditions and expectations, however widely shared, do not constitute "objective conditions" for the purposes of defining the judicial independence required by s. 11(*d*) of the *Charter*. The Court cannot amend the legislation by reading in expectations, however widely

nommés à titre inamovible. La Cour d'appel de l'Ontario a considéré que l'existence et la force de cette tradition étaient suffisantes pour garantir l'indépendance judiciaire. Le juge Le Dain, p. 699, note que « le juge en chef Howland a accordé une importance considérable au rôle de la tradition en tant que condition ou garantie objectives de l'indépendance judiciaire ». Le juge en chef Howland avait notamment cité P. W. Hogg, *Constitutional Law of Canada* (1977), p. 120 :

> [TRADUCTION] L'indépendance du pouvoir judiciaire est devenue depuis une tradition tellement puissante au Royaume-Uni et au Canada que procéder à une analyse subtile des textes qui la garantissent formellement n'aurait guère d'utilité.

133 La Cour s'est dite en désaccord, considérant qu'une « analyse subtile des textes » était en fait très importante. Le juge Le Dain, au nom de la Cour unanime, décide que les traditions et les expectatives, si fortement respectées soient-elles, « ne peu[vent] fournir les conditions essentielles d'indépendance qui doivent être prévues expressément par la loi » (p. 702 (je souligne)). Cela est particulièrement vrai lorsque le texte de loi ne concorde pas avec les attentes alléguées. La loi de l'Ontario prévoyait, contrairement à la tradition invoquée, que les juges à la retraite pouvaient être nommés de nouveau à titre amovible (p. 699). En l'espèce, la loi prévoyait simplement que le juge surnuméraire exerçait les fonctions judiciaires qui lui étaient assignées. Considérer comme incluse dans une telle disposition une réduction spécifique de la charge de travail reviendrait à modifier la loi.

134 En toute déférence, je pense que la loi doit expressément garantir au juge un plein traitement en contrepartie d'un travail à temps partiel pour faire de cette garantie (comme on cherche à le faire en l'espèce) un élément du rempart de l'indépendance judiciaire.

135 La leçon à tirer de ces arrêts est que les traditions et les expectatives, même largement reconnues, ne sont pas des « conditions objectives » pour définir l'indépendance judiciaire exigée par l'al. 11*d*) de la *Charte*. La Cour ne peut modifier la loi en tenant pour incluses des expectatives,

shared (as in the anticipation of a 40 percent workload of supernumerary judges in New Brunswick) or expectation based on longstanding tradition (as in the tenure of post-retirement appointees to the Ontario provincial bench).

136 I do not underestimate the importance of the unwritten customs and traditions that support the institutional independence of the courts. I say only that a particular workload benefit, which never rose to the level of being specified let alone guaranteed in law, does not constitute part of the "objective guarantees" that define the status of judicial independence and which thereby attract constitutional protection.

137 If the legislative provision is so imprecise as not to be capable of constituting part of the guarantee of financial security (or, more broadly, of judicial independence), its existence is not essential to the constitutionality of the court, and its repeal is not therefore constitutionally prohibited.

(ii) *Provincial Court judges on supernumerary status in New Brunswick were guaranteed a full-time salary. The guarantee was honoured.*

138 In *Valente*, *Beauregard*, *Lippé*, and the *Provincial Court Judges Reference*, the Court established "the essential" guarantees of judicial independence. One of these is financial security. No objection is taken to the statutory guarantee of a fixed salary to Provincial Court judges on regular status (s. 14(2)). The judges on supernumerary status were guaranteed the same salary by their inclusion in the definition of "judge" in s. 2(1) of the Act. When the respondents returned to regular status on April 1, 1995, there was no change in either the amount of their pay or its protected status.

(iii) *Provincial Court judges on supernumerary status were guaranteed security of tenure. The guarantee was honoured.*

139 The respondents Mackin and Rice continued to enjoy the same security of tenure as Provincial

même largement reconnues (comme l'attente d'une charge de travail de 40 p. 100 pour les juges surnuméraires du Nouveau-Brunswick) ou fondées sur une longue tradition (l'inamovibilité alléguée des juges de la Cour provinciale de l'Ontario nommés après leur retraite).

Je ne sous-estime pas l'importance des coutumes et traditions non écrites qui soutiennent l'indépendance institutionnelle des tribunaux. Je dis seulement qu'un avantage donné relatif à la charge de travail, qui n'a jamais été garanti ni même mentionné dans une loi, ne fait pas partie des « garanties objectives » qui définissent le statut d'indépendance judiciaire et jouissent de ce fait d'une protection constitutionnelle.

Si la disposition législative est si imprécise qu'elle ne peut être un élément de la garantie de sécurité financière (ou, de façon plus générale, de la garantie d'indépendance judiciaire), son existence n'est pas essentielle à la constitutionnalité du tribunal et son abrogation n'est pas interdite par la Constitution.

(ii) *Une garantie de plein traitement a été donnée aux juges surnuméraires de la Cour provinciale du Nouveau-Brunswick et elle a été respectée.*

Dans *Valente*, *Beauregard*, *Lippé* et *Renvoi : Juges de la Cour provinciale*, précités, notre Cour a établi les garanties « essentielles » de l'indépendance judiciaire. L'une d'elles est la sécurité financière. Aucune objection n'est soulevée quant à la garantie légale d'un traitement fixe pour les juges titulaires de la Cour provinciale (par. 14(2)). Le même salaire était garanti aux juges surnuméraires par leur inclusion dans la définition du mot « juge » au par. 2(1) de la Loi. Quand les intimés ont repris leur statut de juges titulaires le 1er avril 1995, le montant et la protection de leur traitement sont demeurés inchangés.

(iii) *Une garantie d'inamovibilité a été donnée aux juges surnuméraires de la Cour provinciale et elle a été respectée.*

Les intimés Mackin et Rice ont continué de bénéficier de la même inamovibilité que les juges

Court judges on regular status. As mentioned, they were included in the definition of "judge". I agree with my colleague Gonthier J. (at para. 47) that their supernumerary status did not give rise to any special tenure. Those who elected to become supernumerary were not "appointed" or "re-appointed". The original appointment continued in effect with the *potential* of a reduction in workload of an indeterminate amount at an indeterminate time. As the respondent Judge Rice wrote in his letter of February 17, 1993 to the Minister of Justice electing supernumerary status:

> This election is not, in any way, to be considered as my resignation from my appointment as a Judge of the Provincial Court.

In the New Brunswick Court of Appeal, Ryan J.A. argued that the use of the word "office" in s. 4.1(3) implied a separate and distinct tenure that was wiped out by the 1995 amendments. It is true that the word "office" has a special connotation in law, but it is not associated with any particular security of tenure: *Ridge v. Baldwin*, [1964] A.C. 40 (H.L.), *per* Lord Reid, at p. 65. In *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311, the "office" holder was a probationary police constable whose tenure was at pleasure. If Ryan J.A. were correct that use of the word "office" connoted a distinct and separate tenure from that of the Provincial Court judges on regular status, the result would have been an office without clear legislative definition. The holders of the allegedly distinct office of supernumerary judge would have lacked from the outset the objective guarantees of judicial independence. Such a judicial "office" would have been unconstitutional. As pointed out by Lamer C.J. in the extract from the *Provincial Court Judges Reference* previously cited at para. 39, it would not be for the Court to read into the word "office" the necessary guarantees of tenure to make up for the legislative deficiency.

titulaires de la Cour provinciale. Comme je l'ai mentionné, ils étaient inclus dans la définition du mot « juge ». Je souscris à l'opinion de mon collègue le juge Gonthier (par. 47) qu'il n'y a pas de différence dans l'inamovabilité attachée au statut de juge surnuméraire. Ceux qui choisissaient de devenir surnuméraires n'étaient pas « nommés » ou « nommés de nouveau ». La nomination initiale demeurait en vigueur, assortie d'une *possibilité* de réduction indéterminée de la charge de travail à un moment indéterminé. Comme le dit le juge Rice, intimé, dans sa lettre du 17 février 1993 au ministre de la Justice l'informant qu'il choisissait de devenir surnuméraire :

> [TRADUCTION] Ce choix ne constitue en aucune façon une démission de mon poste de juge de la Cour provinciale.

140 Dans le jugement de la Cour d'appel du Nouveau-Brunswick, le juge Ryan souligne que l'utilisation du mot « poste » au par. 4.1(3) implique l'existence d'une charge séparée et distincte qui a été éliminée par les modifications de 1995. Il est vrai que le mot « poste » a une connotation spéciale en droit, mais il n'est pas lié à une inamovibilité particulière : *Ridge c. Baldwin*, [1964] A.C. 40 (H.L.), lord Reid, p. 65. Dans *Nicholson c. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 R.C.S. 311, le titulaire de « poste » était un agent de police en stage occupant un emploi à titre amovible. Si l'utilisation du mot « poste » comportait, comme l'indique le juge Ryan, l'idée d'une charge séparée et distincte de celle des juges titulaires de la Cour provinciale, le résultat aurait été de créer un poste sans définition légale précise. Les titulaires du poste censément distinct de juge surnuméraire auraient été privés dès le début des garanties objectives d'indépendance judiciaire. Une telle « charge » judiciaire aurait été inconstitutionnelle. Comme le souligne le juge en chef Lamer dans l'extrait du *Renvoi : Juges de la Cour provinciale,* cité au par. 39, il n'appartient pas à notre Cour de décider que le terme « poste » comporte les garanties nécessaires d'inamovibilité pour qu'il puisse être remédié à la lacune législative.

(iv) *Provincial Court judges on supernumerary status were not guaranteed a 40 percent workload or any other reduction.*

141 Supernumerary status was adopted in New Brunswick in 1988 after lengthy discussions between the government and the Provincial Court judges which had commenced in about 1981.

142 The theory underlying the 40 percent workload expectation was that to be eligible for supernumerary status a Provincial Court judge must meet all the conditions for retirement except the desire to retire. If he or she elected to retire, the state would be required to pay a pension equivalent to 60 percent of the average of specified years of judicial earnings. There would be no further judicial work. If he or she elected supernumerary status, however, the judge could make up the 40 percent loss of income occasioned by retirement by continuing to work 40 percent of the time. This expectation of a greatly reduced workload was widely shared by Ministers, judges, civil servants and others in New Brunswick. But it was not written into the *Provincial Court Act*.

143 To be clear, the respondent Rice, as a Provincial Court judge with supernumerary status, was *not* a retired person with a part-time job. He was eligible to retire but he had elected not to. He was not drawing a pension "topped up" by 40 percent pay for 40 percent workload. He was receiving a full-time salary and all the benefits of a judge on regular status. He continued to receive medical coverage. His life insurance continued to be subsidized to the extent (at the date of his retirement) of over $2,000 per month. Any increase in annual salary would translate into a higher base on which his pension would eventually be calculated (albeit, as with judges on regular status, he was required to continue pension contributions in the interim). The respondent Mackin was in a similar position. In exchange for these benefits they continued to hold themselves available for work as assigned by the Chief Judge. In a province short on judicial resources, the

(iv) *Aucune garantie n'a été donnée aux juges surnuméraires de la Cour provinciale d'une réduction de la charge de travail à 40 p. 100 ni d'aucune autre réduction.*

Le statut de surnuméraire a été établi en 1988, après de longs pourparlers engagés en 1981 entre le gouvernement et les juges de la Cour provinciale.

L'expectative d'une charge de travail de 40 p. 100 repose sur l'idée qu'un juge de la Cour provinciale, pour devenir admissible au statut de surnuméraire, devait remplir toutes les conditions régissant le départ à la retraite, sauf le désir de prendre sa retraite. Si le juge décidait de prendre sa retraite, l'État devait lui verser une pension égale à 60 p. 100 de la moyenne de ses gains calculés sur un nombre déterminé d'années et ses fonctions judiciaires cessaient. Cependant, s'il décidait de devenir surnuméraire, le juge pouvait combler la perte de revenu de 40 p. 100 résultant de la retraite, en continuant de travailler 40 p. 100 du temps. Cette expectative de forte réduction de la charge de travail était largement reconnue au Nouveau-Brunswick par les ministres, les juges, les fonctionnaires et autres. Toutefois elle n'était pas inscrite dans la *Loi sur la Cour provinciale*.

Pour être bien clair, l'intimé Rice quand il était juge surnuméraire de la Cour provinciale, *n*'était *pas* une personne à la retraite ayant un travail à temps partiel. Il était admissible à la retraite, mais il avait choisi de ne pas la prendre. Il ne touchait pas une pension majorée de 40 p. 100 en contrepartie d'une charge de travail de 40 p. 100. Il recevait un traitement à temps plein ainsi que tous les avantages d'un juge titulaire. Il continuait de bénéficier d'un régime d'assurance médicale. Son assurance-vie continuait d'être subventionnée à raison de plus de 2 000 $ par mois (à la date de sa retraite). Tout accroissement de salaire annuel le plaçait à un échelon plus élevé pour le calcul futur de la pension (mais, comme les juges titulaires, il devait entre-temps continuer de verser ses cotisations de retraite). L'intimé Mackin était dans une position semblable. En contrepartie de ces avantages, ils restaient disponibles pour exercer les fonctions que leur assignait le juge en chef.

assignments in some cases amounted more or less to full-time employment. If the assignments proved unexpectedly onerous, either one of them could have elected to retire on full pension at any time.

Dans une province disposant de ressources judiciaires insuffisantes, les fonctions assignées correspondaient parfois à un emploi à temps plein ou presque. Si ces tâches s'avéraient plus lourdes que prévu, il leur était en tout temps loisible de prendre leur retraite avec une pension complète.

The key provision, as stated, is s. 4.1(5) of the *Provincial Court Act*, which said:

144 Comme je l'ai mentionné, la disposition clé est le par. 4.1(5) de la *Loi sur la Cour provinciale* :

4.1(5) A judge appointed under subsection 2(1) who has elected to hold the office of supernumerary judge shall be available to perform such judicial duties as may be assigned to the judge from time to time by the chief judge or associate chief judge.

4.1(5) Un juge nommé en vertu du paragraphe 2(1) qui a choisi d'exercer les fonctions de juge surnuméraire doit être disponible pour exercer les fonctions judiciaires qui peuvent lui être assignées à l'occasion par le juge en chef ou le juge en chef associé.

If "full" workload for a Provincial Court judge is taken to be plus or minus 251 court days a year (which is the assumption on which the repealing legislation is based), 40 percent of that is plus or minus 100 days a year. The legislation establishing supernumerary status obviously could have specified a precise figure but just as obviously it did not do so. Instead the obligation was to do the judicial work assigned by the Chief Judge, whatever and whenever it might be.

145 Si une « pleine » charge de travail de juge de la Cour provinciale est censée se situer aux alentours de 251 jours par an (hypothèse sur laquelle repose la loi abrogative), une charge de 40 p. 100 correspond à environ 100 jours par an. Il est évident que le texte instaurant le poste de surnuméraire aurait pu préciser un chiffre et il est tout aussi évident qu'il ne l'a pas fait. Au lieu de cela, les obligations du poste consistaient à exécuter les travaux judiciaires assignés par le juge en chef, quels qu'en soient la nature et le moment.

My colleague Gonthier J., in para. 65, places emphasis on the words "time to time" in s. 4.1(5). It was not, of course, contemplated that the first assignment by the Chief Judge would necessarily be the last. It was to be expected that from "time to time" the assignments would change. In my view that phrase indicates a multiplicity of assignments, not a reduction in workload. With respect, an *increase* in overall workload would be equally consistent with the statutory language (such as, for example, a transfer to a busier court).

146 Mon collègue le juge Gonthier met l'accent au par. 65 sur l'expression « à l'occasion » du par. 4.1(5). Il n'était certainement pas envisagé que les premières tâches assignées par le juge en chef seraient nécessairement les dernières. Il fallait s'attendre à ce que les fonctions assignées changent « à l'occasion ». À mon avis, cette expression suggère une multiplicité de tâches, et non une réduction de la charge de travail. En toute déférence, le texte de loi peut tout aussi bien viser un *accroissement* de la charge de travail (par exemple, le détachement auprès d'une cour plus affairée).

When the respondent, Judge Rice, who at the time was a judge of over 20 years' experience, was considering whether to elect supernumerary status in 1992, he sought a number of clarifications from the Minister of Justice. He asked for information as follows:

147 En 1992, lorsque le juge Rice, intimé, qui avait alors plus de 20 ans d'expérience, examinait s'il devait choisir de devenir surnuméraire, il a demandé au ministre de la Justice un certain nombre de précisions en ces termes :

(3) WORK ASSIGNMENTS. Supernumerary Judges are required to sit a minimum of 40% of working days

[TRADUCTION] (3) FONCTIONS ASSIGNÉES. Un juge surnuméraire est tenu de siéger au minimum 40 p.

each year, as assigned by the Chief Judge, the Associate Chief Judge, or a Judge designated for the purpose of assigning Judges in a Judicial District. [Emphasis in original.]

This was confirmed by the Minister in writing on March 16, 1992:

A supernumerary judge is required to sit the equivalent of a minimum of 40% of a full-time judge's work year. The Chief Judge, or the Associate Chief Judge, is responsible to assign sittings. [Emphasis added.]

148 Neither the respondent, Judge Rice, nor the Minister suggested that there existed a *maximum* workload short of 100 percent of the workload of a judge on regular status. Having regard to the varied work experiences of Judge Rice, Judge Harper and Judge Mackin, I do not think, with respect, that the evidence supports my colleague's conclusion, at para. 65, that "[n]ormally" a judge on supernumerary status "enjoyed a substantial reduction in his or her workload". The experience was too mixed to permit any generalization in that regard, in my opinion.

149 The assignment responsibility rested with the Chief Judge, but the reality was that he could only work within the resources the province provided. The respondents' position is, in truth, not only that the 40 percent workload should be read into the Act, but that the province had a constitutional responsibility to provide enough judges to make the 40 percent workload achievable. This, with respect, is too much to "read into" a statute that simply says a judge is to do the work assigned by the Chief Judge.

(v) *A constitutional rule that provided that any decrease or increase in an undefined judicial workload could only be initiated through a remuneration commission would be unworkable*.

150 The judgments on appeal state that the 1995 repeal of supernumerary status was unconstitutional because it did not receive prior review by an independent, effective and objective process (e.g. a remuneration commission). Quite apart from the fact the constitutional requirement of an

100 des jours ouvrables chaque année, selon les fonctions qui peuvent lui être assignées par le juge en chef, le juge en chef associé ou un juge désigné chargé d'assigner les juges d'un district judiciaire. [Souligné dans l'original.]

Le 16 mars 1992, le ministre confirmait cela par écrit :

[TRADUCTION] Un juge surnuméraire est tenu de siéger 40 p. 100 au minimum d'une année de travail d'un juge à temps plein. Il appartient au juge en chef ou au juge en chef associé d'assigner les séances. [Je souligne.]

Ni l'intimé le juge Rice ni le ministre ne laissent entendre qu'il existait une charge de travail *maximale* inférieure à la pleine charge de travail d'un juge titulaire. Compte tenu des expériences professionnelles variées des juges Rice, Harper et Mackin, je ne crois pas, en toute déférence, que la preuve appuie la conclusion de mon collègue au par. 65 selon laquelle, « [n]ormalement », un juge devenant juge surnuméraire « bénéficiait d'une réduction substantielle de sa charge de travail ». À mon avis, l'expérience était trop variable pour justifier une telle généralisation.

Il appartenait au juge en chef d'assigner les fonctions, mais en réalité il ne disposait que des ressources que lui fournissait la province. La thèse des intimés revient à dire en réalité non seulement qu'il faut interpréter la Loi comme prescrivant une charge de travail réduite à 40 p. 100, mais aussi que la province avait la responsabilité constitutionnelle de nommer suffisamment de juges pour que l'objectif de 40 p. 100 soit réalisable. En toute déférence, c'est une « inclusion » trop large dans une loi qui dit simplement qu'un juge exerce les fonctions assignées par le juge en chef.

(v) *Une règle constitutionnelle prévoyant qu'une charge de travail indéfinie ne peut être augmentée ou réduite que par une commission sur la rémunération serait impraticable.*

Selon les jugements portés en appel, l'abrogation en 1995 du statut de surnuméraire était inconstitutionnelle parce qu'elle n'avait pas été préalablement examinée dans le cadre d'un processus indépendant, efficace et objectif (soit une commission sur la rémunération). En dehors du fait que notre

independent, effective and objective process was not elaborated by this Court until the *Provincial Court Judges Reference* in 1997, two years after the amendments in issue here, I cannot accept this argument.

Cour n'a élaboré l'exigence constitutionnelle d'un processus indépendant, efficace et objectif qu'en 1997 dans le *Renvoi : Juges de la Cour provinciale*, soit deux ans après les modifications contestées en l'espèce, je ne puis souscrire à cet argument.

It is useful to reiterate that the respondents received the same salary after the repeal of the supernumerary status as they did beforehand.

151 Il est utile de rappeler que les intimés ont touché le même traitement tant après qu'avant l'abrogation du statut de surnuméraire.

In oral argument it was suggested that if a supernumerary judge were required to do more work for the same amount of money, his hourly rate, if it may be so conceived, was reduced. Instead of earning a full salary for a 40 percent workload he had to work a full year for the same amount of money. However, once the debate is properly focused on workload, and the so-called workload guarantee is related to the process mandated by the *Provincial Court Judges Reference*, the question arises as to how a remuneration commission would be supposed to give *prior* effective review to increases or decreases in judicial workload across the province.

152 Dans les débats, on a laissé entendre que le traitement horaire d'un juge surnuméraire, si on peut le concevoir ainsi, diminuait s'il devait accomplir davantage de travail pour le même traitement. Au lieu de toucher un plein traitement pour 40 p. 100 du travail, le juge surnuméraire devait travailler une année complète pour le même montant. Cependant, si on porte l'attention, comme il se doit, sur la charge de travail, et qu'on établit un rapport entre la prétendue garantie de charge de travail et la procédure imposée par le *Renvoi : Juges de la Cour provinciale*, on peut se demander comment une commission sur la rémunération serait en mesure de faire un examen *préalable* efficace des augmentations ou réductions de la charge de travail des juges à travers la province.

The evidence shows that in 1990-91 each judge in the Provincial Court at Fredericton disposed of 2,714 cases a year. In Campbellton the equivalent per year was 1,775 cases and in St. John it was 2,729 cases. The busiest Provincial Court was Moncton where each of the judges disposed of about 5,335 cases per year. In each instance the Provincial Court judge on regular status received the same salary. If the statistics are to be believed, judges in different regions therefore had a very different workload and, because each earned the same salary, a very different "hourly" rate.

153 Selon la preuve, chaque juge de la Cour provinciale à Fredericton a statué, en 1990-1991, sur 2 714 dossiers, contre 1 775 dossiers à Campbellton et 2 729 à Saint John. C'est à Moncton que la Cour provinciale était la plus occupée, chaque juge statuant sur environ 5 335 dossiers par an. Dans chaque cas, le juge titulaire de la Cour provinciale recevait le même traitement. S'il faut croire les statistiques, les juges des diverses régions avaient des charges de travail très différentes et, puisqu'ils recevaient tous le même traitement, bénéficiaient donc de taux « horaires » très différents.

The Chief Judge testified that the statistics were simplistic and failed to take into account many factors, including the nature of the cases. I agree with his criticism, but even making a generous allowance for the crudity of the statistics, the workload variation is impressive. In these circumstances how many hours a year constitutes a 100 percent workload on which the 40 percent workload is to be cal-

154 Le juge en chef a témoigné que les statistiques étaient simplistes et ne tenaient pas compte de nombreux facteurs, dont la nature des dossiers. Je fais mienne cette critique; cependant, même en tenant largement compte du caractère rudimentaire des statistiques, la variation de la charge de travail est considérable. Dans ces circonstances, il faut se demander à combien d'heures de travail correspond

culated? Are we to take a provincial average or is a judge entitled to look at the historical average for his or her region? Or his or her personal history? This again provides unevenly moving targets. The statistics show that whereas the workload in Moncton was expected to grow by 17 percent in 1991-92, the increase in St. John was only 2 percent. In Campbellton the expected growth was 66 percent.

155 The constitutional requirement is for prior reference of a change in benefits to the remuneration commission. Unless the Legislature was prepared to fix a specific number of work days per year (and, as stated, 100 days would be 40 percent of a notional 251 days a year sat by Provincial Court judges on regular status), I do not understand how "workload" as an abstract statistic can be fixed in advance. The bare concept of a *reduced* workload is too elastic to provide a manageable standard. The legislature, as stated, was clearly not prepared to guarantee any fixed and defined benefit, or indeed any benefit at all.

156 The bottom line is that the 1995 New Brunswick legislation established a *potential* benefit of wholly indeterminate value. It offered the possibility of less work for the same amount of pay, but the possibility of achieving this expectation was always subject to the exigencies of each court location and the resources available to the Chief Judge to get done the judicial work that had to be done. The *Provincial Court Judges Reference* established the requirement of an independent, effective and objective process to deal with financial security. The salary of supernumerary judges was secure. Each supernumerary judge received full pay. An extension of the remuneration commission process to an undefined "reduced" workload is neither sensible nor required. Yet it is the repeal of the workload benefit supposedly guaranteed by supernumerary status that is said to be unconstitutional because the province did not first go through a remuneration commission process.

une charge complète qui sert à calculer la charge de 40 p. 100. Faut-il prendre une moyenne provinciale, ou le juge peut-il examiner la moyenne historique de sa région? Faut-il utiliser les antécédents personnels? Cela donne aussi de fortes fluctuations. Selon les statistiques, en 1991-1992, les prévisions indiquaient un accroissement de 17 p. 100 du travail à Moncton, contre seulement 2 p. 100 à Saint John. À Campbellton, la croissance prévue était de 66 p. 100.

L'exigence constitutionnelle est de soumettre préalablement à la commission sur la rémunération les modifications des avantages. À moins que la législature ne soit disposée à fixer un nombre annuel précis de jours de travail (ce qui donnerait, comme on l'a vu, 100 jours pour une charge de travail de 40 p. 100 d'un nombre théorique de 251 jours de travail pour un juge titulaire de la Cour provinciale), je ne vois pas comment la « charge de travail » en tant que statistique abstraite peut être fixée à l'avance. Le simple concept de *réduction* de charge de travail est trop extensible pour être une norme utilisable. Comme je l'ai indiqué, il est évident que la législature n'était pas disposée à garantir un avantage fixe et défini, ou en fait un avantage quelconque.

L'essentiel est que le texte législatif de 1995 du Nouveau-Brunswick établissait un avantage *potentiel* ayant une valeur totalement indéterminée. Ce texte offrait aux juges la possibilité de travailler moins pour le même traitement, mais la réalisation de cette possibilité dépendait toujours des impératifs tenant à la région et aux ressources dont disposait le juge en chef pour les travaux judiciaires. Le *Renvoi : Juges de la Cour provinciale* a établi l'exigence d'un processus indépendant, efficace et objectif relativement aux questions de sécurité financière. Le traitement des juges surnuméraires était garanti. Chaque juge surnuméraire recevait un plein traitement. Il n'est ni raisonnable ni requis d'étendre l'application de la procédure d'une commission sur la rémunération à une « réduction » indéterminée de la charge de travail. Pourtant, c'est l'abrogation de l'avantage relatif à la charge de travail prétendument garanti par le statut de surnuméraire que l'on allègue être inconstitutionnelle parce que la province ne l'a pas préalablement soumise au processus d'une commission sur la rémunération.

(vi) *The existence (or repeal) of discretionary benefits does not threaten judicial independence.*

The potential advantages of supernumerary status lay either in the discretion of the Chief Judge or his delegate who was responsible for assigning the work (or assigning a specific courtroom) to the supernumerary judge or, alternatively in the discretion of the provincial government in its overall budgetary allocation for the Provincial Court and its willingness to appoint new judges to replace supernumerary judges to help to deal with the expanding workload.

In my view the culprit here, if culprit there be, is the provincial government's refusal to allocate adequate resources to the court. Chief Judge Strange was clearly willing to exercise his discretion to allow very significant workload reductions to supernumerary judges, but his priority was to staff the courts on a week-to-week basis, and the lack of adequate resources left him unable to accomplish both objectives. As between the public interest in seeing the courts operate on a full-time basis and the private interest of some of the judges on supernumerary status in realizing their expected benefits, he chose correctly, and inevitably, the public interest. The issue, therefore, is really about the government's exercise of its discretion over the Provincial Court budget.

In *Valente* it was contended that government control over such discretionary matters as post-retirement reappointment, or leaves of absence with or without pay, or permission to engage in extra-judicial employment, violated judicial independence. This argument was rejected. Le Dain J. stated at p. 714:

> While it may well be desirable that such discretionary benefits of advantages, to the extent that they should exist at all, should be under the control of the judiciary rather than the Executive, as recommended by the Deschênes report and others, I do not think that their control by the Executive touches what must be considered to be one of the essential conditions of judicial independence for purposes of s. 11(*d*) of the *Charter*. In so far as the

(vi) *L'existence (ou l'abrogation) d'avantages discrétionnaires ne menace pas l'indépendance judiciaire*.

157 Les avantages potentiels du statut de surnuméraire procédaient du pouvoir discrétionnaire du juge en chef ou du juge qui, par délégation, assignait le travail (ou une salle d'audience particulière) au juge surnuméraire, ou, subsidiairement, du pouvoir discrétionnaire du gouvernement provincial de décider du budget global de la Cour provinciale ainsi que de sa volonté de nommer de nouveaux juges en remplacement des juges surnuméraires pour faire face à une charge de travail croissante.

158 À mon avis, le problème en l'espèce, si problème il y a, est le refus du gouvernement provincial d'affecter suffisamment de ressources à la cour. Le juge en chef Strange était clairement disposé à exercer son pouvoir discrétionnaire pour réduire d'une façon très marquée la charge de travail des juges surnuméraires, mais il avait comme priorité d'assigner les audiences d'une semaine à l'autre. L'insuffisance des ressources l'empêchait d'atteindre l'un et l'autre de ces objectifs. Entre l'intérêt public visant à assurer le fonctionnement des cours à temps plein et l'intérêt privé de certains des juges surnuméraires voulant la concrétisation des avantages attendus, le juge en chef a correctement, et inévitablement choisi l'intérêt public. En conséquence, la question touche en réalité l'exercice par le gouvernement de son pouvoir discrétionnaire sur le budget de la Cour provinciale.

159 Dans *Valente*, on soutenait que le contrôle gouvernemental sur des questions discrétionnaires, comme les nouvelles nominations après la retraite, les congés non payés ou payés ou encore l'autorisation d'exercer des activités extrajudiciaires, portait atteinte à l'indépendance judiciaire. Cet argument a été rejeté. Le juge Le Dain dit à la p. 714 :

> S'il peut être souhaitable que ces bénéfices ou avantages discrétionnaires, dans la mesure où il devrait y en avoir, soient contrôlés par le pouvoir judiciaire plutôt que par l'exécutif, comme le rapport Deschênes et d'autres l'ont recommandé, je ne pense pas que leur contrôle par l'exécutif touche à ce qui doit être considéré comme l'une des conditions essentielles de l'indépendance judiciaire pour les fins de l'al. 11*d*) de la

subjective aspect is concerned, I agree with the Court of Appeal that it would not be reasonable to apprehend that a provincial court judge would be influenced by the possible desire for one of these benefits or advantages to be less than independent in his or her adjudication.

160 When a similar objection was raised in the *Provincial Court Judges Reference* in relation to the discretion of the Government of Prince Edward Island over judges' sabbatical leave, Lamer C.J. simply cited the above passage from *Valente* and added, "To my mind, the same reasoning applies here" (para. 207).

161 Even if one were to assume (as I do) that the variable benefits of supernumerary status were a function of the government's budget control rather than within the gift of the Chief Judge, I do not think either the existence of these benefits or their ultimate repeal in 1995 violated the "objective guarantees" of judicial independence. As noted by Lamer C.J. in the *Provincial Court Judges Reference* at para. 113, the question is whether a reasonable person, who was informed of the relevant statutory provisions, their historical background and other relevant facts, after viewing the matter realistically and practically, would conclude that the tribunal or court was independent. In my view such persons would not regard the creation, continuation or ultimate repeal of the discretionary workload benefit associated with supernumerary status as compromising judicial independence. They would hold, I believe, a loftier view of their judges.

(vii) *The disappointed expectations of the Provincial Court judges, however understandable, do not justify a finding of unconstitutionality.*

162 In the end this appeal comes down to the fact that the respondents formed a quite legitimate expectation of a substantially reduced workload if they elected supernumerary status and their expectation was not honoured. A reduction to roughly 40 percent of a notional workload was permitted, but not required, by the *Provincial Court Act*. The evidence does not clearly source this expectation

Charte. Pour ce qui est de l'aspect subjectif, je conviens avec la Cour d'appel qu'il ne serait pas raisonnable de craindre qu'un juge de cour provinciale, influencé par l'éventuelle volonté d'obtenir l'un de ces bénéfices ou avantages, soit loin d'être indépendant au moment de rendre jugement.

Le juge en chef Lamer cite simplement cet extrait de *Valente* pour répondre à une objection analogue dans le *Renvoi : Juges de la Cour provinciale* relativement au pouvoir discrétionnaire du gouvernement de l'Île-du-Prince-Édouard sur les congés sabbatiques des juges, et ajoute : « À mon sens, le même raisonnement s'applique en l'espèce » (par. 207).

Même si l'on suppose (comme je le fais) que les avantages variables liés au statut de surnuméraire relevaient plus du contrôle gouvernemental sur les budgets que du pouvoir discrétionnaire du juge en chef, je ne crois pas que l'existence de ces avantages ou leur abrogation en 1995 portait atteinte aux « garanties objectives » d'indépendance judiciaire. Comme le fait remarquer le juge en chef Lamer dans le *Renvoi : Juges de la Cour provinciale*, par. 113, la question est de savoir si une personne raisonnable, informée des dispositions législatives pertinentes, de leur historique et des autres faits pertinents, après avoir envisagé la question de façon réaliste et pratique, conclurait que le tribunal ou la cour est indépendant. À mon avis, de telles personnes ne considéreraient pas que la création, le maintien ou l'abrogation de l'avantage discrétionnaire relatif à la charge de travail des juges surnuméraires compromet l'indépendance judiciaire. Elles auraient, je crois, une opinion plus haute de leurs juges.

(vii) *Les expectatives déçues des juges de la Cour provinciale, si compréhensibles soient-elles, ne justifient pas une conclusion d'inconstitutionnalité.*

En dernière analyse, le pourvoi tient au fait que les intimés s'attendaient très légitimement à une réduction importante de leur charge de travail s'ils choisissaient le statut de surnuméraire et que cette attente ne s'est pas réalisée. La *Loi sur la Cour provinciale* permettait, mais n'exigeait pas, une réduction à environ 40 p. 100 de la charge de travail théorique. La preuve ne rattache pas

in the Minister's office (i.e., the Minister's letter talked about a minimum of 40 percent), but even if the respondents could establish all of the elements of the administrative law doctrine of legitimate expectation as set out in *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, and *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, it would not assist the respondents' attack on the repealing legislation. As Sopinka J. pointed out in *Canada Assistance Plan*, at p. 558, the doctrine does not apply "to a body exercising purely legislative functions". Nor can it operate to entitle the respondents to a substantive as opposed to procedural remedy. In some ways the respondents' effort to use their disappointed expectations to attack the validity of the legislative amendments in this case parallels the unsuccessful effort of the Government of British Columbia to use expectations created by federal-provincial funding arrangements to attack the validity of amendments to the Canada Assistance Plan in that case. The attempt was rejected there and it should be rejected here as well.

clairement la source de cette attente au cabinet du ministre (la lettre du ministre mentionnait un minimum de 40 p. 100); cependant, même si les intimés pouvaient établir tous les éléments de la théorie de droit administratif relative à l'expectative légitime exposée dans *Assoc. des résidents du Vieux St-Boniface Inc. c. Winnipeg (Ville)*, [1990] 3 R.C.S. 1170; *Renvoi relatif au Régime d'assistance; publique du Canada (C.-B.)*, [1991] 2 R.C.S. 525, et *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817, cela n'appuierait pas leur contestation de la loi abrogative. Comme le fait remarquer le juge Sopinka dans le *Renvoi relatif au Régime d'assistance publique du Canada*, p. 558, la théorie ne s'applique pas « à un organe qui exerce des fonctions purement législatives ». Elle ne permet pas non plus aux intimés d'avoir droit à une réparation substantielle par opposition à une réparation procédurale. À certains égards, l'utilisation par les intimés de leurs expectatives déçues pour contester la validité des modifications législatives en l'espèce se rapproche de la vaine tentative du gouvernement de la Colombie-Britannique, dans le renvoi, d'utiliser les expectatives créées par les accords fédéraux-provinciaux de financement pour contester la validité des modifications au Régime d'assistance publique du Canada. Cette tentative a été rejetée alors et devrait l'être également en l'espèce.

In summary, the 1988 amendments to the *Provincial Court Act* enacted a form of supernumerary status that created expectations but not guarantees. Its repeal, as high-handed and offensive as it may have appeared to the respondents, did not undermine the judicial independence of the Provincial Court judges or the court of which they were members. The repeal was undertaken in a period of budgetary cuts which impacted all the residents of New Brunswick. Supernumerary benefits for judges competed with the closure of hospital beds and the reduction or elimination of crucial public expenditures in other areas. The New Brunswick legislature sought to change a system (which had so unevenly benefited Judge Rice, Judge Harper and Judge Mackin) to a pay-for-work system in which a retired judge who in fact works about 100 days a year (i.e., 40 percent of a notional 251 court

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En résumé, les modifications de 1988 de la *Loi sur la Cour provinciale* ont instauré un type de statut de surnuméraire qui créait des attentes, mais non des garanties. Leur abrogation, si arbitraire et offensante qu'elle puisse paraître aux intimés, n'a pas porté atteinte à l'indépendance judiciaire des juges de la Cour provinciale ou de la cour elle-même. L'abrogation a été effectuée en période de restrictions budgétaires qui avaient une incidence sur tous les résidents du Nouveau-Brunswick. Les avantages attachés au statut de juge surnuméraire étaient en concurrence avec la suppression de lits dans les hôpitaux et la réduction ou l'élimination de dépenses publiques cruciales dans d'autres domaines. La législature du Nouveau-Brunswick a cherché à modifier un système (dont les juges Rice, Harper et Mackin ont bénéficié de façon si inégale) pour en faire un régime de rémunération

days) while drawing a full pension (i.e., equivalent to 60 percent of a full salary) would receive "top up" *per diem* payments equivalent to the remaining 40 percent of the full salary. The new system, according to the evidence, was designed to allow judges on supernumerary status to get the same financial benefits as under the 1988-95 scheme but by means of a method of payment that tied rewards to actual work. It appears that all retired Provincial Court judges are eligible for *per diem* work if they want it. Work assignments are still made by the Chief Judge within an overall budget. Whether the new system is better or fairer than the old system is not for us to judge. The only question before us is whether the change is unconstitutional. In my view, for the reasons discussed, the repeal of the former system of supernumerary status, as much as the original enactment, was within the legislative competence of the Province of New Brunswick in relation to "[t]he Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts" under s. 92(14) of the *Constitution Act, 1867*.

selon le travail fourni, dans lequel un juge à la retraite travaillant en fait environ 100 jours par an (soit 40 p. 100 d'un nombre théorique de 251 jours d'audience), touchant une pleine pension (c.-à-d. l'équivalent de 60 p. 100 d'une pleine rémunération), recevrait une indemnité journalière « complémentaire » équivalente au 40 p. 100 manquant par rapport à un plein traitement. Selon la preuve, le nouveau système visait à permettre aux juges surnuméraires de bénéficier des mêmes avantages financiers que dans le régime en vigueur entre 1988 et 1995, mais par l'instauration d'une méthode de paiement liant la rémunération à un travail réel. Il semble que tous les juges de la Cour provinciale à la retraite soient admissibles à ce régime de travail s'ils le désirent. C'est encore le juge en chef qui assigne le travail, selon un budget global. Il ne nous appartient pas de décider si le nouveau système est meilleur ou plus équitable que l'ancien. La seule question à trancher est celle de la constitutionnalité du changement. À mon avis, pour les motifs exposés, l'abrogation de l'ancien régime de juges surnuméraires relevait, tout autant que le texte original, de la compétence législative de la province du Nouveau-Brunswick relativement à « [l]'administration de la justice dans la province, y compris la création, le maintien et l'organisation de tribunaux de justice pour la province » en vertu du par. 92(14) de la *Loi constitutionnelle de 1867*.

Conclusion

164 I would allow the appeal with costs. I would therefore answer the first two constitutional questions in the negative and, in light of that conclusion, the third constitutional question does not arise.

Conclusion

Je suis d'avis d'accueillir le pourvoi avec dépens. Je répondrais donc par la négative aux deux premières questions constitutionnelles. Vu cette conclusion, la troisième question constitutionnelle ne se pose pas.

Appeal allowed in part with costs, BINNIE *and* LEBEL JJ. *dissenting.*

Pourvoi accueilli en partie avec dépens, les juges BINNIE *et* LEBEL *sont dissidents*.

Solicitor for the appellant: The Attorney General for New Brunswick, Fredericton.

Procureur de l'appelante : Le procureur général du Nouveau-Brunswick, Fredericton.

Solicitors for the respondent Mackin: Wood Melanson, Fredericton.

Procureurs de l'intimé Mackin : Wood Melanson, Fredericton.

Solicitors for the respondent Rice: Stewart McKelvey Stirling Scales, Fredericton.

Procureurs de l'intimé Rice : Stewart McKelvey Stirling Scales, Fredericton.

Solicitor for the intervener the Attorney General of Canada: The Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General for Ontario: The Attorney General for Ontario, Toronto.

Solicitor for the intervener the Attorney General of Quebec: The Department of Justice, Sainte-Foy.

Solicitor for the intervener the Attorney General of Manitoba: The Department of Justice, Winnipeg.

Solicitor for the intervener the Attorney General of British Columbia: The Ministry of the Attorney General, Victoria.

Solicitor for the intervener the Attorney General for Saskatchewan: The Attorney General for Saskatchewan, Regina.

Solicitor for the intervener the Attorney General for Alberta: The Attorney General for Alberta, Edmonton.

Solicitors for the intervener the Canadian Judges Conference: Ogilvy Renault, Montréal.

Solicitors for the intervener the Canadian Association of Provincial Court Judges: Myers Weinberg, Winnipeg.

Procureur de l'intervenant le procureur général du Canada : Le procureur général du Canada, Ottawa.

Procureur de l'intervenant le procureur général de l'Ontario : Le procureur général de l'Ontario, Toronto.

Procureur de l'intervenant le procureur général du Québec : Le ministère de la Justice, Sainte-Foy.

Procureur de l'intervenant le procureur général du Manitoba : Le ministère de la Justice, Winnipeg.

Procureur de l'intervenant le procureur général de la Colombie-Britannique : Le ministère du Procureur général, Victoria.

Procureur de l'intervenant le procureur général de la Saskatchewan : Le procureur général de la Saskatchewan, Regina.

Procureur de l'intervenant le procureur général de l'Alberta : Le procureur général de l'Alberta, Edmonton.

Procureurs de l'intervenante la Conférence canadienne des juges : Ogilvy Renault, Montréal.

Procureurs de l'intervenante l'Association canadienne des juges de cours provinciales : Myers Weinberg, Winnipeg.

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

v.

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

and

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

and between

Ontario Judges' Association, Ontario Family Law Judges' Association and Ontario Provincial Court (Civil Division) Judges' Association *Appellants*

v.

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

and

Attorney General of Quebec, Attorney General of Alberta, Canadian Bar Association and Federation of Law Societies of Canada *Interveners*

and between

Association des juges de la Cour provinciale du Nouveau-Brunswick, honorable juge Michael McKee et honorable juge Steven Hutchinson *Appelants*

c.

Sa Majesté la Reine du chef de la province du Nouveau-Brunswick, représentée par le ministre de la Justice *Intimée*

et

Procureur général du Canada, procureur général de l'Ontario, procureur général du Québec, procureur général de la Colombie-Britannique, procureur général de la Saskatchewan, procureur général de l'Alberta, Association canadienne des juges de cours provinciales, Conférence des juges de l'Ontario et Fédération des ordres professionnels de juristes du Canada *Intervenants*

et entre

Association des juges de l'Ontario, Association ontarienne des juges du droit de la famille et Ontario Provincial Court (Civil Division) Judges' Association *Appelantes*

c.

Sa Majesté la Reine du chef de la province de l'Ontario, représentée par le président du Conseil de gestion *Intimée*

et

Procureur général du Québec, procureur général de l'Alberta, Association du Barreau canadien et Fédération des ordres professionnels de juristes du Canada *Intervenants*

et entre

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 Justices Association of British Columbia and Federation of Law Societies of Canada *Interveners*

and between

Attorney General of Quebec and Minister of Justice of Quebec *Appellants*

v.

Conférence des juges du Québec, Maurice Abud, Claude C. Boulanger, Marc Vanasse, Gilles Gagnon, Jacques R. Roy, Gérald Laforest, Jean-François Gosselin, Hubert Couture, Michael Sheehan, Yvan Mayrand, Dominique Slater, Guy Gagnon, Mireille Allaire, Anne Laberge, Armando Aznar, Jean-Pierre Lortie, Guy Lecompte, Huguette

Sa Majesté la Reine du chef de l'Alberta et le Lieutenant-gouverneur en conseil *Appelants*

c.

Chereda Bodner, Robert Philp, Timothy Stonehouse, William Martin, Waldo B. Ranson, Glenn Morrison, c.r., Johnathan H.B. Moss, David M. Duggan, Mark W. Gruman, Patrick McIlhargy, John R. Shaw et Gregory Francis *Intimés*

et

Procureur général du Canada, procureur général de l'Ontario, procureur général du Québec, procureur général du Nouveau-Brunswick, procureur général de la Colombie-Britannique, procureur général de la Saskatchewan, Association canadienne des juges des cours supérieures, Conférence des juges de l'Ontario, Conférence des juges du Québec, Association canadienne des juges de cours provinciales, Association des juges de paix de l'Ontario, Judicial Justices Association of British Columbia et Fédération des ordres professionnels de juristes du Canada *Intervenants*

et entre

Procureur général du Québec et ministre de la Justice du Québec *Appelants*

c.

Conférence des juges du Québec, Maurice Abud, Claude C. Boulanger, Marc Vanasse, Gilles Gagnon, Jacques R. Roy, Gérald Laforest, Jean-François Gosselin, Hubert Couture, Michael Sheehan, Yvan Mayrand, Dominique Slater, Guy Gagnon, Mireille Allaire, Anne Laberge, Armando Aznar, Jean-Pierre Lortie, Guy Lecompte, Huguette

St-Louis, Rémi Bouchard, Michel Jasmin, Jacques Lachapelle, Louise Provost, Michèle Rivet, Paule Lafontaine, Rosaire Larouche, Réal R. Lapointe, Claude Chicoine, Céline Pelletier, René de la Sablonnière, Gabriel de Pokomandy, Jean-R. Beaulieu, Michel Beauchemin, Jacques Trudel, Denis Bouchard, Ruth Veillet, Gilson Lachance, Claude Parent, Michel L. Auger, Lise Gaboury and Jean Alarie *Respondents*

and

Attorney General of New Brunswick and Federation of Law Societies of Canada *Interveners*

and between

Attorney General of Quebec and Minister of Justice of Quebec *Appellants*

v.

Morton S. Minc, Denis Boisvert, Antonio Discepola, Yves Fournier, Gilles Gaumond, Louise Baribeau, Jean-Pierre Bessette, Pierre D. Denault, René Déry, Gérard Duguay, Pierre Fontaine, Pierre Gaston, Denis Laliberté, Louis-Jacques Léger, Jean Massé, Evasio Massignani, Ronald Schachter, Bernard Caron, Jean Charbonneau and Raymonde Verreault *Respondents*

and

Attorney General of New Brunswick and Federation of Law Societies of Canada *Interveners*

and between

Conférence des juges municipaux du Québec *Appellant*

v.

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 et Jean Alarie *Intimés*

et

Procureur général du Nouveau-Brunswick et Fédération des ordres professionnels de juristes du Canada *Intervenants*

et entre

Procureur général du Québec et ministre de la Justice du Québec *Appelants*

c.

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 et Raymonde Verreault *Intimés*

et

Procureur général du Nouveau-Brunswick et Fédération des ordres professionnels de juristes du Canada *Intervenants*

et entre

Conférence des juges municipaux du Québec *Appelante*

c.

Conférence des juges du Québec et al. and Attorney General of Quebec *Respondents*

and

Attorney General of New Brunswick and Federation of Law Societies of Canada *Interveners*

INDEXED AS: PROVINCIAL COURT JUDGES' ASSN. OF NEW BRUNSWICK *v.* NEW BRUNSWICK (MINISTER OF JUSTICE); ONTARIO JUDGES' ASSN. *v.* ONTARIO (MANAGEMENT BOARD); BODNER *v.* ALBERTA; CONFÉRENCE DES JUGES DU QUÉBEC *v.* QUEBEC (ATTORNEY GENERAL); MINC *v.* QUEBEC (ATTORNEY GENERAL)

Neutral citation: 2005 SCC 44.

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

2004: November 9, 10; 2005: July 22.*

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

ON APPEAL FROM THE COURT OF APPEAL FOR NEW BRUNSWICK

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Constitutional law — Judicial independence — Judicial remuneration — Nature of judicial compensation

* The amendments to paras. 134, 152 and 171, issued on July 28, 2005, are included in these reasons. The motions to amend the judgment or for a rehearing of the appeal, filed subsequently by the Conférence des juges du Québec et al. and by the Conférence des juges municipaux du Québec, were dismissed on October 27, 2005. This decision is reported at [2005] 3 S.C.R. 41.

Conférence des juges du Québec et autres et procureur général du Québec *Intimés*

et

Procureur général du Nouveau-Brunswick et Fédération des ordres professionnels de juristes du Canada *Intervenants*

RÉPERTORIÉ : ASSOC. DES JUGES DE LA COUR PROVINCIALE DU NOUVEAU-BRUNSWICK *c.* NOUVEAU-BRUNSWICK (MINISTRE DE LA JUSTICE); ASSOC. DES JUGES DE L'ONTARIO *c.* ONTARIO (CONSEIL DE GESTION); BODNER *c.* ALBERTA; CONFÉRENCE DES JUGES DU QUÉBEC *c.* QUÉBEC (PROCUREUR GÉNÉRAL); MINC *c.* QUÉBEC (PROCUREUR GÉNÉRAL)

Référence neutre : 2005 CSC 44.

N^os^ du greffe : 30006, 30148, 29525, 30477.

2004 : 9, 10 novembre; 2005 : 22 juillet*.

Présents : La juge en chef McLachlin et les juges Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella et Charron.

EN APPEL DE LA COUR D'APPEL DU NOUVEAU-BRUNSWICK

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit constitutionnel — Indépendance de la magistrature — Rémunération des juges — Nature des

* Les modifications qui ont été apportées aux par. 134, 152 et 171 du jugement le 28 juillet 2005 sont incorporées dans les présents motifs. Les requêtes demandant la modification du jugement ou la tenue d'une nouvelle audience, qui ont été présentées par la Conférence des juges du Québec et autres et par la Conférence des juges municipaux du Québec, ont été rejetées le 27 octobre 2005. Cette décision est publiée à [2005] 3 R.C.S. 41.

commissions and their recommendations — Obligation of government to respond to recommendations — Scope of judicial review of government's response — Remedies.

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

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

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

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

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

In New Brunswick, a commission established under the *Provincial Court Act* recommended increasing the salary of Provincial Court judges from $142,000 in 2000 to approximately $169,000 in 2003. The Government rejected this recommendation, arguing (1) that the Commission had misunderstood its mandate; (2) that it was inappropriate to link the Provincial Court judges'

commissions de rémunération des juges et de leurs recommandations — Obligation pour le gouvernement de répondre aux recommandations — Portée du contrôle judiciaire de la réponse du gouvernement — Réparations.

Droit constitutionnel — Indépendance de la magistrature — Rémunération des juges — Décision du gouvernement de s'écarter des recommandations de la commission de rémunération portant sur les traitements et avantages — Les motifs invoqués par le gouvernement pour justifier sa décision de s'écarter des recommandations satisfont-ils au critère de la rationalité? — Analyse en trois étapes pour déterminer la rationalité de la réponse du gouvernement.

Preuve — Admissibilité — Contrôle judiciaire de la réponse du gouvernement aux recommandations de la commission de rémunération — Gouvernement cherchant à faire admettre des affidavits en preuve — Les affidavits sont-ils admissibles? — Les affidavits présentent-ils des éléments de preuve et des faits ne figurant pas dans la réponse du gouvernement?

Tribunaux — Juges — Rémunération — Comité de rémunération — Mandat — Recommandation, par le comité, de l'élimination de la parité salariale entre les juges de la Cour du Québec et les juges des cours municipales — Le comité avait-il le mandat d'examiner la question de la parité?

Procédure civile — Demande d'autorisation d'intervenir en Cour d'appel — Conférence des juges municipaux du Québec ne contestant pas en cour la réponse du gouvernement aux recommandations du comité de rémunération au sujet du traitement des juges des cours municipales à l'extérieur de Laval, de Montréal et de Québec — Conférence demandant sans succès l'autorisation d'intervenir dans des affaires connexes devant la Cour d'appel — L'autorisation d'intervenir aurait-elle dû être accordée?

Les présents pourvois soulèvent la question de l'indépendance de la magistrature dans le contexte de la rémunération des juges, y compris la nécessité de clarifier les principes du recours à une commission de rémunération pour éviter des conflits à l'avenir.

Au Nouveau-Brunswick, une commission établie en vertu de la *Loi sur la Cour provinciale* a recommandé de porter le traitement des juges de la Cour provinciale de 142 000 $ en 2000 à environ 169 000 $ en 2003. Le gouvernement a rejeté cette recommandation, soutenant (1) que la commission avait mal compris son mandat, (2) qu'il n'était pas fondé d'établir un lien entre le traitement

salary to that of federally appointed judges; and (3) that the judges' existing salary was adequate. The appellant Association applied for judicial review of the Government's response, and the Government successfully applied to have four affidavits admitted in evidence. On the salary issue, the reviewing judge found the Government's reasons for rejecting the Commission's recommendation to be rational. The Court of Appeal reversed the reviewing judge's decision on the admissibility of the affidavits, but upheld his decision on the salary issue.

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

In Alberta, the compensation commission issued a report recommending, among other things, a substantial increase in salary for Justices of the Peace. Although Alberta accepted that salaries and per diem rates ought to be increased, it rejected the specific increases recommended by the Commission and proposed a modified amount. Alberta's reasons stressed that it had a duty to manage public resources and act in a fiscally responsible manner, and that the overall level of increase recommended was greater than that of other publicly funded programs and significantly exceeded those of individuals in comparative groups. The Court of Queen's Bench allowed the respondents' application challenging the constitutionality of the changes, holding that Alberta's reasons for rejecting the Commission's recommendations did not pass the

des juges de la Cour provinciale et celui des juges de nomination fédérale et (3) que le traitement en vigueur pour les juges était adéquat. L'association appelante a demandé le contrôle judiciaire de la réponse du gouvernement, lequel a réussi à faire admettre quatre affidavits en preuve. Pour ce qui est de la question salariale, le juge saisi du contrôle judiciaire a estimé que les motifs invoqués par le gouvernement pour rejeter la recommandation de la commission étaient rationnels. La Cour d'appel a infirmé la décision du juge saisi du contrôle judiciaire au sujet de l'admissibilité des affidavits, mais a confirmé sa décision concernant la question salariale.

En Ontario, la commission de rémunération a émis une recommandation ayant force obligatoire selon laquelle les traitements devraient être majorés d'environ 28 pour 100 sur trois ans et des recommandations facultatives concernant les pensions. La province d'Ontario a retenu les services d'un cabinet d'expertise comptable pour déterminer le coût de la mise en œuvre des options en matière de pension. Elle a, par la suite, refusé d'adopter toute recommandation, justifiant sa décision par plusieurs motifs, dont les suivants : (1) l'augmentation salariale de 28 pour 100, qui avait entraîné automatiquement une majoration de 28 pour 100 de la valeur des pensions, était suffisante; (2) aucun changement démographique important n'était survenu depuis l'examen du régime de retraite en 1991 et (3) les obligations financières qu'avait alors le gouvernement exigent l'engagement continu de procéder à des compressions budgétaires. Les juges ont demandé le contrôle judiciaire. La province d'Ontario a déposé à l'appui de sa position les affidavits du cabinet d'expertise comptable, lesquels ont été jugés admissibles. La Cour divisionnaire a rejeté la demande, statuant que les motifs invoqués par la province pour rejeter les recommandations concernant les pensions étaient clairs, logiques et pertinents. La Cour d'appel a confirmé la décision.

En Alberta, la commission de rémunération a publié un rapport dans lequel elle recommandait notamment une augmentation salariale substantielle pour les juges de paix. La province d'Alberta reconnaissait que les traitements et les taux quotidiens doivent être majorés, mais elle rejetait les augmentations recommandées par la commission et proposait plutôt un montant modifié. Dans ses motifs, la province insiste sur son obligation de gérer les ressources publiques et d'agir de manière responsable sur le plan financier. Elle y souligne que la hausse globale recommandée est supérieure à celle accordée dans le cas d'autres programmes financés par l'État et dépasse de beaucoup celle octroyée aux personnes faisant partie des groupes de référence. La Cour du Banc de la Reine a fait droit à la demande des intimés dans laquelle ils contestaient la constitutionnalité des modifications,

test of simple rationality. The Court of Appeal upheld the decision.

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

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

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

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

statuant que les motifs invoqués par la province pour rejeter les recommandations de la commission ne satisfaisaient pas au critère de la simple rationalité. La Cour d'appel a confirmé la décision.

Au Québec, le comité de la rémunération des juges, institué en vertu de la *Loi sur les tribunaux judiciaires*, a recommandé de porter le traitement des juges de la Cour du Québec de 137 000 $ à 180 000 $ et de rajuster leur pension. Il a aussi recommandé dans son rapport l'élimination de la parité salariale des juges des cours municipales de Laval, de Montréal et de Québec avec les juges de la Cour du Québec et a proposé une échelle salariale inférieure. La deuxième formation du comité a fait rapport sur la rémunération des juges des cours municipales auxquelles s'applique la *Loi sur les cours municipales*, à savoir les juges des cours municipales à l'extérieur de Laval, de Montréal et de Québec, et, partant du principe que la parité devait être abolie, a établi un barème de traitement reflétant leurs responsabilités moins lourdes que celles des juges exerçant leurs fonctions à temps plein. Dans sa réponse, le gouvernement préconisait le rejet des recommandations les plus importantes. Il limitait la majoration salariale initiale à 8 pour 100 pour les juges de la Cour du Québec, de faibles hausses additionnelles étant prévues pour 2002 et 2003. Il acceptait l'élimination de la parité pour les juges des cours municipales, limitait la hausse de leur traitement à 4 pour 100 en 2001 et leur accordait pour 2002 et 2003 les mêmes rajustements que pour les juges de la Cour du Québec. Il rajustait en conséquence les honoraires payables aux juges des cours municipales auxquelles s'applique la *Loi sur les cours municipales* au lieu d'accepter les échelles salariales recommandées par le comité. La Conférence des juges du Québec, qui représente les juges de la Cour du Québec et les juges des cours municipales de Laval, de Montréal et de Québec, a contesté en cour la réponse du gouvernement. La Cour supérieure et la Cour d'appel ont statué que la réponse ne satisfaisait pas au critère de la rationalité. La Conférence des juges municipaux du Québec, qui représente les juges municipaux de l'extérieur de Laval, de Montréal et de Québec et qui n'avait pas contesté la réponse du gouvernement, s'est vu refuser l'autorisation d'intervenir en Cour d'appel.

Arrêt : Les pourvois dans les affaires du Nouveau-Brunswick et de l'Ontario sont rejetés.

Arrêt : Le pourvoi dans l'affaire de l'Alberta est accueilli.

Arrêt : Les pourvois formés par le procureur général du Québec et le ministre de la Justice du Québec sont rejetés. Les dispositions des ordonnances rendues par les juridictions inférieures qui sont incompatibles avec les présents motifs sont infirmées et l'affaire est renvoyée

Government of Quebec and the National Assembly for reconsideration in accordance with these reasons.

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

General Principles

Judicial salaries can be maintained or changed only by recourse to a commission that is independent, objective and effective. Unless the legislature provides otherwise, a commission's report is consultative, not binding. Its recommendations must be given weight, but the government retains the power to depart from the recommendations as long as it justifies its decision with rational reasons in its response to the recommendations. Reasons that are complete and that deal with the commission's recommendations in a meaningful way will meet the standard of rationality. The reasons must also rely upon a reasonable factual foundation. If different weights are given to relevant factors, this difference must be justified. The use of a particular comparator must also be explained. If it is called upon to justify its decision in a court of law, the government may not advance reasons other than those mentioned in its response, though it may provide more detailed information with regard to the factual foundation it has relied upon. [8] [21] [26-27]

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

If the reviewing court concludes that the commission process has not been effective, the appropriate remedy will generally be to return the matter to the government for reconsideration. If problems can be traced to the commission, the matter can be referred back to it. Courts should avoid issuing specific orders to make the

au gouvernement du Québec et à l'Assemblée nationale pour réexamen conformément à ces motifs.

Arrêt : Le pourvoi formé par la Conférence des juges municipaux du Québec est accueilli en partie et la demande d'autorisation d'intervenir est accordée.

Principes généraux

Il faut recourir à une commission indépendante, objective et efficace pour maintenir ou modifier les traitements des juges. Sauf indication contraire de l'assemblée législative, le rapport d'une commission a valeur d'avis; il n'a pas force obligatoire. Il faut accorder du poids aux recommandations de la commission, mais le gouvernement conserve le pouvoir de s'en écarter à condition de justifier sa décision par des motifs rationnels dans sa réponse aux recommandations. Les motifs qui respectent la norme de la rationalité sont ceux qui sont complets et qui traitent les recommandations de la commission de façon concrète. Les motifs doivent également reposer sur un fondement factuel raisonnable. Si l'importance accordée aux facteurs pertinents varie, cette variation doit être justifiée. Il faut aussi expliquer l'emploi d'un facteur de comparaison donné. S'il est tenu d'expliquer sa décision devant une cour de justice, le gouvernement ne peut invoquer d'autres motifs que ceux mentionnés dans sa réponse, mais il lui est possible de fournir d'autres renseignements plus détaillés sur le fondement factuel sur lequel il s'est appuyé. [8] [21] [26-27]

La réponse du gouvernement est soumise à une forme limitée de contrôle judiciaire par les cours supérieures. Le tribunal saisi du contrôle judiciaire n'a pas à décider si la rémunération des juges est adéquate. Il doit plutôt se concentrer sur la réponse du gouvernement et se demander si l'objectif du recours à une commission est atteint. Il faut suivre une analyse en trois étapes pour déterminer la rationalité de la réponse du gouvernement : (1) Le gouvernement a-t-il justifié par un motif légitime sa décision de s'écarter des recommandations de la commission? (2) Les motifs invoqués par le gouvernement ont-ils un fondement factuel raisonnable? (3) Dans l'ensemble, le mécanisme d'examen par une commission a-t-il été respecté et les objectifs du recours à une commission, à savoir préserver l'indépendance de la magistrature et dépolitiser la fixation de la rémunération des juges, ont-ils été atteints? [29-31]

Si le tribunal saisi du contrôle judiciaire conclut que le recours à une commission ne s'est pas révélé efficace, la réparation appropriée consistera généralement à renvoyer l'affaire au gouvernement pour réexamen. Si les difficultés rencontrées sont attribuables à la commission, l'affaire peut lui être renvoyée. Les tribunaux devraient

recommendations binding unless the governing statutory scheme gives them that option. [44]

New Brunswick

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

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

Ontario

The Ontario government's reasons rejecting the Commission's optional pension recommendations pass the rationality test. The reasons outlined in the Government's response do not reveal political or discriminatory motivations or any improper motive. They reveal a consideration of the judicial office and an intention to deal with it appropriately. Also, Ontario relied upon a reasonable factual foundation by alleging the need for fiscal restraint and suggesting that no significant demographic change had occurred warranting a change to the pension plan structure. Lastly, in its

s'abstenir de rendre des ordonnances donnant force obligatoire aux recommandations, à moins d'y être autorisés par le régime législatif applicable. [44]

Nouveau-Brunswick

La partie de la réponse du gouvernement portant sur sa remise en question du mandat de la commission n'est pas légitime, mais la partie qui porte sur le caractère adéquat du traitement en vigueur pour les juges et sur le caractère excessif de la hausse recommandée satisfait à la norme de la rationalité. Premièrement, on ne peut pas affirmer que les motifs exposés par le gouvernement sur ces deux points soient purement politiques ou constituent une tentative d'éviter le recours à une commission, et rien n'indique qu'il essayait de manipuler la magistrature. Deuxièmement, la réponse du gouvernement a un fondement factuel raisonnable. Certaines parties peuvent sembler dénoter un manque d'égard, mais d'autres ont des assises rationnelles. D'une part, le rejet par le gouvernement de la hausse recommandée parce qu'elle est excessive est amplement justifié par un fondement factuel rationnel. D'autre part, la commission n'a pas analysé correctement les arguments en faveur du statu quo. Le gouvernement a donc eu raison de reformuler sa position selon laquelle le traitement en vigueur était suffisant pour attirer des candidats compétents. Il a eu raison de s'appuyer sur ce fondement factuel. Troisièmement, même si, à plusieurs égards, le gouvernement n'a pas justifié de façon satisfaisante sa décision de s'écarter des recommandations, sa réponse, examinée globalement et avec retenue, montre qu'il a pris au sérieux le processus. [67-69] [76] [81] [83]

Les affidavits déposés par le gouvernement devant le juge saisi du contrôle de révision sont admissibles. Bien que le gouvernement doive indiquer dans sa réponse publique tous les motifs sur lesquels il s'appuie pour rejeter les recommandations de la commission, ces affidavits ne contiennent aucun argument qu'il n'a pas déjà soulevé. Ils donnent tout simplement des détails sur le fondement factuel invoqué par le gouvernement. [62-64]

Ontario

Les motifs du gouvernement d'Ontario rejetant les recommandations facultatives de la commission en matière de pensions satisfont aux critères de la rationalité. Les motifs invoqués dans la réponse du gouvernement ne révèlent pas qu'ils sont dictés par des considérations politiques ou discriminatoires, ou qu'ils sont illégitimes. Ils dénotent un examen sérieux de la charge judiciaire et l'intention de prendre les mesures qui s'imposent. De plus, la province d'Ontario s'est appuyée sur un fondement factuel raisonnable en invoquant la nécessité d'effectuer des compressions

reasons, examined globally, Ontario has clearly respected the commission process, taken it seriously and given it a meaningful effect. Ontario's engagement of an accounting firm was not a distortion of the process but, rather, demonstrates Ontario's good faith and the serious consideration given to the Commission's recommendations. [95-101]

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

Alberta

The judicial independence of Justices of the Peace warrants the same degree of constitutional protection that is provided by an independent, objective commission. Since Alberta has already provided an independent commission process through the *Justices of the Peace Compensation Commission Regulation*, this process must be followed. [121]

Alberta's reasons for rejecting the specific level of salary increase satisfy the rationality test. The reasons do not reveal political or discriminatory motivations, and are therefore legitimate. They consider the overall level of increase recommended, comment upon the Government's responsibility to properly manage fiscal affairs, and examine various comparator groups. The reasons illustrate Alberta's desire to compensate its Justices of the Peace in a manner consistent with the nature of the office. They clearly state the reasons for variation and explain why Alberta attributed different weights to the comparator groups. Further, the factual basis upon which the Government sought to rely is indicated and its reliance is, for the most part, rational. In its reasons, Alberta discusses general fiscal policy, various comparator groups, and the roles and responsibilities of Justices of the Peace. Finally, viewed globally, it appears that the process of the Commission, as a consultative body created to depoliticize the issue of judicial remuneration, has been effective. [122-126] [128] [131]

Quebec

The Government's response does not meet the standard of rationality. While the response does not evidence any improper political purpose or intent to

budgétaires et en affirmant qu'aucun changement démographique important justifiant une modification de la structure du régime de retraite ne s'est produit. Enfin, dans ses motifs, examinés globalement, elle a clairement respecté le mécanisme d'examen par une commission, l'a pris au sérieux et lui a donné un effet concret. Le recours par la province aux services d'un cabinet d'expertise comptable n'a pas faussé le mécanisme. Au contraire, il démontre la bonne foi de la province et indique qu'elle a analysé en profondeur les recommandations de la commission. [95-101]

Les affidavits du cabinet d'expertise comptable ont été admis à bon droit. Ils n'apportent pas de nouveaux arguments. Ils illustrent simplement l'engagement de la province de prendre au sérieux les recommandations de la commission. [103]

Alberta

L'indépendance des juges de paix commande la même protection constitutionnelle que celle garantie par une commission indépendante et objective. Comme la province d'Alberta a déjà prévu un processus d'examen par une commission indépendante lorsqu'elle a adopté le règlement intitulé *Justices of the Peace Compensation Commission Regulation*, il faut suivre ce processus. [121]

Les motifs avancés par la province d'Alberta pour rejeter les hausses recommandées satisfont au critère de la « rationalité ». Ils ne révèlent pas qu'ils sont dictés par des considérations politiques ou discriminatoires; ils sont donc légitimes. Dans ses motifs, la province tient compte des hausses globales recommandées, commente l'obligation pour le gouvernement de gérer judicieusement les finances publiques et passe en revue divers groupes de référence. Les motifs illustrent la volonté de la province de rémunérer ses juges de paix en fonction de la nature de leur charge. Ils indiquent clairement les raisons des écarts et expliquent pourquoi la province a accordé un poids différent aux divers groupes de référence. De plus, le fondement factuel que voulait invoquer le gouvernement est indiqué et sa décision de s'y appuyer était pour l'essentiel rationnel. Dans ses motifs, la province d'Alberta aborde plusieurs questions, dont la politique budgétaire, les divers groupes de référence ainsi que les rôles et responsabilités des juges de paix. Enfin, globalement, il semble que le recours à la commission, en tant qu'organisme consultatif mis sur pied pour dépolitiser l'examen de la rémunération des juges, a été efficace. [122-126] [128] [131]

Québec

La réponse du gouvernement ne satisfait pas à la norme de la rationalité. Même si elle ne dénote pas l'existence d'un objectif politique illégitime ni une intention

manipulate or influence the judiciary, it fails to address the Committee's most important recommendations and the justifications given for them. The Government appears to have been content to restate its original position before the Committee, and in particular the point that no substantial salary revision was warranted because the recommendations of the previous committee, which led to a substantial increase in judges' salaries, had just been implemented. Once the Committee had decided to conduct a broad review of the judicial compensation of provincial judges, as it was entitled to do, the constitutional principles governing the response required the Government to give full and careful attention to the recommendations and to the justifications given for them. The failure to do so impacted on the validity of the essentials of the response. [158-159] [162] [164]

With respect to the issue of salary parity for municipal court judges, the Government did not have to state the reasons for its agreement with recommendations which were well explained. Moreover, the Committee did not exceed its mandate or breach any principle of natural justice in examining the issue of parity. [166-168]

The appeal and the application for leave to intervene of the Conférence des juges municipaux du Québec should be allowed for the sole purpose of declaring that the response is also void in respect of the compensation of the judges of municipal courts to which the *Act respecting municipal courts* applies. The recommendations concerning the three groups of judges are closely linked, and the complete constitutional challenge launched by the other two groups of judges benefits the members of the Conférence. [169-170]

Cases Cited

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

Statutes and Regulations Cited

Act respecting municipal courts, R.S.Q., c. C-72.01.
Alberta Order in Council, 174/2000, s. 2, Sch. 1, 6, 7.
Courts of Justice Act, R.S.O. 1990, c. C.43, Schedule (Appendix A of Framework Agreement), para. 28.

de manipuler ou d'influencer la magistrature, elle ne tient pas compte des recommandations les plus importantes du comité et de leur justification. Le gouvernement semble s'être contenté de reformuler la position initiale qu'il avait adoptée devant le comité et, en particulier, le fait qu'aucune révision en profondeur n'était justifiée, car les recommandations du comité précédent — dont l'application avait donné lieu à une forte augmentation du traitement des juges — venaient juste d'être mises en œuvre. Une fois que le comité a décidé d'effectuer un vaste examen de la rémunération des juges provinciaux — comme c'était son droit —, les principes constitutionnels régissant la réponse du gouvernement obligeaient celui-ci à porter toute son attention sur les recommandations et leur justification. Son omission à cet égard se répercutait sur la validité de l'essentiel de la réponse. [158-159] [162] [164]

En ce qui concerne la parité salariale pour les juges des cours municipales, le gouvernement n'avait pas à justifier sa décision de souscrire à des recommandations déjà bien expliquées. De plus, le comité n'a pas outrepassé son mandat et n'a violé aucun principe de justice naturelle en examinant la question de la parité. [166-168]

Le pourvoi de la Conférence des juges municipaux du Québec est accueilli et leur demande d'autorisation d'intervenir est autorisée, à seule fin de déclarer que la réponse est également annulée en ce qui concerne la rémunération des juges des cours municipales auxquelles s'applique la *Loi sur les cours municipales*. Les recommandations visant les trois groupes de juges sont étroitement liées et la contestation constitutionnelle engagée par les deux autres groupes de juges profite aux membres de la Conférence. [169-170]

Jurisprudence

Arrêts appliqués : *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1997] 3 R.C.S. 3; *Renvoi relatif à la Loi anti-inflation*, [1976] 2 R.C.S. 373; **arrêts mentionnés :** *Valente c. La Reine*, [1985] 2 R.C.S. 673; *Beauregard c. Canada*, [1986] 2 R.C.S. 56; *Ell c. Alberta*, [2003] 1 R.C.S. 857, 2003 CSC 35; *Mackin c. Nouveau-Brunswick (Ministre des Finances)*, [2002] 1 R.C.S. 405, 2002 CSC 13; *Conférence des juges du Québec c. Québec (Procureure générale)*, [2000] R.J.Q. 744; *Conférence des juges du Québec c. Québec (Procureure générale)*, [2000] R.J.Q. 2803.

Lois et règlements cités

Alberta Order in Council, 174/2000, art. 2, ann. 1, 6, 7.
Judicature Act, R.S.A. 1980, ch. J-1 [mod. 1998, ch. 18].

Courts of Justice Act, R.S.Q., c. T-16 [am. 1997, c. 84], ss. 246.29, 246.30, 246.31, 246.42, 246.43, 246.44.
Judicature Act, R.S.A. 1980, c. J-1 [am. 1998, c. 18].
Justices of the Peace Compensation Commission Regulation, Alta. Reg. 8/2000, ss. 3(1), 5(1), 16, 21(2).
Provincial Court Act, R.S.N.B. 1973, c. P-21, s. 22.03(1), (6).

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

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

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

APPEAL from a judgment of the Quebec Court of Appeal (Robert C.J.Q. and Brossard, Proulx, Rousseau-Houle and Morissette JJ.A.), [2004] R.J.Q.

Justices of the Peace Compensation Commission Regulation, Alta. Reg. 8/2000, art. 3(1), 5(1), 16, 21(2).
Loi sur la Cour provinciale, L.R.N.-B. 1973, ch. P-21, art. 22.03(1), (6).
Loi sur les cours municipales, L.R.Q., ch. C-72.01.
Loi sur les tribunaux judiciaires, L.R.O. 1990, ch. C.43, annexe (appendice A de la convention cadre), art. 28.
Loi sur les tribunaux judiciaires, L.R.Q., ch. T-16 [mod. 1997, ch. 84], art. 246.29, 246.30, 246.31, 246.42, 246.43, 246.44.

POURVOI contre un arrêt de la Cour d'appel du Nouveau-Brunswick (les juges Turnbull, Larlee et Robertson) (2003), 231 D.L.R. (4th) 38, 260 R.N.-B. (2e) 201, 5 Admin. L.R. (4th) 45, 40 C.P.C. (5th) 207, [2003] A.N.-B. no 321 (QL), 2003 NBCA 54, qui a confirmé un jugement du juge Boisvert (2002), 213 D.L.R. (4th) 329, 249 R.N.-B. (2e) 275, 42 Admin. L.R. (3d) 275, [2002] A.N.-B. no 156 (QL), 2002 NBQB 156. Pourvoi rejeté.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (le juge en chef adjoint O'Connor et les juges Borins et MacPherson) (2003), 67 O.R. (3d) 641, 233 D.L.R. (4th) 711, 8 Admin. L.R. (4th) 222, 38 C.C.P.B. 118, 112 C.R.R. (2d) 58, [2003] O.J. No. 4155 (QL), qui a confirmé un jugement des juges O'Driscoll, Then et Dunnet (2002), 58 O.R. (3d) 186, 157 O.A.C. 367, 33 C.C.P.B. 83, [2002] O.J. No. 533 (QL). Pourvoi rejeté.

POURVOI contre un arrêt de la Cour d'appel de l'Alberta (les juges Côté, Picard et Paperny) (2002), 222 D.L.R. (4th) 284, 16 Alta. L.R. (4th) 244, 317 A.R. 112, 284 W.A.C. 112, 36 C.P.C. (5th) 1, [2003] 9 W.W.R. 637, [2002] A.J. No. 1428 (QL), 2002 ABCA 274, qui a confirmé un jugement du juge Clark (2001), 93 Alta. L.R. (3d) 358, 296 A.R. 22, 10 C.P.C. (5th) 157, [2001] 10 W.W.R. 444, [2001] A.J. No. 1033 (QL), 2001 ABQB 650, avec motifs supplémentaires (2001), 3 Alta. L.R. (4th) 59, 300 A.R. 170, 19 C.P.C. (5th) 242, [2002] 8 W.W.R. 152, [2001] A.J. No. 1565 (QL), 2001 ABQB 960. Pourvoi accueilli.

POURVOI contre un arrêt de la Cour d'appel du Québec (le juge en chef Robert et les juges Brossard, Proulx, Rousseau-Houle et Morissette),

1450, [2004] Q.J. No. 6622 (QL), affirming a decision of Guibault J., [2003] R.J.Q. 1488, [2003] Q.J. No. 3947 (QL). Appeal dismissed.

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

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

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

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

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

Lori R. Sterling, *Sean Hanley* and *Arif Virani*, for the respondent Her Majesty the Queen in Right of the Province of Ontario, as represented by the Chair of Management Board.

Phyllis A. Smith, *Q.C.*, *Kurt Sandstrom* and *Scott Chen*, for the appellants Her Majesty the Queen in Right of Alberta and the Lieutenant Governor in Council.

[2004] R.J.Q. 1450, [2004] J.Q. nº 6622 (QL), qui a confirmé un jugement du juge Guibault, [2003] R.J.Q. 1488, [2003] J.Q. nº 3947 (QL). Pourvoi rejeté.

POURVOIS contre des arrêts de la Cour d'appel du Québec (le juge en chef Robert et les juges Brossard, Proulx, Rousseau-Houle et Morissette), [2004] R.J.Q. 1475, [2004] J.Q. nº 6626 (QL) et [2004] J.Q. nº 6625 (QL), qui ont infirmé un jugement du juge Guibault, [2003] R.J.Q. 1510, [2003] J.Q. nº 3948 (QL). Pourvois rejetés.

POURVOI contre un arrêt de la Cour d'appel du Québec (le juge en chef Robert et les juges Brossard, Proulx, Rousseau-Houle et Morissette), [2004] R.J.Q. 1450, [2004] J.Q. nº 6622 (QL), qui a rejeté la demande d'intervention de la Conférence des juges municipaux du Québec. Pourvoi accueilli en partie.

Susan Dawes et *Robb Tonn*, pour les appelants l'Association des juges de la Cour provinciale du Nouveau-Brunswick, l'honorable juge Michael McKee et l'honorable juge Steven Hutchinson.

Gaétan Migneault et *Nancy Forbes*, pour l'intimée Sa Majesté la Reine du chef de la province du Nouveau-Brunswick, représentée par le ministre de la Justice.

C. Michael Mitchell et *Steven M. Barrett*, pour les appelantes l'Association des juges de l'Ontario, l'Association ontarienne des juges du droit de la famille et Ontario Provincial Court (Civil Division) Judges' Association, et l'intervenante la Conférence des juges de l'Ontario.

Lori R. Sterling, *Sean Hanley* et *Arif Virani*, pour l'intimée Sa Majesté la Reine du chef de la province de l'Ontario, représentée par le président du Conseil de gestion.

Phyllis A. Smith, *c.r.*, *Kurt Sandstrom* et *Scott Chen*, pour les appelants Sa Majesté la Reine du chef de l'Alberta et le Lieutenant-gouverneur en conseil.

Alan D. Hunter, *Q.C.*, and *S. L. Martin*, *Q.C.*, for the respondents Chereda Bodner et al.

Claude-Armand Sheppard, *Annick Bergeron* and *Brigitte Bussières*, for the appellant/respondent/intervener the Attorney General of Quebec and the appellant the Minister of Justice of Quebec.

Raynold Langlois, *Q.C.*, and *Chantal Chatelain*, for the respondent/intervener Conférence des juges du Québec, the respondents Maurice Abud et al., and the intervener the Canadian Association of Provincial Court Judges.

William J. Atkinson and *Michel Gagné*, for the respondents Morton S. Minc et al.

André Gauthier and *Raymond Nepveu*, for the appellant Conférence des juges municipaux du Québec.

Robert J. Frater and *Anne M. Turley*, for the intervener the Attorney General of Canada.

Janet Minor, *Sean Hanley* and *Arif Virani*, for the intervener the Attorney General of Ontario.

Gaétan Migneault, for the intervener the Attorney General of New Brunswick.

George H. Copley, *Q.C.*, and *Jennifer Button*, for the intervener the Attorney General of British Columbia.

Graeme G. Mitchell, *Q.C.*, for the intervener the Attorney General for Saskatchewan.

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

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

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

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

Alan D. Hunter, *c.r.*, et *S. L. Martin*, *c.r.*, pour les intimés Chereda Bodner et autres.

Claude-Armand Sheppard, *Annick Bergeron* et *Brigitte Bussières*, pour l'appelant/intimé/intervenant le procureur général du Québec et l'appelant le ministre de la Justice du Québec.

Raynold Langlois, *c.r.*, et *Chantal Chatelain*, pour l'intimée/intervenante la Conférence des juges du Québec, les intimés Maurice Abud et autres, et l'intervenante l'Association canadienne des juges de cours provinciales.

William J. Atkinson et *Michel Gagné*, pour les intimés Morton S. Minc et autres.

André Gauthier et *Raymond Nepveu*, pour l'appelante la Conférence des juges municipaux du Québec.

Robert J. Frater et *Anne M. Turley*, pour l'intervenant le procureur général du Canada.

Janet Minor, *Sean Hanley* et *Arif Virani*, pour l'intervenant le procureur général de l'Ontario.

Gaétan Migneault, pour l'intervenant le procureur général du Nouveau-Brunswick.

George H. Copley, *c.r.*, et *Jennifer Button*, pour l'intervenant le procureur général de la Colombie-Britannique.

Graeme G. Mitchell, *c.r.*, pour l'intervenant le procureur général de la Saskatchewan.

Kurt Sandstrom, pour l'intervenant le procureur général de l'Alberta.

F. William Johnson, *c.r.*, pour l'intervenante l'Association du Barreau canadien.

Louis Masson, *Michel Paradis* et *Valerie Jordi*, pour l'intervenante la Fédération des ordres professionnels de juristes du Canada.

Pierre Bienvenu, pour l'intervenante l'Association canadienne des juges des cours supérieures.

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

Written submissions only by *W. S. Berardino*, *Q.C.*, for the intervener the Judicial Justices Association of British Columbia.

The following is the judgment delivered by

THE COURT —

I. Introduction

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

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

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

Paul B. Schabas et *Catherine Beagan Flood*, pour l'intervenante l'Association des juges de paix de l'Ontario.

Argumentation écrite seulement par *W. S. Berardino*, *c.r.*, pour l'intervenante Judicial Justices Association of British Columbia.

Version française du jugement rendu par

LA COUR —

I. Introduction

Les présents pourvois soulèvent encore une fois l'importante question de l'indépendance de la magistrature, y compris la nécessité de préserver cette indépendance tant dans les faits que dans la perception du public. Il doit être hors de doute pour les parties qui font appel à notre système judiciaire que le juge chargé d'instruire leur affaire est manifestement indépendant et que son seul objectif est la recherche d'une solution juste et conforme aux principes.

La notion d'indépendance de la magistrature a évolué avec le temps. En effet, « [l]es idées ont évolué au cours des années sur ce qui idéalement peut être requis, sur le plan du fond comme sur celui de la procédure, pour assurer une indépendance judiciaire [. . .] Les opinions diffèrent sur ce qui est nécessaire ou souhaitable, ou encore réalisable » (*Valente c. La Reine*, [1985] 2 R.C.S. 673, p. 692, le juge Le Dain).

Cette évolution est manifeste dans le contexte de la rémunération des juges. Dans *Valente*, p. 706, le juge Le Dain a précisé que l'essentiel était non pas que la rémunération des juges soit fixée par un comité indépendant, mais que la loi prévoie le droit du juge de cour provinciale à un traitement. En 1997, il est devenu clair qu'il ne suffisait plus de laisser au corps législatif le soin de fixer le salaire des juges. Dans le *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1997] 3 R.C.S. 3 (« *Renvoi* »), la Cour a statué qu'il fallait recourir à des commissions indépendantes pour améliorer le mécanisme permettant

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*

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

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.

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.

de garantir l'indépendance de la magistrature, mais qu'il n'était pas nécessaire de donner un caractère obligatoire à leurs recommandations. La création de ces commissions avait pour but de dépolitiser le mécanisme d'examen de la rémunération et d'éviter un affrontement entre les gouvernements et la magistrature. Le *Renvoi* n'a toutefois pas apporté la solution espérée et il faut maintenant aller plus loin.

II. Principes généraux

A. *Le principe de l'indépendance de la magistrature*

4 Le principe de l'indépendance de la magistrature tire ses origines à la fois de la common law et de la Constitution canadienne; voir *Beauregard c. Canada*, [1986] 2 R.C.S. 56, p. 70-73; *Ell c. Alberta*, [2003] 1 R.C.S. 857, 2003 CSC 35, par. 18-23. On a qualifié l'indépendance de la magistrature d'« élément vital du caractère constitutionnel des sociétés démocratiques » (*Beauregard*, p. 70) qui « existe au profit de la personne jugée et non des juges » (*Ell*, par. 29). L'indépendance est essentielle en raison du rôle des juges en tant que protecteurs de la Constitution et des valeurs fondamentales qui s'y trouvent, notamment la primauté du droit, la justice fondamentale, l'égalité et la préservation du processus démocratique (*Beauregard*, p. 70).

5 L'indépendance de la magistrature comporte deux dimensions : l'indépendance individuelle d'un juge et l'indépendance institutionnelle de la cour qu'il préside. Ces deux dimensions sont tributaires de l'existence des normes objectives qui préservent le rôle des juges (*Valente*, p. 687; *Beauregard*, p. 70; *Ell*, par. 28).

6 Les juges doivent non seulement être indépendants, mais aussi être perçus comme tels. La confiance du public repose sur ces deux conditions (*Valente*, p. 689). « L'indépendance judiciaire est non pas une fin en soi, mais un moyen de préserver notre ordre constitutionnel et de maintenir la confiance du public dans l'administration de la justice » (*Ell*, par. 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. 131-35, 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

Les composantes de l'indépendance de la magistrature sont l'inamovibilité, l'indépendance administrative et la sécurité financière (voir *Valente*, p. 694, 704 et 708; le *Renvoi*, par. 115; *Ell*, par. 28).

Le *Renvoi* précise que la sécurité financière comporte trois éléments (par. 131-135). Premièrement, il faut recourir à une commission indépendante pour maintenir ou modifier les traitements des juges. Deuxièmement, les négociations sont interdites entre la magistrature et le gouvernement. Troisièmement, les traitements ne peuvent être abaissés sous un seuil minimum.

Le *Renvoi* découle de la réduction des traitements des juges de la Cour provinciale de l'Île-du-Prince-Édouard que le gouvernement a imposée par voie législative dans le cadre de son programme de réduction du déficit budgétaire. À la suite de cette réduction, de nombreux accusés ont attaqué la constitutionnalité des procédures intentées contre eux en Cour provinciale, affirmant que la cour avait perdu sa qualité de tribunal indépendant et impartial. Des affaires similaires auxquelles sont parties des juges d'autres cours provinciales sont jointes au *Renvoi*. Avant cet arrêt, la révision des salaires s'effectuait entre les juges des cours provinciales, ou leur association, et le ministre provincial compétent. Des différends ont inévitablement surgi.

Les négociations salariales souvent vigoureuses et la rhétorique publique qui en résultait étaient susceptibles de nuire à la perception qu'a le public de l'indépendance de la magistrature. Malgré l'indépendance réelle des juges, il existait un danger que le public perçoive les juges comme susceptibles de se laisser influencer en faveur ou défaveur du gouvernement à cause de problèmes découlant des négociations salariales. Le *Renvoi* traduisait l'intention d'éviter de tels affrontements. Le juge en chef Lamer espérait « dépolitiser » les rapports en changeant la méthode de détermination de la rémunération des juges (par. 146).

Les commissions de rémunération étaient appelées à devenir des forums de discussion, d'examen et de recommandation pour les questions relatives à la rémunération des juges. On espérait que leurs

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.

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*

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

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

recommandations, même si elles n'avaient pas un caractère obligatoire, permettraient de régler efficacement la question salariale et des questions connexes. Les tribunaux n'auraient pas à fixer le montant de la rémunération des juges et les gouvernements provinciaux ne seraient pas accusés de manipuler les tribunaux à leurs propres fins.

12 Tels étaient les espoirs, mais ils ne se sont pas réalisés. Dans certaines provinces et au niveau fédéral, les commissions judiciaires semblent jusqu'à maintenant fonctionner de façon satisfaisante. Dans d'autres provinces, toutefois, le rejet systématique des rapports des commissions a donné lieu à des poursuites. Loin de diminuer, les frictions entre les juges et les gouvernements se sont envenimées. Il n'y a plus de négociations directes, celles-ci ayant été remplacées par des litiges. Ces événements regrettables donnent une piètre image de ceux qui y sont associés. Il convient de clarifier les principes fondamentaux du recours à une commission de rémunération formulés dans le *Renvoi*, afin de prévenir les conflits comme ceux dont il est question en l'espèce.

B. *Les principes fondamentaux du recours à une commission*

13 Les principes énoncés dans le *Renvoi* demeurent valables. Le *Renvoi* s'articule autour de trois thèmes : la nature des commissions de rémunération et leurs recommandations; l'obligation pour le gouvernement de répondre aux recommandations et la portée du contrôle judiciaire de la réponse du gouvernement; et les réparations susceptibles d'être accordées.

(1) La nature des commissions de rémunération et leurs recommandations

14 Le *Renvoi* a établi le mécanisme qui permet d'assurer l'indépendance des juges des cours provinciales par rapport aux gouvernements en empêchant les négociations salariales entre les deux parties ainsi que les interventions arbitraires dans la rémunération des juges. Les commissions servent de « crible institutionnel » (*Renvoi*, par. 170, 185 et 189) — de séparation organisationnelle entre le

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.

gouvernement et la magistrature. Elles n'agissent pas à titre d'arbitre de différends ni à titre de tribunal judiciaire. Elles remplissent essentiellement la fonction de déterminer le niveau de rémunération approprié pour la charge judiciaire en cause. Elles peuvent examiner toutes les questions pertinentes. Le mécanisme est souple et le rôle de la commission ne consiste pas simplement à « mettre à jour » le rapport de la commission précédente. Toutefois, en l'absence de raisons dans le sens contraire, le point de départ de l'examen demeure la date du rapport de la commission précédente.

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.

Chaque commission doit procéder à son évaluation dans son propre contexte. Toutefois, cela ne signifie pas que chaque nouvelle commission de rémunération opère dans le vide, sans tenir compte des travaux et des recommandations de ses prédécesseurs. Les rapports des commissions antérieures et les suites qui leur ont été données font partie des éléments et du contexte dont la nouvelle commission de rémunération doit tenir compte. La nouvelle commission peut très bien décider que, dans les circonstances, ses prédécesseurs ont effectué un examen complet de la question de la rémunération des juges et que, en l'absence de preuves démontrant un changement, seuls des rajustements mineurs s'imposent. Par contre, si elle estime que les rapports antérieurs n'ont pas fixé un niveau approprié pour les traitements et avantages en raison de circonstances particulières, elle peut légitimement aller plus loin que les conclusions de la commission précédente et, après une analyse minutieuse, formuler ses propres recommandations.

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.

C'est une exigence constitutionnelle que les commissions soient indépendantes, objectives et efficaces. L'exigence d'indépendance suppose que le mandat des membres de la commission est à durée déterminée variable. Les nominations à une commission ne relèvent pas exclusivement de l'un des trois pouvoirs du gouvernement. Le processus de nomination doit être souple. La composition des commissions est établie par la loi, mais elle doit être représentative des parties.

17 The commission must objectively consider the submissions of all parties and any relevant factors

La commission doit examiner objectivement les arguments de toutes les parties et tenir compte des

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.

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).

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.

"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).

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

facteurs pertinents énoncés dans la loi habilitante et ses règlements d'application. Elle doit formuler ses recommandations après la tenue d'une audience équitable et objective. Elle doit expliquer et justifier sa position dans son rapport.

18 Le *Renvoi* énonce plusieurs critères auxquels les commissions doivent satisfaire pour assurer l'efficacité du mécanisme. Une fois celui-ci enclenché, les membres de la commission doivent se réunir rapidement et régulièrement. De plus, aucune modification ne peut être apportée à la rémunération des juges tant que la commission n'a pas rendu public son rapport et ne l'a pas transmis au gouvernement. Les travaux de la commission doivent avoir un « effet concret » sur la détermination de la rémunération des juges (*Renvoi*, par. 175).

19 Qu'entend-on par « effet concret »? Selon certains des appelants, il s'agit d'un effet obligatoire pour le gouvernement. Par contre, des procureurs généraux ont soutenu que cette expression exige que les recommandations et les réponses soient faites dans le cadre d'un mécanisme public et transparent. Ils demandent instamment que les gouvernements soient autorisés à s'écarter du rapport pour un motif rationnel, mais non pour manipuler la magistrature. Il s'agit essentiellement ici de savoir si « effet concret » s'entend d'un effet obligatoire ou d'un mécanisme transparent. Pour les motifs qui suivent, nous concluons que c'est le deuxième sens qui s'applique.

20 « Effet concret » ne signifie pas effet obligatoire. La Cour a examiné cette question dans le *Renvoi*, où elle a statué qu'une recommandation pourrait produire des effets sans pour autant avoir un caractère obligatoire. Elle a conclu que la Constitution n'exige pas que les rapports des commissions aient un caractère obligatoire, car les décisions concernant l'affectation des ressources publiques relèvent de la compétence de l'assemblée législative et de l'exécutif (par. 176).

21 Les rapports des commissions ont valeur d'avis. Le gouvernement peut toutefois étendre leur portée. Sauf si l'assemblée législative donne force obligatoire aux recommandations de la commission, le

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

gouvernement conserve le pouvoir de s'en écarter à condition de justifier sa décision par des motifs rationnels. Ceux-ci doivent faire partie de la réponse du gouvernement aux recommandations de la commission.

(2) La réponse du gouvernement aux recommandations

Selon le *Renvoi*, le gouvernement qui décide de ne pas suivre les recommandations de la commission est tenu d'y répondre. Ce sont les incertitudes au sujet de la nature et de l'étendue des réponses des gouvernements qui sont à l'origine du présent litige. Sauf dispositions législatives contraires, la détermination de la rémunération des juges relève des gouvernements. Ce pouvoir n'est toutefois pas absolu.

Il convient d'accorder du poids aux recommandations de la commission. Elles doivent être examinées par la magistrature et le gouvernement. La réponse du gouvernement doit être complète et porter sur les recommandations elles-mêmes et non pas simplement sur les positions exposées devant la commission que celle-ci a, pour l'essentiel, déjà abordées. À cette étape, ce sont les recommandations qui importent.

La réponse doit être adaptée aux recommandations de la commission et être « légitime » (*Renvoi*, par. 180-183), ce qu'exigent le droit, l'obligation d'agir honorablement et le respect du mécanisme d'examen. Le gouvernement doit répondre aux recommandations de la commission et justifier par des motifs légitimes sa décision de les modifier ou de ne pas les suivre.

Le gouvernement peut rejeter ou modifier les recommandations de la commission, à condition de fournir des motifs légitimes. Les motifs qui respectent la norme de la rationalité sont ceux qui sont complets et qui traitent les recommandations de la commission de façon concrète. Les motifs sont légitimes s'ils sont conciliables avec la common law et la Constitution. Le gouvernement doit aborder de bonne foi les questions en jeu. De simples déclarations rejetant ou désapprouvant les

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.

recommandations ne suffisent pas. Au contraire, les motifs doivent révéler que les recommandations ont été prises en compte et ils doivent être fondés sur des faits et un raisonnement solide. Ils doivent indiquer à quels égards et dans quelle mesure le gouvernement s'écarte des recommandations et indiquer les raisons du rejet ou de la modification. Ils doivent démontrer qu'on a procédé à un examen des fonctions judiciaires et qu'on a l'intention de prendre les mesures qui s'imposent. Ils ne doivent pas donner à penser qu'on cherche à manipuler la magistrature. Les motifs doivent refléter l'intérêt du public à ce qu'il y ait recours à une commission, mécanisme qui garantit la dépolitisation de l'examen de la rémunération et permet de préserver l'indépendance de la magistrature.

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.

26 Les motifs doivent également reposer sur des faits raisonnables. Si l'importance accordée aux facteurs pertinents varie, cette variation doit être justifiée. Il est légitime de procéder à des comparaisons avec les salaires offerts dans le secteur public ou dans le secteur privé, mais il faut expliquer l'emploi d'un facteur de comparaison donné. Si un fait ou circonstance nouveau se produit après la publication du rapport de la commission, le gouvernement peut l'invoquer dans ses motifs pour modifier les recommandations de la commission. Il lui est également loisible d'analyser l'incidence des recommandations et de s'assurer de l'exactitude des renseignements contenus dans le rapport de la commission.

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.

27 Le gouvernement doit, dans sa réponse, énoncer clairement et complètement les motifs qui l'amènent à s'écarter des recommandations de la commission ainsi que le fondement factuel de ses motifs. S'il est tenu d'expliquer sa décision devant une cour de justice, il ne peut invoquer d'autres motifs que ceux mentionnés dans sa réponse, mais il lui est possible de fournir d'autres renseignements plus détaillés sur le fondement factuel sur lequel il s'est appuyé, comme nous allons l'expliquer plus loin.

(3) The Scope and Nature of Judicial Review

(3) La portée et la nature du contrôle judiciaire

Once the commission has made its recommendations and the government has responded, it is hoped that, with the guidance of these reasons for

28 Une fois que la commission a formulé ses recommandations et que le gouvernement y a répondu, il est à espérer que, grâce aux indications données

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?

dans les présents motifs, les tribunaux seront rarement appelés à intervenir. Il faut néanmoins envisager la possibilité d'un contrôle judiciaire.

Le *Renvoi* précise que la réponse du gouvernement est soumise à une forme limitée de contrôle judiciaire par les cours supérieures. Si le gouvernement décide de s'écarter des recommandations de la commission, il doit justifier sa décision suivant la norme de la rationalité. Selon le *Renvoi*, la norme de contrôle judiciaire applicable est celle de la « simple rationalité » (par. 183-184). L'adjectif « simple » confirme simplement que la norme est celle de la seule rationalité.

Le tribunal saisi du contrôle judiciaire n'a pas à décider si la rémunération des juges est suffisante ou adéquate. Il doit plutôt se concentrer sur la réponse du gouvernement et se demander si l'objectif du recours à une commission est atteint. Il s'agit d'un contrôle fondé sur un principe de retenue judiciaire qui reconnaît à la fois la position unique et l'expertise accumulée du gouvernement et sa responsabilité constitutionnelle en matière de gestion des finances de la province.

Le *Renvoi* prévoit une analyse en deux étapes pour la détermination de la rationalité de la réponse du gouvernement (par. 183). Nous ajoutons maintenant une troisième étape, laquelle exige que le juge saisi du contrôle judiciaire examine la question dans son ensemble et détermine si l'objectif général du recours à une commission a été réalisé. Les questions pertinentes à se poser au moment de l'analyse sont les suivantes :

(1) Le gouvernement a-t-il justifié par un motif légitime sa décision de s'écarter des recommandations de la commission?

(2) Les motifs invoqués par le gouvernement ont-ils un fondement factuel raisonnable?

(3) Dans l'ensemble, le mécanisme d'examen par une commission a-t-il été respecté et les objectifs du recours à une commission, à savoir préserver l'indépendance de la magistrature et dépolitiser la fixation de la rémunération des juges, ont-ils été atteints?

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).

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

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.

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

32 La première étape décrite dans le *Renvoi* est celle de l'examen préalable. Le gouvernement doit justifier par un motif « légitime » sa décision de s'écarter de toute recommandation de la commission. Nous avons déjà expliqué dans le présent jugement ce qui constitue un motif « légitime » (par. 23-27).

33 La deuxième étape du contrôle consiste à déterminer si le rejet ou la modification par le gouvernement des recommandations de la commission reposent sur un fondement factuel raisonnable et suffisant. La Cour déclare dans le *Renvoi* qu'il s'agit de procéder comme elle l'a fait dans le *Renvoi relatif à la Loi anti-inflation*, [1976] 2 R.C.S. 373 (« *Renvoi anti-inflation* »), où elle s'est demandé s'il existait une « crise financière ».

34 Il faut interpréter dans son contexte la mention par le juge en chef Lamer du *Renvoi anti-inflation*. Sa déclaration ne signifie pas qu'il faille incorporer les circonstances de cette affaire (c.-à-d. la crise) et que l'assemblée législative ou l'exécutif doive donc établir l'existence de « circonstances exceptionnelles » pour justifier sa décision de ne pas suivre les recommandations. Elle signifiait plutôt que le tribunal saisi du contrôle judiciaire doit évaluer le fondement factuel des motifs du gouvernement de la même manière que la Cour a procédé dans le *Renvoi anti-inflation* pour déterminer s'il existait des « circonstances exceptionnelles » pouvant servir de fondement rationnel à l'adoption de la loi en cause en vertu du pouvoir de légiférer pour assurer « la paix, l'ordre et le bon gouvernement ».

35 Dans le *Renvoi anti-inflation*, l'analyse a porté principalement sur deux éléments : il s'agissait, premièrement, de savoir si le gouvernement avait indiqué que c'était le fondement factuel de l'adoption de la loi et, deuxièmement, si, compte tenu de la preuve présentée, il était rationnel pour le gouvernement de s'appuyer sur de tels faits. L'analyse exigeait l'application d'une norme fondée sur la retenue (voir le juge en chef Laskin, p. 423) :

> En examinant ces éléments de preuve et en appréciant leur poids, la Cour ne se demande pas s'ils démontrent l'existence des circonstances exceptionnelles comme on prouve un fait dans une cause ordinaire. Elle est appelée à [se] prononcer sur une question de politique sociale

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

et économique, c'est-à-dire sur le jugement exercé par le gouvernement et le Parlement. Il est possible que les circonstances exceptionnelles soient d'une telle notoriété que la Cour puisse en prendre connaissance d'office sans recourir à des éléments de preuve extrinsèque. Lorsque la situation n'est pas aussi claire, les éléments de preuve extrinsèque ne sont requis que pour convaincre la Cour que la loi contestée a un fondement rationnel dans le pouvoir législatif invoqué à l'appui de sa validité.

Dans son analyse de ces deux éléments dans le cadre de la deuxième étape du contrôle judiciaire, le tribunal doit déterminer si le gouvernement a expliqué dans sa réponse le fondement factuel de ses motifs. En l'absence de nouveaux faits ou circonstances, il est généralement trop tard pour le gouvernement, une fois devant le tribunal saisi du contrôle judiciaire, de remédier aux lacunes du fondement factuel. Cependant, il peut être autorisé à le développer en fournissant, sous forme d'affidavits, des détails sur des données et calculs économiques et actuariels. Sont également admissibles les affidavits contenant des preuves de la bonne foi et de l'engagement à l'égard du mécanisme, par exemple, des renseignements sur l'étude gouvernementale de l'impact des recommandations de la commission.

Le tribunal saisi du contrôle judiciaire doit également, appliquant le *Renvoi anti-inflation*, déterminer s'il est rationnel pour le gouvernement de s'appuyer sur les faits ou circonstances exposés pour justifier sa réponse. Pour ce faire, il doit examiner la validité des faits par rapport à la position que le gouvernement a adoptée dans sa réponse.

À la troisième étape du contrôle, le tribunal doit examiner la réponse de façon globale. Outre les questions particulières, il doit évaluer le mécanisme et la réponse dans leur ensemble pour déterminer s'ils démontrent que le gouvernement s'est engagé concrètement dans le recours à une commission et a opposé une réponse rationnelle aux recommandations de la commission. Même s'il peut trouver matière à critiquer certains aspects du mécanisme adopté par le gouvernement, certaines réponses particulières ou l'absence de réponse, le tribunal doit soupeser et apprécier la participation du gouvernement ainsi que sa réponse pour déterminer si, dans son ensemble, la réponse comporte des

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.

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.

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.

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.

lacunes inacceptables, même compte tenu du degré de retenue qui s'impose à l'égard de l'avis du gouvernement sur ces questions. L'analyse porte sur l'ensemble du mécanisme et de la réponse.

39 Il est évident que, d'après le critère formulé ci-dessus, il ne suffit pas de désapprouver une recommandation de la commission ou de déclarer « suffisants » les traitements en vigueur pour les juges. Il est impossible de rédiger un code complet à l'intention des gouvernements; il faut donc s'en remettre à leur bonne foi. Cependant, une application consciencieuse de la norme de la rationalité rend superflues bon nombre des règles qui ont dominé les débats sur la norme depuis le *Renvoi*. Le critère permet également d'écarter les « règles » interdisant le recours à d'autres méthodes, dont l'interdiction de réévaluer les facteurs déjà pris en considération par la commission, pour rejeter les recommandations de la commission. Il est possible dans la réponse de réévaluer des facteurs déjà pris en compte à condition de fournir des motifs légitimes. Il s'agit essentiellement de savoir si le gouvernement a, dans sa réponse aux recommandations de la commission, fourni des motifs légitimes reposant sur un fondement factuel raisonnable.

40 Dans le contexte du contrôle judiciaire, le tribunal doit se rappeler que le mécanisme d'examen par une commission est souple et que, même si seuls des motifs légitimes permettent de rejeter les recommandations des commissions, il y a lieu de faire preuve de retenue à l'égard de la réponse puisque les recommandations n'ont pas un caractère obligatoire. Si, en fin de compte, le tribunal saisi du contrôle judiciaire conclut que la réponse ne satisfait pas à la norme, il faudra constater la violation des principes de l'indépendance de la magistrature.

41 Dans le *Renvoi*, le juge en chef Lamer a commenté brièvement en passant la justification en vertu de l'article premier de la *Charte canadienne des droits et libertés* (par. 277-285). Comme les parties n'ont pas soulevé cette question en l'espèce, à supposer même qu'elle soit pertinente, elle ne peut être examinée que dans le cadre d'une affaire ultérieure. Nous allons maintenant examiner les réparations possibles pour les cas qui ne satisfont pas à la norme constitutionnelle.

(4) Remedies

42 The limited nature of judicial review dictates the choice of remedies. The remedies must be consistent with the role of the reviewing court and the purpose of the commission process. The court must not encroach upon the commission's role of reviewing the facts and making recommendations. Nor may it encroach upon the provincial legislature's exclusive jurisdiction to allocate funds from the public purse and set judicial salaries unless that jurisdiction is delegated to the commission.

43 A court should not intervene every time a particular reason is questionable, especially when others are rational and correct. To do so would invite litigation, conflict and delay. This is antithetical to the object of the commission process. If, viewed globally, it appears that the commission process has been effective and that the setting of judicial remuneration has been "depoliticized", then the government's choice should stand.

44 In light of these principles, if the commission process has not been effective, and the setting of judicial remuneration has not been "depoliticized", then the appropriate remedy will generally be to return the matter to the government for reconsideration. If problems can be traced to the commission, the matter can be referred back to it. Should the commission no longer be active, the government would be obliged to appoint a new one to resolve the problems. Courts should avoid issuing specific orders to make the recommendations binding unless the governing statutory scheme gives them that option. This reflects the conclusion in *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, 2002 SCC 13, that it is "not appropriate for this Court to dictate the approach that should be taken in order to rectify the situation. Since there is more than one way to do so, it is the government's task to determine which approach it prefers" (para. 77).

(4) Les réparations

Les limites du contrôle judiciaire dictent le choix des réparations. Celles-ci doivent rester conciliables avec le rôle du tribunal saisi du contrôle judiciaire et avec l'objectif du recours à une commission. Le tribunal ne devrait pas empiéter sur le rôle de la commission, qui consiste à examiner les faits et à formuler des recommandations. Il ne devrait pas non plus empiéter sur la compétence exclusive des assemblées législatives provinciales en matière d'allocation des fonds publics et de fixation des traitements des juges, sauf délégation de pouvoirs à la commission.

Un tribunal ne devrait pas intervenir chaque fois qu'un motif particulier est discutable, surtout si les autres motifs sont rationnels et corrects. Une telle façon de procéder entraînerait des litiges, des conflits et des retards. C'est l'antithèse de l'objectif du recours à une commission. S'il ressort, dans l'ensemble, que le recours à une commission s'est révélé efficace et qu'on a « dépolitisé » la fixation de la rémunération des juges, le choix du gouvernement devrait alors être confirmé.

Selon ces principes, si le recours à une commission ne s'est pas révélé efficace et qu'on n'a pas « dépolitisé » la fixation de la rémunération des juges, la réparation appropriée consistera généralement à renvoyer l'affaire au gouvernement pour réexamen. Il pourra toutefois être renvoyé à la commission si les difficultés rencontrées lui sont attribuables. Si la commission n'existe plus, le gouvernement aura l'obligation d'en constituer une nouvelle pour régler les problèmes. Les tribunaux devraient s'abstenir de rendre des ordonnances donnant force obligatoire aux recommandations, à moins d'y être autorisés par le régime législatif applicable. Tous ces commentaires reflètent la conclusion dans *Mackin c. Nouveau-Brunswick (Ministre des Finances)*, [2002] 1 R.C.S. 405, 2002 CSC 13, selon laquelle « la Cour ne devrait pas dicter la marche à suivre pour remédier à la situation. En effet, comme il y a plus d'une façon d'y parvenir, il appartient au gouvernement de déterminer celle qui lui convient » (par. 77).

III. Application of the Principles to the Cases

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*

Before the *Reference*, the Government of New Brunswick negotiated directly with Provincial Court judges. Although these negotiations led to salary changes in some years, the judges' salary was usually treated on the same basis as the salaries of non-bargaining civil service employees, notably those of senior civil servants. After the *Reference*, the New Brunswick legislature amended the province's *Provincial Court Act*, R.S.N.B. 1973, c. P-21, in order to establish the process recommended by our Court (s. 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.

III. Application des principes en l'espèce

45 Des juges provinciaux du Nouveau-Brunswick, de l'Ontario et du Québec, des juges de paix de l'Alberta ainsi que des juges municipaux du Québec ont demandé le contrôle judiciaire de la décision de leur gouvernement provincial de rejeter certaines recommandations des commissions de rémunération concernant leurs traitements et avantages. Nous appliquerons les principes énoncés précédemment aux faits de chacune de ces affaires.

A. *Nouveau-Brunswick*

46 Avant le *Renvoi*, le gouvernement du Nouveau-Brunswick négociait directement avec les juges de la Cour provinciale. Même si, à l'occasion, les négociations aboutissaient à une modification des salaires, la plupart du temps, les salaires des juges étaient traités de la même manière que ceux des employés non syndiqués de la fonction publique, en particulier ceux des hauts fonctionnaires. Après le *Renvoi*, la législature du Nouveau-Brunswick a modifié la *Loi sur la Cour provinciale*, L.R.N.-B. 1973, ch. P-21, afin d'établir la procédure recommandée par la Cour (par. 22.03(1)). La nouvelle loi énonce les facteurs dont la Commission doit tenir compte dans ses recommandations :

22.03(6) Lorsqu'elle fait son rapport et ses recommandations, la Commission doit prendre en considération les facteurs suivants :

a) la suffisance de la rémunération des juges relativement au coût de la vie ou aux changements du revenu réel par tête,

a.1) la rémunération versée aux autres membres de la magistrature du Canada ainsi que les facteurs qui peuvent justifier les différences qui existent entre la rémunération des juges et celle des autres membres de la magistrature du Canada,

b) l'équité économique, y compris la rémunération versée à d'autres personnes prélevée sur le Fonds consolidé,

c) la situation économique de la province, et

d) tous autres facteurs que la Commission considère pertinents à sa révision.

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

Ces facteurs servent désormais de base à l'évaluation que doivent effectuer les commissions sur la rémunération des juges au Nouveau-Brunswick.

Lorsque la première commission a été établie en 1998, le salaire des juges de nomination provinciale au Nouveau-Brunswick s'élevait à 100 000 $. Devant la Commission de 1998, l'Association des juges de la Cour provinciale du Nouveau-Brunswick (« Association ») a fait valoir qu'une hausse était justifiée vu l'augmentation de la charge de travail de ses membres par suite d'un certain nombre de modifications en matière législative. Elle a soutenu que leur travail était aussi important que celui des juges de la Cour du Banc de la Reine et elle a donc demandé qu'ils reçoivent la même rémunération. La Commission de 1998 a recommandé de porter le traitement des juges à 125 000 $ au 1er avril 1998 et à environ 142 000 $ en 2000. Elle s'est appuyée principalement sur deux facteurs : « tant la nature du travail que la charge de travail des juges de la Cour provinciale ont connu une évolution spectaculaire » et « le salaire et les prestations actuellement consentis à un juge de la Cour provinciale au Nouveau-Brunswick sont insuffisants pour attirer [des candidats assez nombreux possédant les qualités requises] pour les besoins de la Cour ». La Commission a mentionné le traitement des juges de nomination fédérale, mais uniquement pour comparaison avec celui des juges de la Cour provinciale.

Dans sa réponse au rapport de la Commission de 1998, le Gouvernement n'a accepté que la hausse de 25 000 $. Toutefois, le 27 octobre 2000, quelques mois seulement avant l'établissement de la Commission de 2001, le traitement a été porté au niveau recommandé.

Par un décret publié le 14 février 2001, le Gouvernement a nommé les membres d'une commission dont le mandat devait prendre fin le 31 décembre 2003. L'Association a réitéré son argument fondé sur la comparaison avec les juges des autres cours provinciales et a établi un lien avec les juges de nomination fédérale. Elle a encore une fois insisté sur l'augmentation du nombre des causes dont les juges sont saisis, sur leur durée et sur leur complexité. Le Gouvernement a

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 other judges in Canada. It specifically rejected parity with federally appointed judges.

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.

prétendu que la rémunération des juges de la Cour provinciale était juste et suffisante pour attirer des candidats compétents. Il a affirmé que, depuis la dernière hausse, il n'était survenu aucun changement pouvant justifier une autre augmentation de la rémunération des juges. Il a fourni à la Commission des indices, des renseignements sur les facteurs économiques au Nouveau-Brunswick, les tendances salariales dans le secteur public ainsi que des comparaisons avec d'autres juges au Canada. Il a expressément rejeté la parité avec les juges de nomination fédérale.

Dans son rapport, la Commission de 2001 mentionne la charge de travail croissante des juges. Elle y souligne que le Gouvernement n'a tenu aucun propos indiquant qu'il connaissait des difficultés financières et elle fait remarquer que les hausses accordées aux fonctionnaires étaient supérieures à ce qui était prévu dans la politique de restrictions salariales. Elle aborde expressément la question de la parité. L'extrait suivant du rapport comporte l'essentiel des arguments invoqués pour justifier les recommandations salariales :

> Sans vouloir débattre le bien-fondé du développement du système judiciaire au cours des 300 dernières années, la Commission estime qu'on ne peut ignorer la différence salariale entre les juges de la Cour provinciale et les juges de la Cour du Banc de la Reine.
>
> En fait, les juges de la Cour du Banc de la Reine sont les seules personnes dont le travail et le mode de nomination sont semblables à ceux des juges de la Cour provinciale au Nouveau-Brunswick.
>
> Toutefois, c'est une chose que de reconnaître cette réalité, mais c'en est une autre d'insister sur la parité salariale entre les juges de la Cour provinciale et ceux de la Cour du Banc de la Reine ou sur un système de pourcentage fixe qui maintiendrait la rémunération des juges de la Cour provinciale à un pourcentage constant, soit au-dessus, soit au-dessous de la rémunération des juges de la Cour du Banc de la Reine.
>
> . . .

Dans sa soumission, la province fait remarquer qu'il n'était pas nécessaire d'envisager une autre augmentation salariale pour les juges de la Cour provinciale puisqu'ils avaient reçu une augmentation salariale de 40 % au cours des six derniers mois environ.

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.

Il en résulterait un blocage du traitement des juges de la Cour provinciale pendant trois ans, à l'exception peut-être du rajustement au titre du coût de la vie que tous les employés reçoivent.

La raison pour laquelle cette augmentation considérable a été accordée à ce moment-là est parce que la province n'avait pas payé ce qui avait été recommandé par l'ancienne Commission.

. . .

La Commission est d'avis que la proposition de la province selon laquelle le statu quo salarial devrait être observé pour une autre période de trois ans constituerait une violation de la décision de la Cour suprême.

. . .

Selon les chiffres figurant dans la soumission de la province, le revenu personnel par tête au Nouveau-Brunswick pour l'année 1999 était de 85 % de la moyenne canadienne.

Compte tenu de ces facteurs et de la perspective que le traitement des juges de la Cour du Banc de la Reine augmentera un peu au-delà de 200 000 $ et qu'il continuera d'augmenter d'environ 2 000 $, la Commission propose que les juges de la Cour provinciale reçoivent une augmentation de 8 % au cours de la première année et une augmentation additionnelle de 5 % pour les deux années suivantes de façon que soit maintenu un rapport acceptable entre la rémunération des juges de la Cour provinciale avec celle des juges de la Cour du Banc de la Reine.

Il en résulterait un traitement annuel comme suit, à compter du 1er janvier 2001 et à la même date au cours des deux années suivantes :

2001 – 154 018 $
2002 – 161 709 $
2003 – 169 805 $

En outre, la Commission recommande que la province applique à ces montants l'indice de la rémunération pour l'ensemble des activités économiques du Nouveau-Brunswick . . .

Au cours de la troisième année, le traitement annuel des juges de la Cour provinciale serait d'environ 30 000 $ de moins que le traitement des juges de la Cour du Banc de la Reine, et légèrement inférieur au pourcentage que représentait le revenu personnel par tête du Nouveau-Brunswick par rapport à la moyenne nationale de 1999.

The Commission also made a number of recommendations with respect to pensions, vacations, health care and life insurance.

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

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.

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

51 La Commission a aussi formulé plusieurs recommandations au sujet de la pension, des vacances, des soins de santé et de l'assurance-vie.

52 Le Gouvernement a rejeté toutes les recommandations salariales de la Commission, à l'exception de la hausse fondée sur l'indice de la rémunération pour l'ensemble des activités économiques de la province. Il a formulé sa réponse sous forme d'attendus, qui sont reproduits en annexe et seront examinés plus en détail plus loin. On peut toutefois regrouper ces 29 attendus sous trois motifs principaux : de l'avis du Gouvernement, (1) la Commission a mal compris son mandat, (2) il n'était pas fondé d'établir un lien entre le traitement des juges de la Cour provinciale et celui des juges de nomination fédérale et (3) le traitement en vigueur pour les juges est adéquat.

(1) Historique des procédures judiciaires

53 Le juge saisi du contrôle judiciaire a conclu que les motifs invoqués par le Gouvernement pour rejeter les recommandations salariales de la Commission étaient rationnels, mais que ce n'était pas le cas des motifs fournis relativement à la pension et aux autres avantages ((2002), 249 R.N.-B. (2e) 275). Il a déclaré que les recommandations se rapportant aux vacances, à la pension et au régime d'assurance-maladie liaient le Gouvernement.

54 Le juge a souligné que le processus de contrôle devrait être axé sur les motifs figurant dans la réponse du Gouvernement plutôt que sur le bien-fondé des recommandations de la Commission : « Je souligne en passant que notre Cour n'a pas à déterminer si les recommandations de la Commission de 2001 sont ou non appropriées, insuffisantes ou excessivement généreuses. Notre Cour a plutôt pour rôle de déterminer si le gouvernement a justifié sa décision conformément au critère que la Cour suprême du Canada a énoncé dans le *Renvoi relatif aux juges de la Cour provinciale (Î.-P.-É.)* » (par. 20). Le juge a toutefois considéré qu'il devait déterminer si l'indépendance de la magistrature avait été préservée malgré le rejet par le Gouvernement de la hausse recommandée : « . . . est-ce qu'une personne raisonnable qui comparaîtrait devant la Cour

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 ((2003), 260 N.B.R. (2d) 201, 2003 NBCA 54, at 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

provinciale craindrait de ne pas être entendue par un tribunal indépendant parce que le gouvernement de notre Province a refusé de hausser le traitement du juge qui préside l'instance et de le faire passer de 141 206 $ à 169 805 $ à la même époque l'an prochain? Je dois répondre "non" à cette question » (par. 52).

Analysant si l'indépendance de la magistrature avait été préservée, le juge a examiné les augmentations proposées selon la norme de la personne raisonnable. C'est ce qui l'a amené à axer son analyse sur une évaluation quantitative pour déterminer si l'indépendance de la magistrature était menacée. Les juges de la Cour provinciale se sont pourvus en Cour d'appel. Le Gouvernement n'a pas interjeté appel de l'ordonnance en ce qui a trait aux pensions et aux autres avantages.

La Cour d'appel a déclaré que le mandat de la Commission consistait à mettre les tribunaux à l'abri de l'ingérence politique et à dépolitiser le processus de modification des traitements des juges ((2003), 260 R.N.-B. (2e) 201, 2003 NBCA 54, par. 60). Elle a souligné que la Commission avait pour responsabilité de recommander la rémunération appropriée pour les juges en tenant compte des facteurs pertinents (par. 69). La cour s'est distancée d'une norme de retenue à l'égard de la Commission. Elle a plutôt parlé de la nécessité de faire preuve de retenue à l'égard de la réponse du Gouvernement : « Pour conclure, le critère de la simple rationalité exige la retenue face au fondement factuel de la décision de rejet prise par le gouvernement » (par. 113). Elle a reproché au Gouvernement de s'être appuyé dans sa réponse sur des contraintes d'ordre économique qui n'avaient pas été débattues devant la Commission. Elle a aussi blâmé le Gouvernement d'avoir soutenu que le traitement est adéquat, mais elle a attribué cette erreur à une lacune du rapport de la Commission :

> Le gouvernement soutient que le niveau de traitement actuel est suffisant au sens où il n'y a pas eu de changement de situation important depuis la mise en vigueur de la hausse de traitement de 40 % recommandée par la Commission de 1998; voir le 1er attendu. À mon avis, cette vague assertion ne satisfait pas au critère de la simple rationalité. Par exemple, le gouvernement passe sous silence le fait que les traitements des juges

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]

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.

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.

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

d'autres provinces et ceux des juges fédéraux ont augmenté depuis l'application de la recommandation de la Commission de 1998 en matière de traitement. Cela dit, je dois admettre que la réponse de la Commission à cet argument est insuffisante. [par. 138]

57 La Cour d'appel a ensuite signalé des problèmes majeurs dans le rapport de la Commission, en particulier lorsque cette dernière conclut que le refus d'accorder une hausse irait à l'encontre du *Renvoi*. La cour a fait remarquer que le Gouvernement aurait pu, dans sa réponse, invoquer comme motifs les erreurs de droit commises par la Commission (par. 141). Elle a souligné que ces erreurs auraient pu être évitées si la Commission, qui n'est pas formé de juristes, avait pu bénéficier des services d'un conseiller juridique indépendant chargé de l'aider dans ses délibérations. La Cour d'appel a aussi examiné la prétention du Gouvernement que le redressement salarial recommandé est excessif, en particulier si on le compare avec les hausses accordées aux fonctionnaires. Elle a conclu que cette comparaison n'était pas appropriée et que la réponse, à cet égard, ne satisfaisait pas à la norme de la rationalité. Elle a ensuite examiné l'argument fondé sur la parité avec les juges de nomination fédérale et elle a jugé que le Gouvernement avait eu raison de nier l'existence d'un lien entre les traitements des juges de nomination fédérale et ceux des juges de la Cour provinciale. La cour a alors analysé si les traitements étaient suffisants pour attirer des candidats compétents. Elle a conclu que la position du Gouvernement était rationnelle et qu'elle pouvait être réitérée dans la réponse parce que la Commission ne l'avait pas convenablement analysée.

58 Ayant conclu que le Gouvernement avait avancé deux raisons convaincantes pour refuser d'appliquer le rapport de la Commission, à savoir le rejet de la parité et la capacité d'attirer des candidats compétents, la Cour d'appel a jugé que les motifs invoqués satisfaisaient à la norme de la rationalité et a rejeté l'appel. L'Association se pourvoit maintenant devant la Cour.

59 Pour les motifs qui suivent, le pourvoi doit être rejeté. Dans sa réponse au rapport de la Commission de 2001, le Gouvernement a justifié sa décision de rejeter les recommandations de la Commission par

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.

des motifs qui satisfont à la norme de la rationalité. Afin d'expliquer cette conclusion, nous examinerons la réponse en fonction des principes énoncés précédemment. Il convient de déterminer, premièrement, si la réponse fournit des motifs légitimes, dictés par l'intérêt public, deuxièmement, si elle a un fondement factuel suffisant et, enfin, si les motifs invoqués par le Gouvernement, considérés globalement, montrent que les objectifs du recours à une commission ont été atteints. Mais avant de procéder à l'analyse, il importe de trancher une question préliminaire : l'admissibilité des affidavits déposés en première instance par le Gouvernement à l'appui de sa réponse au rapport de la Commission.

(2) Admissibilité des affidavits

Le Gouvernement a tenté de faire admettre quatre affidavits devant la Cour du Banc de la Reine. Bryan Whitfield, conseiller supérieur en politiques à la Direction de la recherche et de la planification du ministère de la Justice, a estimé en détail dans son affidavit le coût qu'entraînerait la mise en œuvre des recommandations de la Commission. Conrad Ferguson, un actuaire de pratique privée, indique dans son affidavit le coût annuel des traitements et avantages des juges à divers niveaux de traitement. James Turgeon, directeur général de la Division des politiques économiques et fiscales du ministère des Finances, décrit la conjoncture économique de la province. Enfin, Lori Anne McCracken, une employée du Bureau des ressources humaines du Gouvernement, traite dans son affidavit des hausses salariales accordées dans la fonction publique.

Les appelants contestent l'admissibilité des quatre affidavits déposés par le Gouvernement, faisant valoir que ces documents apportent des éléments de preuve additionnels et de nouveaux motifs de rejeter les recommandations salariales de la Commission. Le juge saisi du contrôle judiciaire a autorisé le dépôt des affidavits au dossier. La Cour d'appel a infirmé la décision du tribunal de première instance et a statué que les affidavits n'étaient pas admissibles parce qu'ils introduisaient des éléments de preuve et des faits ne faisant pas partie de la réponse du Gouvernement.

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.

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.

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

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

Dans le *Renvoi*, la Cour a dit que la réponse du gouvernement doit être complète. En d'autres mots, le gouvernement doit indiquer dans sa réponse publique tous les motifs sur lesquels il s'appuie pour rejeter les recommandations de la commission. Par conséquent, une fois devant le juge saisi du contrôle judiciaire, il ne peut plus renforcer sa réponse en y incluant des justifications et des motifs non mentionnés dans sa réponse. 62

Cela ne signifie pas que la réponse du gouvernement doive contenir et mentionner tous les éléments sur lesquels reposent les motifs qu'il a invoqués. Obliger les gouvernements à répondre aux recommandations des commissions en produisant, par exemple, des volumes entiers de données économiques et actuarielles ne contribuerait pas à la mise en place d'un mécanisme public et transparent. Il suffit que les motifs fournis par le gouvernement en réponse aux recommandations de la commission soient suffisamment détaillés pour informer le public, les députés et le tribunal saisi du contrôle judiciaire des faits sur lesquels repose sa décision et pour leur permettre de constater que le processus a été pris au sérieux. 63

En l'espèce, les affidavits ne contiennent aucun argument que le Gouvernement n'a pas déjà soulevé devant la Commission et n'ajoutent rien aux motifs qu'il a fournis dans sa réponse. Ils donnent tout simplement des détails sur le fondement factuel invoqué par le Gouvernement. Ils indiquent comment les calculs ont été faits et quelles données étaient disponibles. Ils contribuent à démontrer que la recommandation a été examinée avec sérieux. Il est permis de fournir de tels détails et les documents sont admissibles en preuve. 64

(3) Application des principes

Comme il a été mentionné précédemment, le Gouvernement invoque dans sa réponse trois motifs distincts pour rejeter les recommandations. Nous allons maintenant les analyser en fonction du critère formulé ci-dessus. Le Gouvernement fait premièrement valoir que la Commission a mal compris son mandat. Il soutient que, lorsqu'elle formule ses recommandations salariales, la Commission a 65

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.

pour principal objectif de s'assurer que le niveau de rémunération ne tombe pas sous le seuil minimum requis pour assurer l'indépendance de la magistrature. Deuxièmement, il estime excessive la hausse recommandée parce qu'elle ne tient pas compte de la conjoncture économique du Nouveau-Brunswick et repose plutôt sur la volonté de maintenir une parité partielle avec les juges de nomination fédérale. Troisièmement, il affirme que le traitement des juges en vigueur est adéquat. Il s'appuie, à cet égard, sur les indices et les données économiques ainsi que sur la capacité d'attirer des candidats compétents grâce au régime de rémunération en vigueur. Il prétend qu'un rajustement fondé sur le taux d'inflation suffirait pour que la rémunération demeure adéquate.

La première étape de l'analyse consiste à examiner les motifs du gouvernement pour déterminer s'ils sont légitimes. À cette fin, il faut établir s'ils dénotent uniquement un simple rejet ou s'ils sont guidés par l'intérêt public, et s'assurer qu'ils ne sont pas dictés par des considérations purement politiques.

Il est peu judicieux pour le Gouvernement de remettre en question le mandat de la Commission et de le reformuler. Comme nous l'avons déjà mentionné et comme la Cour d'appel l'a fait remarquer avec raison, l'objectif du recours à une commission est de dépolitiser le processus de fixation de la rémunération et d'éviter un affrontement direct entre le Gouvernement et la magistrature. On ne peut donc pas considérer que le mandat de la Commission consiste, comme le prétend le Gouvernement, à empêcher que le traitement des juges ne tombe sous le seuil minimum requis pour assurer l'indépendance de la magistrature. La Commission n'a pour objectif ni de déterminer le seuil minimum ni d'établir quelles seraient les conditions maximales. Son rôle consiste plutôt à recommander un niveau de rémunération approprié. Le Gouvernement a tort de remettre en cause le mandat de la Commission et donne une définition erronée du rôle de celle-ci. La partie de sa réponse portant sur sa remise en question du mandat de la Commission n'est pas légitime. Elle ne favorise en rien l'intérêt public et ne résiste donc pas à la première étape de l'analyse.

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).

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.

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

68 On ne peut toutefois pas affirmer, à la première étape de l'analyse, que les motifs exposés par le Gouvernement relativement au caractère adéquat du traitement en vigueur pour les juges et au caractère excessif de la majoration recommandée sont purement politiques ou constituent une tentative d'éviter le recours à une commission. De plus, rien n'indique que le Gouvernement essayait de manipuler la magistrature. Quant aux motifs concernant le bien-fondé des recommandations salariales, même si certains des attendus semblent dénoter un manque d'égard pour le processus, le juge saisi du contrôle judiciaire a eu raison, dans l'ensemble, de conclure à la première étape (par. 58) :

> Aucune preuve n'indique qu'en refusant d'accepter la recommandation de la Commission de 2001 en matière de traitement, l'exécutif avait l'intention de manipuler la magistrature ou de la soumettre à une ingérence politique. Rien n'indique que la politique de compression budgétaire du gouvernement consistait en des mesures qui ne visaient que les juges. On ne laisse nullement entendre que le refus d'accorder une augmentation de traitement équivaut à la prise de mesures peu scrupuleuses grâce auxquelles le gouvernement aurait utilisé « son pouvoir de fixer les traitements des juges comme moyen d'influencer le déroulement et l'issue des litiges » (*Renvoi relatif aux juges de la Cour provinciale (Î.-P.-É.)*, au paragraphe 145).

69 Comme la partie de la réponse du Gouvernement qui porte sur le caractère adéquat du traitement en vigueur pour les juges et sur le caractère excessif de la hausse recommandée est légitime, il faut examiner de façon plus approfondie les motifs invoqués pour déterminer s'ils ont un fondement factuel suffisant. Dans le cadre de cette deuxième étape de l'analyse du critère de la rationalité, la cour doit déterminer tout d'abord si le gouvernement a énoncé suffisamment de faits pour étayer les motifs qu'il a avancés pour rejeter les recommandations salariales et, ensuite, s'il est rationnel pour lui de s'appuyer sur ces faits pour justifier sa réponse.

70 Les deux arguments invoqués par le Gouvernement doivent être examinés séparément. Après tout, accepter l'argument du Gouvernement que l'augmentation salariale recommandée est excessive ne signifie pas nécessairement que le traitement dont bénéficient les juges soit adéquat. On

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.

peut cependant examiner ensemble les faits invoqués par le Gouvernement à l'appui de ces arguments dans la mesure où les éléments de preuve qu'il a produits pour démontrer que la hausse recommandée est excessive lui permettent, dans une certaine mesure du moins, de prétendre que la rémunération est suffisante.

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):

Le Gouvernement s'est opposé à l'augmentation salariale parce que, à son avis, en accordant une majoration de cette envergure, la Commission donnait en fait suite à l'argument des juges de la Cour provinciale qu'ils devraient avoir droit à la parité ou à une parité partielle. Même si la Commission a affirmé expressément qu'elle n'acceptait pas l'argument de la parité, il existe dans les faits un lien évident entre la hausse recommandée et le traitement des juges de nomination fédérale, lien qui se dégage du rapport. En effet, par suite de la hausse recommandée, le traitement des juges représenterait 85 pour 100 de celui des juges de nomination fédérale. C'est ce pourcentage de 85 pour 100 que le Gouvernement a mentionné devant la Commission pour exprimer le revenu moyen par habitant au Nouveau-Brunswick par rapport à la moyenne nationale et que la Commission a repris dans son rapport. Cela explique le chiffre que la Commission a choisi, sans donner d'autres raisons, pour la hausse recommandée. La Cour d'appel a fait correctement ressortir les faits invoqués par le Gouvernement ainsi que les lacunes du rapport de la Commission à cet égard (par. 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

> Dans le passé, les commissions fédérales sur la rémunération des juges ont constamment admis que le traitement fédéral devrait être uniforme et, à une exception près, ne pas tenir compte des différences géographiques. En outre, les commissions fédérales ont constamment reconnu que le traitement uniforme doit être fixé à un niveau capable d'attirer des candidats très compétents. Ce facteur constitue un problème pour ce qui est des candidats éventuels qui pratiquent le droit dans les grands centres métropolitains du Canada. On peut comprendre qu'ils gagnent davantage et espèrent un traitement plus élevé que les avocats qui pratiquent dans des collectivités plus petites. Au lieu de recommander une différence de traitement fondée sur le lieu de résidence d'un juge, les commissions fédérales ont conclu que le niveau de traitement devait être fixé à un niveau qui ne nuirait pas au recrutement dans les grandes régions métropolitaines

federal salary is adjusted to reflect this geographic disparity.

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.

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

du pays. Pour cette raison, le traitement fédéral recommandé est rajusté pour tenir compte de cette disparité géographique.

72 Le tribunal saisi du contrôle judiciaire n'a pas pour rôle d'apprécier après coup le bien-fondé de la hausse recommandée par la Commission. Il peut cependant constater que le traitement des juges de nomination fédérale est fixé en fonction des conditions économiques et des revenus des avocats dans les grandes villes canadiennes. Ces conditions et ces revenus diffèrent de ceux qui existent au Nouveau-Brunswick. Par conséquent, même si la Commission peut s'inspirer de la rémunération des juges de nomination fédérale pour faire ses recommandations, ce seul facteur ne peut pas être déterminant. En fait, l'al. 22.03(6)*a.1*) de la *Loi sur la Cour provinciale* oblige la Commission à prendre en considération les facteurs qui peuvent justifier les différences qui existent entre la rémunération des juges de la Cour provinciale et celle des autres membres de la magistrature du Canada. Pourtant, la Commission a décidé de ne pas le faire. De plus, il ne convient pas de déterminer la rémunération des juges de la Cour provinciale au Nouveau-Brunswick en appliquant au traitement des juges de nomination fédérale le rapport exprimé en pourcentage entre le revenu moyen au Nouveau-Brunswick et celui au Canada, parce que ce traitement est établi en fonction des revenus des avocats dans les grandes villes canadiennes et non en fonction du revenu moyen canadien.

73 Le Gouvernement affirme également que la conjoncture économique de la province ne justifie pas une augmentation salariale de 49,24 pour 100 entre 1990 et 2000, laquelle s'élève à 68,16 pour 100 une fois combinée à la majoration recommandée pour 2001. Il considère qu'une telle augmentation dépasse de loin les changements des indicateurs économiques au Nouveau-Brunswick. Il compare cette hausse à celle de 18,93 pour 100 qui a été accordée aux hauts fonctionnaires entre 1990 et 2000. Il invoque le fait que, par suite de la recommandation, les juges du Nouveau-Brunswick se classeraient au troisième rang parmi les juges des cours provinciales les mieux rémunérés au pays, après ceux de l'Ontario et de l'Alberta, alors que le salarié moyen au

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.

Nouveau-Brunswick se situe au huitième rang sur dix. Les données économiques sur lesquelles s'appuie le Gouvernement faisaient partie des observations qu'il avait présentées à la Commission, mais celle-ci n'en a pas fait mention dans son rapport. Le calcul de la valeur de la hausse recommandée figure dans les affidavits qu'il a cherché à faire admettre en preuve.

À l'exception du motif concernant le défaut de la part de la Commission d'évaluer le coût de la mise en œuvre de ses recommandations, les arguments que le Gouvernement a invoqués dans sa réponse semblent à première vue être une reformulation de la position qu'il a défendue devant la Commission. Cependant, deux circonstances particulières permettent au Gouvernement de s'y appuyer. Premièrement, la Commission n'a pas traité des données qui faisaient partie des observations du Gouvernement et, deuxièmement, le rapport n'expliquait pas comment on avait tenu compte de l'équité économique ainsi que de la conjoncture économique de la province, même si ce sont là deux facteurs importants que la Commission est tenue par la *Loi sur la Cour provinciale* de prendre en considération. En raison des lacunes du rapport de la Commission, on ne peut pas empêcher le Gouvernement de s'appuyer sur un fondement factuel pertinent, même s'il fait partie des observations qu'il a présentées à la Commission.

Dans sa réponse, le Gouvernement signale à juste titre plusieurs faits qui lui permettent d'affirmer en toute légitimité que la hausse est excessive : les recommandations ne tiennent pas compte de la conjoncture économique du Nouveau-Brunswick, mais correspondent plutôt à un pourcentage du traitement des juges de nomination fédérale; une telle hausse constituerait un traitement préférentiel si on la compare aux augmentations reçues par les hauts fonctionnaires du Nouveau-Brunswick et la plupart des juges des autres cours provinciales au Canada; enfin, la hausse dépasse de loin les changements des indicateurs économiques depuis la mise en œuvre des recommandations de 1998. Le Gouvernement peut donc légitimement refuser d'accorder l'augmentation salariale recommandée au motif qu'elle est excessive.

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.

76 En rejetant les recommandations salariales de la Commission, le Gouvernement fait aussi valoir que, selon lui, le traitement en vigueur pour les juges est adéquat. Il avait également invoqué cet argument dans les observations présentées à la Commission de 2001. Dans son rapport, la Commission a toutefois rejeté cet argument parce que, à son avis, son acceptation entraînerait le gel des salaires, ce qui contreviendrait aux principes énoncés dans le *Renvoi*. En adoptant cette position, la Commission a commis une erreur de droit. Le *Renvoi* n'a jamais rendu les hausses salariales obligatoires. Le Gouvernement a donc eu raison de reformuler sa position selon laquelle le traitement en vigueur était adéquat, à la condition de s'appuyer sur un fondement factuel raisonnable.

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.

77 Dans sa réponse, le Gouvernement invoque trois faits pour étayer sa position : depuis les recommandations de la Commission de 1998, il ne s'est produit aucun changement qui justifierait une autre hausse; la rémunération en vigueur est suffisante pour attirer des candidats compétents; enfin, les juges se classent à l'heure actuelle parmi les 5 pour 100 des habitants qui, au Nouveau-Brunswick, touchent les plus hauts salaires. Nous examinerons chacun de ces faits l'un après l'autre.

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.

78 La Commission de 2001 a rejeté l'argument du Gouvernement qu'il n'y a eu aucun changement depuis la hausse salariale accordée quelques mois avant sa création. Elle a reproché au Gouvernement d'avoir retardé la mise en œuvre des recommandations salariales de la commission précédente. Dans ces circonstances, si on reconnaît un fondement factuel raisonnable à la position du Gouvernement quant au caractère adéquat de la rémunération, ce n'est pas parce qu'il n'y a eu aucun changement depuis la dernière augmentation.

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

79 Le Gouvernement a également affirmé dans sa réponse que le traitement en vigueur pour les juges était adéquat puisqu'il permettait d'attirer des candidats compétents à la magistrature. La Commission n'a pas évalué cet argument ni les faits à l'appui, sauf pour faire remarquer que les juges de la Cour provinciale et ceux de la Cour du Banc de la Reine sont choisis dans le même bassin d'avocats. Le

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.

chiffre de 50 candidats compétents avancé par le Gouvernement a été contesté, mais la Cour d'appel a conclu qu'il y avait au moins 30 candidats, ce qui prouvait que le traitement, conjugué à la valeur de la pension de juge, était suffisant pour attirer des candidats compétents. La Cour d'appel a conclu à juste titre que, dans son rapport, la Commission n'avait pas examiné suffisamment la position du Gouvernement. Il est raisonnable pour celui-ci d'invoquer ce fondement factuel.

Enfin, l'argument du Gouvernement que l'augmentation salariale devrait être refusée parce que les juges font partie à l'heure actuelle des 5 pour 100 des plus hauts salariés de la province a peu de poids en soi. Cette information n'a aucune valeur, car les salaires dans ce groupe peuvent varier considérablement. Le Gouvernement a effectivement mentionné les 5 pour 100 des plus hauts salariés dans les arguments qu'il a présentés à la Commission de 2001, affirmant que le salaire moyen dans cette catégorie s'établissait à environ 92 000 $. Cette somme est inférieure au traitement que touchaient les juges avant même que la Commission de 1998 commence ses travaux. Comme l'a mentionné la Cour d'appel, ce n'est pas le moment de remonter le cours de l'histoire.

En conclusion, on ne peut pas écarter la réponse du Gouvernement au motif qu'elle n'a pas un fondement factuel raisonnable. Certaines parties de sa réponse peuvent sembler dénoter un manque d'égard, mais d'autres ont des assises rationnelles. D'une part, le refus du Gouvernement d'accorder la hausse recommandée parce qu'elle est excessive est amplement justifié par un fondement factuel rationnel. D'autre part, la Commission n'a pas analysé correctement les arguments en faveur du statu quo. Elle n'a pas non plus examiné, comme elle aurait dû le faire, les arguments de l'Association en faveur d'une majoration raisonnable, à savoir ceux concernant l'augmentation de la charge de travail et des traitements des juges des cours provinciales dans les autres provinces et territoires. Il se peut que l'argument de la parité avancé par l'Association ait fait perdre de vue son objectif à la Commission et soit à l'origine de ces omissions.

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.

82 Cela dit, le tribunal saisi du contrôle judiciaire ne peut pas se substituer à la Commission et déterminer le niveau de traitement approprié si elle a négligé de le faire. L'exercice de la retenue ne saurait toutefois entraver le processus. Normalement, une commission peut considérer que la commission précédente a déterminé, dans son rapport, le niveau de traitement approprié; néanmoins, dans certaines circonstances, par exemple, lorsque la commission précédente n'a pas tenu compte de tous les critères énumérés dans la *Loi sur la Cour provinciale* ou a fait face à des contraintes l'empêchant d'appliquer pleinement un ou plusieurs critères, la commission suivante peut dans son analyse réexaminer les facteurs ou les recommandations déjà considérés par la commission précédente. C'est peut-être l'un de ces cas où une commission future disposera d'une plus grande latitude qu'elle n'aurait autrement eue.

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.

83 À la troisième étape de l'analyse de la rationalité, il faut examiner globalement les motifs invoqués par le gouvernement pour déterminer si les objectifs du recours à une commission ont été atteints. À plusieurs égards, le Gouvernement n'a pas justifié de façon satisfaisante sa décision de s'écarter des recommandations de la Commission. Toutefois, à cette étape, la réponse doit être examinée globalement et avec retenue. Dans cette perspective, la réponse montre que le Gouvernement a pris au sérieux le processus de fixation de la rémunération des juges. À certains égards, il a dû s'appuyer sur les observations qu'il avait soumises à la Commission, car cette dernière ne les a pas examinées comme il se devait. Ainsi, le Gouvernement a participé activement au processus. Il convient donc de faire preuve à son égard d'une plus grande retenue que s'il n'avait pas respecté ce mécanisme.

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.

84 Dans l'ensemble, l'analyse montre bien que les principes formulés dans le *Renvoi* ont été respectés et que c'est à juste titre que les critiques formulées à l'égard de la réponse du Gouvernement ont été écartées.

For these reasons, the appeal is dismissed with disbursement costs to the respondent, as requested by the latter.

85 Pour ces motifs, le pourvoi est rejeté, avec paiement des débours en faveur de l'intimée, comme elle l'a demandé.

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

B. *Ontario*

L'Association des juges de l'Ontario, l'Association ontarienne des juges du droit de la famille et l'Ontario Provincial Court (Civil Division) Judges' Association (collectivement les « Juges ») sont les appelantes dans le présent pourvoi. Sa Majesté la Reine du chef de la province d'Ontario, représentée par le président du Conseil de gestion (la « province d'Ontario » ou la « province ») est l'intimée.

Selon le régime législatif de l'Ontario, les recommandations d'une commission qui ont trait aux salaires lient le gouvernement. Toutefois celles de la commission portant sur les pensions n'ont pas force obligatoire. Il s'agit en l'espèce de recommandations concernant les pensions. Pour les motifs qui suivent, le pourvoi est rejeté.

(1) Contexte

La quatrième Commission triennale de rémunération des juges provinciaux (1998-2001) (« Commission ») a été établie en vertu de l'appendice A de la convention cadre prévue à l'annexe de la *Loi sur les tribunaux judiciaires*, L.R.O. 1990, ch. C.43. La convention cadre régit la compétence et le mandat de chaque commission triennale. Devant la Commission, les Juges ont demandé des traitements plus élevés et une meilleure pension. Ils cherchaient notamment à faire réduire l'écart entre les traitements des juges de nomination fédérale et celui des juges de nomination provinciale. La province d'Ontario a fait valoir devant la Commission qu'il n'y avait pas lieu de hausser les traitements et avantages. Elle a en outre soutenu que les traitements, pensions et avantages des Juges étaient justes et adéquats.

La Commission a recommandé une augmentation salariale de l'ordre de 28 pour 100 sur trois ans. Cette recommandation a force obligatoire en Ontario en raison de la convention cadre. De plus, les membres de la Commission ont émis, à la majorité, trois recommandations facultatives concernant les pensions : (1) bonifier le régime de retraite des Juges provinciaux de manière à ce qu'il corresponde à celui des juges fédéraux, (2) adopter un

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.

taux d'accumulation des prestations de retraite de 3,3 pour 100 sur 20 ans, ce qui donnerait au juge une pension de 66 2/3 pour 100 du salaire à 65 ans après 20 années de service, ou (3) accorder une augmentation générale de 10 pour 100 des prestations de retraite. La Commission a également recommandé, à la majorité, que la province soit (1) applique la « règle de 80 », qui permettrait au juge de prendre sa retraite sans pénalité si l'addition de son âge et de ses années de service donne au moins 80, soit (2) réduise les pénalités en cas de retraite anticipée.

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.

90 La Commission n'a pas retenu les services d'actuaires pour évaluer le coût de la mise en œuvre de ses recommandations en matière de pensions compte tenu de l'augmentation salariale de 28 pour 100. Les seuls coûts dont il est question dans le rapport de la Commission sont les coûts estimatifs de la bonification des pensions qui avaient été calculés compte non tenu de l'augmentation salariale. Les membres minoritaires de la Commission n'ont pas souscrit aux recommandations en matière de pensions.

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.

91 Pour étudier les recommandations facultatives de la Commission en matière de pensions, la province d'Ontario a demandé à PricewaterhouseCoopers (« PwC ») d'évaluer le coût de leur application. Elle a finalement conclu que l'augmentation salariale de 28 pour 100, qui entraînait automatiquement une majoration de 28 pour 100 de la valeur des pensions, était suffisante. Elle a refusé d'adopter les recommandations touchant les pensions. Le 1er février 2000, elle a envoyé sa réponse au président de la Commission. Elle a justifié par sept motifs sa décision de ne pas donner suite à ces recommandations, notamment le fait que les droits à pension en vigueur étaient adéquats et que la valeur des pensions se trouvait déjà accrue par suite de l'augmentation salariale (28 pour 100) accordée par la Commission. Elle ne précise toutefois pas dans ses motifs de rejet des recommandations de la Commission qu'elle a retenu les services de PwC; elle n'y indique pas non plus que les coûts établis par la Commission seraient erronés ou incomplets.

The Judges applied for judicial review. In support of its position, Ontario filed affidavits from

92 Les Juges ont demandé un contrôle judiciaire. La province d'Ontario a déposé à l'appui de sa position

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

les affidavits d'Owen M. O'Neil, de PwC, qui expliquent en détail le travail que PwC effectue pour le Gouvernement. Les Juges se sont opposés au recours par la province aux services de PwC. Ils se sont également opposés à l'admissibilité en preuve des affidavits. Ils ont accusé la province de s'engager dans un [TRADUCTION] « processus unilatéral et secret d'après-Commission ». Ils ont soutenu que cette façon d'agir compromettait l'efficacité du mécanisme. Évidemment, les parties ne s'entendaient pas sur l'objet réel du mandat confié à PwC.

(2) Historique des procédures judiciaires

a) *Cour supérieure de justice de l'Ontario (Cour divisionnaire)* ((2002), 58 O.R. (3d) 186)

La Cour divisionnaire de l'Ontario a rejeté la demande des Juges. Elle a statué que la preuve par affidavits concernant l'évaluation du coût faite par PwC était admissible parce que, selon le *Renvoi*, un gouvernement a le droit de [TRADUCTION] « justifier sa décision devant une cour de justice ». La cour a examiné le *Renvoi* et a conclu que les motifs invoqués par la province pour rejeter les recommandations concernant les pensions étaient clairs, logiques, pertinents et conciliables avec la position défendue devant la Commission. Rien n'indique que la décision était purement politique, discriminatoire ou dénuée de fondement rationnel. L'article 28 de la convention cadre prévoit la possibilité de renvoyer l'affaire à la Commission si elle n'a pas traité de questions soulevées légitimement par l'enquête ou qu'une erreur se trouve clairement dans son rapport. Cependant, cette mesure est simplement facultative. Quoi qu'il en soit, la Cour divisionnaire n'est pas convaincue que la Commission ait fait erreur à l'un ou l'autre de ces égards.

b) *Cour d'appel* ((2003), 67 O.R. (3d) 641)

La Cour d'appel de l'Ontario a confirmé le rejet de la demande des Juges. Le juge MacPherson a expliqué que la Cour divisionnaire a eu raison de conclure que le recours aux services de PwC par la province n'avait pas compromis l'efficacité du recours à une commission. Cette décision dénotait

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?*

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.

Do these reasons pass the test of "rationality"? To pass the test of rationality, the reasons must be

plutôt l'intention de la province de procéder à une analyse minutieuse des recommandations. La cour a examiné chacun des sept motifs invoqués par la province pour rejeter les recommandations relatives aux pensions. Elle a conclu que les motifs étaient clairs, logiques, pertinents et conciliables avec la position défendue par la province d'Ontario devant la Commission.

(3) Analyse

a) *Les motifs fournis par la province d'Ontario satisfont-ils au critère de la « rationalité »?*

95 Comme nous l'avons indiqué précédemment, la province d'Ontario a rejeté toutes les recommandations facultatives de la Commission en matière de pensions. Les motifs invoqués à l'appui de cette décision sont exposés dans la lettre que l'honorable Chris Hodgson, président du Conseil de gestion, a adressée à M. Stanley M. Beck, c.r., président de la Commission (« Lettre »). Ces sept motifs peuvent essentiellement se résumer ainsi : (1) la majoration automatique de 28 pour 100 est suffisante; (2) grâce à la formule de calcul des prestations, la pension des Juges ne s'amenuisera pas avec le temps; (3) la hausse des traitements des Juges (qui a entraîné un relèvement automatique de la pension) a réduit l'écart entre la rémunération des juges de nomination provinciale et celle des juges de nomination fédérale; (4) aucun changement démographique important n'est survenu depuis que la commission indépendante de 1991 a examiné la structure du régime de retraite des Juges et a proposé un modèle qui a été accepté; (5) le régime de retraite en vigueur permet un coefficient de remplacement du revenu de 75 pour 100 compte tenu des épargnes probables des Juges avant leur nomination; (6) le régime de retraite des Juges de l'Ontario est supérieur à ceux des autres provinces et territoires; (7) les obligations financières qu'avait alors le Gouvernement ainsi que les demandes concurrentes de ressources limitées exigent l'engagement continu de procéder à des compressions budgétaires pour renforcer l'économie ontarienne.

96 Ces motifs satisfont-ils au critère de la « rationalité »? Pour satisfaire à ce critère, les motifs

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.

doivent être légitimes. La Lettre énonce sept motifs justifiant le rejet des recommandations facultatives concernant les pensions. Rien dans les motifs fournis dans la Lettre ne révèle qu'ils sont dictés par des considérations politiques ou discriminatoires. Ils indiquent que l'augmentation salariale de 28 pour 100 entraîne un relèvement automatique de la valeur des pensions. Ils précisent en outre qu'il ne s'est produit aucun changement démographique depuis l'analyse de la structure du régime de retraite par la deuxième Commission triennale de rémunération en 1991. Ils expliquent que la province d'Ontario se trouve en période de compressions budgétaires et que de nombreux secteurs font face à des réductions de dépenses. Les Juges obtiennent pour leur part une majoration de 28 pour 100 de leurs traitement et pension; il semble implicitement qu'ils sont traités équitablement. Les motifs ne sont ni politiques ni discriminatoires.

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.

Les motifs fournis par la province d'Ontario ne sont pas illégitimes. Il ne s'agit pas de simples déclarations rejetant ou désapprouvant les recommandations. Ces motifs dénotent un examen sérieux de la charge judiciaire et l'intention de prendre les mesures qui s'imposent. Ils reflètent l'intérêt sous-jacent du public à ce qu'il y ait recours à une commission, c'est-à-dire dépolitisation du mécanisme d'examen de la rémunération et nécessité de préserver l'indépendance de la magistrature. Ce volet du critère de la « rationalité » est donc respecté.

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

Il faut ensuite déterminer si les motifs invoqués ont un fondement factuel raisonnable. À cette fin, le critère applicable est la norme qui commande la retenue à l'égard du gouvernement. Celui-ci n'a pas à démontrer l'existence de circonstances exceptionnelles. Il faut seulement se poser les questions suivantes : (1) Le gouvernement a-t-il indiqué le fondement factuel qu'il avait l'intention d'invoquer? (2) Compte tenu de la preuve, était-il rationnel de s'appuyer sur ce fondement factuel? En l'espèce, dans ses motifs, la province d'Ontario invoque la nécessité d'effectuer des compressions budgétaires et signale des réductions des dépenses dans d'autres secteurs. Le rejet des prestations de retraite additionnelles recommandées pour les Juges est compatible avec ce fondement factuel raisonnable. De

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.

même, la province indique dans ses motifs qu'aucun changement démographique important justifiant une modification de la structure du régime de retraite ne s'est produit. Il s'agit là encore d'un fondement factuel raisonnable sur lequel un gouvernement peut s'appuyer pour rejeter les recommandations de la Commission.

We conclude that Ontario's reasons rely upon a reasonable factual foundation.

99 Nous concluons que les motifs de la province d'Ontario ont un fondement factuel raisonnable.

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.

100 Enfin, il convient d'examiner globalement les motifs du gouvernement pour s'assurer que les objectifs du recours à une commission ont été atteints. À cet égard, le tribunal saisi du contrôle judiciaire joue également un rôle limité. En l'espèce, il semble que le recours à une commission a été efficace. En vertu de la convention cadre, les recommandations salariales de la Commission ont force obligatoire, mais ce n'est pas le cas des recommandations relatives aux pensions. En raison du caractère obligatoire des recommandations salariales, la valeur des pensions des Juges a augmenté de 28 pour 100. Il ressort de ses motifs que la province a clairement respecté le mécanisme d'examen par une commission, l'a pris au sérieux, en tient compte et lui a donné un effet concret.

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.

101 Nous convenons également avec la Cour divisionnaire de l'Ontario et la Cour d'appel que le recours par la province aux services de PwC n'a pas faussé le mécanisme. Au contraire, il démontre la bonne foi de la province et indique qu'elle a analysé en profondeur les recommandations de la Commission.

Ontario's reasons, viewed globally, meet the "rationality" test.

102 Globalement, les motifs de la province d'Ontario satisfont au critère de la « rationalité ».

(b) *Admissibility of the PwC Affidavits*

b) *Admissibilité des affidavits de PwC*

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

103 Les Juges ont contesté non seulement le recours aux services de PwC, mais aussi l'admissibilité des affidavits de PwC. Nous convenons avec la Cour divisionnaire de l'Ontario et la Cour d'appel que les affidavits ont été admis à bon droit. Les Juges ont demandé à la province d'Ontario de justifier ses motifs « devant une cour de justice », ce qu'elle a fait. Les affidavits n'apportent pas de nouveaux

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,

arguments. Ils illustrent simplement la bonne foi de la province et son engagement de prendre au sérieux les recommandations de la Commission. Il importe peu que la Lettre ne fasse pas état du fait que la province avait retenu les services de PwC. Le mandat de PwC n'est pas invoqué comme motif principal pour le rejet des recommandations de la Commission relatives aux pensions. Les motifs pertinents sont ceux qui figurent dans la Lettre elle-même. Ces motifs satisfont au critère de la « rationalité ».

Le pourvoi est rejeté avec dépens.

C. *Alberta*

Les intimés en l'espèce sont les juges de paix de l'Alberta. Sa Majesté la Reine du chef de l'Alberta et le lieutenant-gouverneur en conseil (collectivement la « province d'Alberta » ou la « province ») sont les appelants. Il s'agit de déterminer si la décision de la province d'Alberta de ne pas respecter intégralement l'augmentation salariale recommandée par la Commission de rémunération des juges de paix (« Commission ») contrevient au principe de l'indépendance de la magistrature. Les intimés affirment que c'est le cas. La province n'est pas d'accord. Pour les motifs qui suivent, nous concluons qu'il n'y a pas contravention à ce principe.

(1) Contexte

Le 30 avril 1998, des modifications à la *Judicature Act*, R.S.A. 1980, ch. J-1 (mod. S.A. 1998, ch. 18), sont entrées en vigueur; elles prévoyaient notamment la constitution d'une commission indépendante de rémunération des juges de paix. Le paragraphe 3(1) du *Justices of the Peace Compensation Commission Regulation*, Alta. Reg. 8/2000, dispose que la Commission est chargée d'examiner la rémunération et les avantages consentis aux juges de paix de l'Alberta. L'article 16 énonce les critères pertinents à prendre en considération. Les recommandations de la Commission n'ont pas force obligatoire (voir par. 5(1) et 21(2) du règlement).

En l'espèce, la Commission a reçu des observations visant la période du 1er avril 1998 au 31 mars

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.

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

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

2003. Le 29 février 2000, elle a publié un rapport dans lequel elle recommandait notamment une augmentation salariale substantielle (*The Justices of the Peace Compensation Commission : Commission Report* (2000)). À son avis, la rémunération des juges de paix devrait représenter environ les deux tiers de celle des juges de la Cour provinciale.

108 Lorsque la Commission a émis ses recommandations, le traitement des juges de paix siégeant à temps plein s'établissait à environ 55 008 $ par année. Les taux quotidiens de rémunération pour les juges de paix siégeant à temps partiel et pour les juges de paix présidant à temps partiel s'élevaient à 250 $ et à 220 $ respectivement. Ces taux demeurent les mêmes depuis 1991. Dans son rapport, la Commission a mentionné qu'elle ne considérait pas d'un grand recours les niveaux de rémunération en vigueur. En effet, ils ne correspondaient nullement à ceux des groupes de référence et ils ne résultaient pas d'une enquête indépendante. La Commission a formulé les recommandations suivantes :

[TRADUCTION] Juges de paix siégeant ou présidant à temps plein

1er avril 1998 – 95 000 $ par année
1er avril 1999 – 95 000 $ par année
1er avril 2000 – 100 000 $ par année
1er avril 2001 – 100 000 $ par année
1er avril 2002 – 105 000 $ par année

plus, pour chaque année, les avantages en vigueur, une somme additionnelle représentant 10 pour 100 du traitement en guise de prestations de retraite et quatre semaines de vacances au lieu de trois.

Juges de paix siégeant ou présidant à temps partiel

1er avril 1998 – 600 $ par jour
1er avril 1999 – 600 $ par jour
1er avril 2000 – 650 $ par jour
1er avril 2001 – 650 $ par jour
1er avril 2002 – 670 $ par jour

109 La province d'Alberta a accepté la majeure partie des recommandations de la Commission. Le décret 174/2000 (le « décret ») a été pris le 17 mai 2000. La province reconnaissait ce qui suit : les traitements et les taux quotidiens doivent être majorés (sous réserve des modifications proposées) (al. 2a)); les avantages

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]

en vigueur pour les juges de paix à temps plein doivent être maintenus (al. 2b)); le nombre de semaines de vacances pour les juges de paix à temps plein doit passer de trois à quatre (al. 2c)); les juges de paix à temps plein doivent recevoir une somme additionnelle représentant 10 pour 100 du traitement annuel en guise de prestations de retraite (al. 2d)) et la rémunération des juges de paix qui siègent à l'instance ou qui la président doit être déterminée de la même façon (al. 2e)). Même s'il reconnaissait qu'une augmentation salariale s'imposait, le décret rejetait les augmentations recommandées par la Commission (al. 2f)) et proposait plutôt un montant modifié (al. 2g)). Les intimés contestent la constitutionnalité des al. 2a), f) et g).

L'annexe 6 du décret énonce les motifs invoqués par la province d'Alberta pour justifier sa décision de rejeter les hausses recommandées par la Commission. Ils figurent sous les rubriques suivantes :

[TRADUCTION]

1 Commentaire général [soulignant le fait que l'exécutif et le législatif sont responsables, sur les plans constitutionnel et politique, de la gestion judicieuse des finances publiques]

2 Niveau global de la hausse [comparaison du niveau global de la hausse avec la rémunération en vigueur et les hausses accordées dans d'autres programmes financés par l'État]

3 Conditions d'admissibilité et détermination de la rémunération par comparaison avec les avocats de la Couronne [il est allégué que les avocats de la Couronne constituent un groupe de référence approprié dans le cas des juges de paix]

4 Rémunération des avocats en général [mise en garde contre l'utilisation, pour comparaison, des avocats de pratique privée à cause de leurs conditions et heures de travail différentes, des pressions exercées par les clients et des problèmes de perception des honoraires, facteurs ne s'appliquant pas dans le cas des juges de paix]

5 Comparaisons avec le tarif de l'aide juridique et la rémunération des avocats de la Couronne *ad hoc* [reconnaissant qu'il s'agit là d'indicateurs acceptables, mais contestant les sommes utilisées par la Commission au motif qu'elles ne représentent pas les tarifs réels]

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]

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.

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

6 Comparaison avec la rémunération des hauts fonctionnaires [mise en garde contre l'utilisation des hauts fonctionnaires comme groupe de référence, vu les responsabilités différentes]

7 Comparaison avec la rémunération des juges de paix des autres provinces et territoires du Canada [comparaison de la rémunération des juges de paix de l'Alberta avec celle des juges de paix d'autres provinces et territoires]

8 Comparaison avec les juges de la Cour provinciale [désaccord avec la conclusion de la Commission que la rémunération doit représenter les 2/3 de celle des juges de la Cour provinciale]

111 Dans ses motifs, la province d'Alberta insiste sur son obligation de gérer les ressources publiques et d'agir de manière responsable sur le plan financier. Elle y souligne que la hausse globale recommandée est supérieure à celle accordée dans le cas d'autres programmes financés par l'État et dépasse de beaucoup celle octroyée aux personnes faisant partie des groupes de référence. Les groupes de référence qui, selon la province, pouvaient servir de base de comparaison étaient les avocats de la Couronne, ceux rémunérés selon le tarif de l'aide juridique et ceux de la Couronne *ad hoc*, les hauts fonctionnaires et les juges de paix d'autres provinces et territoires du Canada. La province a toutefois estimé qu'une distinction avec les avocats de pratique privée s'imposait. Les motifs invoqués pour justifier l'utilisation de ces groupes de référence correspondent à la position adoptée par la province devant la Commission.

112 L'alinéa 2g) du décret établit les hausses annuelles modifiées que la province a finalement décidé d'accorder après avoir examiné les recommandations de la Commission. Les augmentations pour les juges de paix siégeant ou présidant à temps plein sont les suivantes :

[TRADUCTION] Juges de paix siégeant [ou présidant] à temps plein

1er avril 1998 – 75 000 $ par année
1er avril 1999 – 80 000 $ par année
1er avril 2000 – 80 000 $ par année
1er avril 2001 – 85 000 $ par année
1er avril 2002 – 85 000 $ par année

plus, pour chaque année, les avantages en vigueur, une somme additionnelle représentant 10 pour 100 du

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.

traitement en guise de prestations de retraite et quatre semaines de vacances au lieu de trois.

Ces augmentations représentent environ 15 000 $ de plus que celles proposées par la province dans ses observations devant la Commission. Les motifs invoqués à l'appui sont énoncés à l'ann. 7 du décret sous les rubriques suivantes :

[TRADUCTION]

1 Prise en compte de l'érosion due à l'inflation

2 Reconnaissance des inconvénients d'un mandat de 10 ans

3 Reconnaissance des rôles et responsabilités des juges de paix

4 Importante hausse globale

5 Mise en place progressive de la hausse et certitude

La province d'Alberta a également augmenté le taux quotidien de rémunération des juges de paix siégeant ou présidant à temps partiel :

[TRADUCTION] Juges de paix siégeant ou présidant à temps partiel

1er avril 1998 – 460 $ par jour
1er avril 1999 – 490 $ par jour
1er avril 2000 – 490 $ par jour
1er avril 2001 – 515 $ par jour
1er avril 2002 – 515 $ par jour

Ces hausses représentent environ 202 $ à 214 $ de plus que celles proposées par la province dans ses observations devant la Commission. L'annexe 7 énonce les motifs invoqués à l'appui.

Dans ses motifs, la province justifie cette augmentation du taux quotidien de rémunération en affirmant qu'elle est calculée en fonction du traitement de base des juges de paix siégeant à temps plein, plus les considérations additionnelles prévues à l'ann. 7 du décret. La hausse tient compte de l'érosion due à l'inflation, reconnaît les rôles et responsabilités des juges de paix et représente une augmentation majeure de l'allocation des ressources publiques aux juges de paix siégeant à temps partiel.

(2) Judicial History

(a) *Court of Queen's Bench* ((2001), 93 Alta. L.R. (3d) 358, 2001 ABQB 650; (2001), 3 Alta. L.R. (4th) 59, 2001 ABQB 960)

The respondents challenged the constitutionality of ss. 2(a), 2(f) and 2(g) of the Order. They claimed these sections violate the judicial independence of Alberta's Justices of the Peace. The trial judge allowed their application. He rejected Alberta's argument that some lesser standard of protection is required for Justices of the Peace. He then examined Alberta's reasons for rejecting the Commission's recommendations and found that they did not pass the test of simple rationality. He found that, apart from the alleged errors made by the Commission, there were no rational reasons for the rejection. The trial judge declared ss. 2(a), 2(f) and 2(g) of the Order to be unconstitutional. As a remedy, it was ordered that the Commission's report be binding and that solicitor-client costs be paid to the respondents.

(b) *Court of Appeal* ((2002), 16 Alta. L.R. (4th) 244, 2002 ABCA 274)

(i) Majority (Paperny and Picard JJ.A.)

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

(2) Historique des procédures judiciaires

a) *Cour du Banc de la Reine* ((2001), 93 Alta. L.R. (3d) 358, 2001 ABQB 650; (2001), 3 Alta. L.R. (4th) 59, 2001 ABQB 960)

117 Les intimés ont contesté la constitutionnalité des al. 2a), f) et g) du décret. Ils ont prétendu que ces dispositions portent atteinte à l'indépendance des juges de paix de l'Alberta. Le juge de première instance a fait droit à leur demande. Il a rejeté l'argument de la province qu'une norme de protection moins élevée s'applique aux juges de paix. Il a ensuite examiné les motifs invoqués par la province pour rejeter les recommandations de la Commission et a conclu qu'ils ne satisfaisaient pas au critère de la simple rationalité. Il a estimé que, à part les erreurs que la Commission aurait commises, aucun motif rationnel ne justifiait le rejet. Le juge de première instance a déclaré inconstitutionnels les al. 2a), f) et g) du décret. En ce qui concerne la réparation, il a statué que le rapport de la Commission devait avoir force obligatoire et que les intimés avaient droit aux dépens sur la base avocat-client.

b) *Cour d'appel* ((2002), 16 Alta. L.R. (4th) 244, 2002 ABCA 274)

(i) Juges majoritaires (juges Paperny et Picard)

118 La Cour d'appel de l'Alberta a souscrit, à la majorité, à la décision du juge de première instance et a rejeté l'appel interjeté par la province. La juge Paperny a insisté sur le caractère constitutionnel du recours à une commission. Elle a statué que les motifs ne résistaient pas à [TRADUCTION] « un examen poussé fondé sur la Constitution » (par. 81). Selon son interprétation du *Renvoi*, la norme de la simple rationalité est une norme élevée. Elle exige [TRADUCTION] « un examen approfondi et rigoureux des motifs invoqués » (par. 108). La juge Paperny expose aux par. 111-115 son interprétation des principes formulés dans le *Renvoi*. Elle a estimé que la province n'avait pas démontré l'existence des [TRADUCTION] « circonstances extraordinaires » (par. 149) qui, selon elle, étaient

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*

nécessaires pour justifier le rejet de toute partie du rapport de la Commission. Elle a statué que les motifs avancés par la province ne satisfaisaient pas au critère de la simple rationalité. Le pourvoi est rejeté, avec dépens sur la base avocat-client dans toutes les cours.

(ii) Le juge Côté (dissident en partie)

Le juge Côté, dissident en partie, a affirmé que la norme de contrôle est assez souple, c'est-à-dire qu'il s'agit de celle de la simple rationalité. Il a examiné chacun des motifs invoqués par le Gouvernement pour rejeter l'augmentation salariale recommandée et a indiqué a) les motifs de rejet du Gouvernement qui reconnaissent les erreurs prouvables de la Commission, b) les motifs de rejet du Gouvernement qui, bien qu'ils n'allèguent pas d'erreurs prouvables de la part de la Commission, satisfont au critère de la simple rationalité, et c) les motifs de rejet du Gouvernement qui ne satisfont pas au critère de la simple rationalité. Il a conclu que certains des motifs sont suffisants et que d'autres ne le sont pas. Cela n'était pas acceptable.

Pour ce qui est de la réparation, le juge Côté aurait ordonné au lieutenant-gouverneur en conseil de réexaminer l'affaire en tenant compte des directives spéciales de la cour. Il n'aurait pas adjugé de dépens sur la base avocat-client.

(3) Application

a) *Dans le contexte de la Commission, un degré d'indépendance moins élevé pour les juges de paix de l'Alberta se justifie-t-il?*

La province d'Alberta a soutenu que l'indépendance des juges de paix ne commande pas la même protection constitutionnelle que celle garantie par une commission indépendante et objective. Nous ne sommes pas d'accord. Comme l'a reconnu la Commission dans son rapport (p. 7-18), les juges de paix de l'Alberta exercent des fonctions judiciaires importantes. Leur rôle a pris de l'ampleur au fil des ans et il exige une protection constitutionnelle (voir *Ell*, par. 17-27, le juge Major). De toute façon, l'Alberta a déjà prévu un processus d'examen par une commission indépendante lorsqu'elle

Compensation Commission Regulation. This process must be followed.

(b) *Do Alberta's Reasons Satisfy the "Rationality" Test?*

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"?

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 nor discriminatory motivations.

Alberta's reasons are legitimate. They reflect the public interest in having a commission process,

a adopté le règlement intitulé *Justices of the Peace Compensation Commission Regulation*. Il faut suivre ce processus.

b) *Les motifs invoqués par la province d'Alberta satisfont-ils au critère de la « rationalité »?*

122 Comme nous l'avons dit précédemment, la province d'Alberta a accepté la grande majorité des recommandations de la Commission, mais elle a rejeté les hausses recommandées et a plutôt proposé un montant modifié. Les motifs de cette décision sont énoncés aux ann. 6 et 7 du décret. Ces motifs satisfont-ils au critère de la « rationalité »?

123 Pour satisfaire au critère de la rationalité, les motifs doivent être légitimes. À cette étape, le rôle du tribunal saisi du contrôle judiciaire consiste à s'assurer que les motifs de rejet des recommandations d'une commission ne sont ni politiques ni discriminatoires. L'annexe 6 du décret énonce huit motifs de rejet des hausses recommandées par la Commission. Les motifs ne révèlent pas qu'ils sont dictés par des considérations politiques ou discriminatoires. Dans ses motifs, la province tient compte des hausses globales recommandées, commente l'obligation pour le Gouvernement de gérer judicieusement les finances publiques et passe en revue divers groupes de référence tels les avocats de la Couronne ayant cinq ans d'expérience, les directeurs et les substituts en chef du procureur général, les avocats de la Couronne *ad hoc*, les avocats payés selon le tarif de l'aide juridique, les hauts fonctionnaires, les juges de paix des autres provinces et territoires et les juges de cours provinciales. Dans ses motifs, la province a exprimé son désaccord au sujet du coefficient de comparaison de deux tiers que la Commission accorde aux juges de cours provinciales. Elle a expliqué son désaccord, invoquant notamment les différences entre les charges judiciaires et le fait que de nombreux juges de paix ne siègent pas à temps plein et continuent d'exercer le droit tout en agissant comme juges de paix. Globalement, les motifs à l'ann. 6 ne semblent pas être dictés par des considérations politiques ou discriminatoires.

124 Les motifs fournis par la province sont légitimes. Ils reflètent l'intérêt du public à ce qu'il y ait recours

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

à une commission, c'est-à-dire dépolitisation du mécanisme d'examen de la rémunération des juges et nécessité de préserver leur indépendance. La province invoque ses obligations en matière d'allocation des ressources publiques, mais elle convient avec la Commission qu'une hausse de la rémunération s'impose; voir l'al. 2a) du décret et les motifs énoncés à l'ann. 1.

Les motifs invoqués pour rejeter les niveaux de rémunération recommandés illustrent la volonté de la province de rémunérer ses juges de paix en fonction de la nature de leur charge. Ils répondent aux recommandations de la Commission. Il ne s'agit pas de simples déclarations rejetant ou désapprouvant les recommandations. Ils indiquent clairement les raisons des écarts et expliquent la raison pour laquelle la province a accordé un poids différent aux divers groupes de référence. Ils expliquent pourquoi ces groupes de référence sont pertinents.

L'annexe 7 explique les niveaux de traitement choisis par la province. Les motifs reconnaissent le rôle et les responsabilités des juges de paix et dénotent une véritable tentative de déterminer les éléments de comparaison appropriés pour cette charge judiciaire. Ils sont de bonne foi et concernent l'intérêt public. Ils satisfont donc à cet aspect du critère de la « rationalité ».

Il convient ensuite de déterminer si les motifs invoqués ont un fondement factuel raisonnable. À cet égard, le critère applicable est celui de la retenue envers le gouvernement. Sur ce point, les juges majoritaires de la Cour d'appel ont fait erreur. Le critère n'exige pas que le gouvernement démontre l'existence de circonstances exceptionnelles. Les seules questions à se poser sont les suivantes : (1) Le gouvernement a-t-il indiqué le fondement factuel qu'il avait l'intention d'invoquer? (2) Compte tenu de la preuve, était-il rationnel de s'appuyer sur ce fondement factuel?

Dans ses motifs, la province d'Alberta aborde plusieurs questions, dont la politique budgétaire, les divers groupes de référence, l'inflation et les rôles et responsabilités des juges de paix. Le fondement

sought to rely is indicated, and its reliance is, for the most part, rational.

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.

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.

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?*

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

factuel que voulait invoquer le Gouvernement y est indiqué et sa décision de s'y appuyer était pour l'essentiel rationnel.

129 Ces motifs comportent toutefois un élément contestable. En particulier, le motif 2 de l'ann. 6 et les motifs 3 à 5 de l'ann. 7 comparent le nouveau niveau de rémunération à celui qui a fait l'objet d'un gel en 1991. Les chiffres servant de référence ne résultent pas d'un mécanisme indépendant. Leur utilité comme base de référence est donc limitée. Toutefois, ils fournissent des renseignements généraux qui permettent de situer la Commission dans son contexte. Les motifs n'ont pas un fondement factuel raisonnable s'ils servent de base de comparaison, mais ils sont acceptables s'ils servent simplement à fournir des renseignements généraux. Il est difficile de déterminer avec précision l'effet de l'erreur alléguée sur la décision de la province de s'écarter des recommandations de la Commission.

130 Enfin, il faut examiner globalement les motifs du gouvernement pour vérifier si l'objectif du recours à une commission a été atteint. À cet égard, le tribunal saisi du contrôle judiciaire joue également un rôle limité.

131 Il semble que le recours à une commission en l'espèce a été efficace. La province a accepté la grande majorité des recommandations de la Commission. Elle a pris au sérieux le mécanisme. Les motifs qu'elle a invoqués pour justifier les modifications sont légitimes. Globalement, il semble que le recours à la Commission, en tant qu'organisme consultatif mis sur pied pour dépolitiser l'examen de la rémunération des juges, a été efficace.

c) *Y a-t-il lieu d'adjuger des dépens sur la base avocat-client?*

132 Les deux juridictions inférieures ont condamné la province d'Alberta à payer des dépens sur la base avocat-client. Ce n'était pas justifié. Aucune partie ne s'est comportée de façon répréhensible, scandaleuse ou choquante. Certes, la protection de

itself sufficient to warrant an award of solicitor-client costs in the case at bar; see *Mackin*, at paras. 86-87, *per* Gonthier J.

(4) Remedy

133 Although the bulk of Alberta's reasons pass the test of "rationality", those which compare the new salary with the 1991 salary do not rely upon a reasonable factual foundation. This was objected to by the respondents, but without a compelling argument to support the objection. A court should not intervene every time a single reason is questionable, particularly when the others are rational. To do so would invite litigation, conflict and delay in implementing the individual salaries. This is antithetical to the object of the commission process. When viewed globally, the commission process appears to have been effective and the setting of judicial remuneration has been "depoliticized". As a result, the appeal is allowed with costs throughout.

D. *Quebec*

134 Three of the appeals that the Court heard together originate from the province of Quebec. In two of them, the Attorney General of Quebec seeks the reversal of judgments in which the Quebec Court of Appeal held that the responses of the Quebec government and National Assembly to a report of a compensation committee on the salaries and benefits of provincially appointed judges of the Court of Québec and the municipal courts of the cities of Laval, Montreal and Quebec City had not met the constitutional standard; the Court of Appeal ordered the Government and the Minister of Justice to follow and implement the compensation committee's first 11 recommendations (*Quebec (Attorney General) v. Conférence des juges du Québec*, [2004] R.J.Q. 1450, [2004] Q.J. No. 6622 (QL); *Minc v. Québec (Procureur général)*, [2004] R.J.Q. 1475). In a third appeal, the Conférence des juges municipaux du Québec, which represents municipal court judges outside Laval, Montreal and Quebec

l'indépendance de la magistrature représente un noble objectif, mais, en l'espèce, elle ne justifie pas en soi l'adjudication des dépens sur la base avocat-client (voir *Mackin*, par. 86-87, le juge Gonthier).

(4) Réparation

Bien que la grande majorité des motifs fournis par l'Alberta satisfassent au critère de la « rationalité », ceux qui comparent les nouveaux traitements à ceux de 1991 n'ont pas un fondement factuel raisonnable. Les intimés ont contesté cette conclusion mais n'ont pas produit d'argument convaincant pour étayer leur thèse. Un tribunal ne devrait pas intervenir chaque fois qu'un seul motif est discutable, surtout si les autres motifs demeurent rationnels. Une telle façon de procéder entraînerait des poursuites, des conflits et des retards dans la mise en œuvre des recommandations concernant les salaires individuels. C'est l'antithèse de l'objectif du recours à une commission. Dans l'ensemble, le mécanisme semble avoir été efficace et la détermination de la rémunération des juges était « dépolitisée ». En conséquence, le pourvoi est accueilli, avec dépens dans toutes les cours.

D. *Québec*

Trois des pourvois que la Cour a entendus conjointement proviennent du Québec. Dans deux de ces pourvois, le procureur général du Québec a demandé l'annulation des arrêts rendus par la Cour d'appel du Québec. Celle-ci y a statué que les réponses du Gouvernement et de l'Assemblée nationale du Québec au rapport du comité de rémunération chargé d'examiner les traitements et avantages consentis aux juges de nomination provinciale de la Cour du Québec et des cours municipales de Laval, de Montréal et de Québec ne respectaient pas la norme constitutionnelle; la Cour d'appel a ordonné au Gouvernement et au ministre de la Justice de suivre et mettre en œuvre les 11 premières recommandations du comité de rémunération (*Québec (Procureur général) c. Conférence des juges du Québec*, [2004] R.J.Q. 1450; *Minc c. Québec (Procureur général)*, [2004] R.J.Q. 1475). Dans le troisième pourvoi, la Conférence des juges municipaux du Québec, qui représente les juges

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.

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

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*.

municipaux de l'extérieur de Laval, de Montréal et de Québec, conteste le rejet par la Cour d'appel de sa requête visant à obtenir l'autorisation d'intervenir dans l'appel interjeté par le procureur général relativement aux juges des cours municipales de Laval, de Montréal et de Québec. Ces trois pourvois ont été joints.

135 Pour trancher ces pourvois en provenance du Québec, il convient d'examiner et d'appliquer les principes généraux énoncés précédemment en ce qui concerne la nature du comité de la rémunération des juges et le recours à ce comité, en tenant compte du cadre juridique établi par la *Loi sur les tribunaux judiciaires*, L.R.Q., ch. T-16. De plus, dans le cas du pourvoi interjeté par la Conférence des juges municipaux, nous devrons examiner certaines questions précises touchant la procédure civile au Québec que la Conférence a soulevées dans sa requête d'intervention.

(1) Contexte

136 Ces pourvois sont les derniers épisodes d'une longue histoire de problèmes et de tensions qui, avant que la Cour ne rende sa décision dans le *Renvoi* et depuis cet arrêt, n'ont cessé d'opposer le gouvernement du Québec et les juges de nomination provinciale. Bien que des comités de la rémunération des juges aient été mis sur pied dès 1984 et qu'ils aient dûment fait rapport sur la situation, leurs rapports ont été pour la plupart écartés ou sont restés lettre morte, du moins pour ce qui est de leurs principales recommandations. Depuis le *Renvoi*, les réponses aux rapports successifs du Comité Bisson et du Comité O'Donnell ont donné lieu à des litiges. La Cour est maintenant saisie des litiges qui ont suivi la publication des rapports du Comité O'Donnell (*Rapport du Comité de rémunération des juges de la Cour du Québec et des cours municipales* (2001)). Pour clarifier la nature de ces litiges et des problèmes qu'ils soulèvent, nous analyserons brièvement le cadre juridique des comités de la rémunération des juges au Québec. Nous devrons ensuite examiner les travaux des deux comités mis sur pied après la modification de la *Loi sur les tribunaux judiciaires* par suite au *Renvoi*.

(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. 1997, 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 Québec 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 Québec 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 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;

a) *La Loi sur les tribunaux judiciaires et le cadre juridique des comités de la rémunération des juges*

Les modifications apportées à la *Loi sur les tribunaux judiciaires* en 1997 (L.Q. 1997, ch. 84) ont établi le cadre juridique permettant d'instituer des comités de la rémunération des juges. Elles prévoient la constitution, tous les trois ans, d'un comité de la rémunération des juges chargé d'examiner les questions concernant le traitement, le régime de retraite et autres avantages sociaux dont bénéficient les juges de la Cour du Québec et les juges des cours municipales de Laval, de Montréal et de Québec ainsi que les juges des autres cours municipales auxquelles s'applique la *Loi sur les cours municipales*, L.R.Q., ch. C-72.01. Les juges nommés en vertu de cette loi peuvent continuer d'exercer le droit et rester membres du barreau. Ils travaillent souvent à temps partiel et ils sont rémunérés à la séance. Le comité de la rémunération est formé de quatre membres, qui siègent en deux formations de trois membres. L'une des formations fait rapport sur les juges de la Cour du Québec et des cours municipales de Laval, de Montréal et de Québec. L'autre formation examine les questions relatives à la rémunération des juges des cours municipales auxquelles s'applique la *Loi sur les cours municipales* (*Loi sur les tribunaux judiciaires*, art. 246.29, 246.30 et 246.31).

Dans son rapport, le comité doit prendre en considération divers facteurs :

246.42. Le comité prend en considération les facteurs suivants :

1° les particularités de la fonction de juge;

2° la nécessité d'offrir aux juges une rémunération adéquate;

3° la nécessité d'attirer d'excellents candidats à la fonction de juge;

4° l'indice du coût de la vie;

5° la conjoncture économique du Québec et la situation générale de l'économie québécoise;

6° l'évolution du revenu réel par habitant au Québec;

7° l'état des finances publiques ou des finances publiques municipales, selon la formation compétente;

(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.

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*

The judicial compensation committees which have reported since 1997 were created pursuant to the *Courts of Justice Act*. The first one was appointed late in 1997. Its chair was the Honourable Claude Bisson, a former Chief Justice of Quebec. The Bisson Committee reported in August 1998 (*Rapport du Comité de la rémunération des juges de la Cour du Québec et des cours municipales* (1998)). Its report recommended significant adjustments to judicial salaries and benefits. The initial response of the Quebec government was to reject the recommendations on salaries. Litigation ensued. The Superior Court of Quebec held that the response did not meet constitutional standards and remitted the matter to the National Assembly for reconsideration (*Conférence des juges du Québec v. Québec (Procureure générale)*, [2000] R.J.Q. 744). The

8º l'état et l'évolution comparés de la rémunération des juges concernés d'une part, et de celle des autres personnes rémunérées sur les fonds publics, d'autre part;

9º la rémunération versée à d'autres juges exerçant une compétence comparable au Canada;

10º tout autre facteur que le comité estime pertinent.

La formation compétente eu égard aux juges des cours municipales auxquelles s'applique la Loi sur les cours municipales [ch. C-72.01] prend également en considération le fait que ces juges exercent principalement leurs fonctions à temps partiel.

139 Le comité doit remettre son rapport dans les six mois. Le ministre de la Justice dépose ce rapport devant l'Assemblée nationale dans les 10 jours de sa réception ou, si elle ne siège pas, dans les 10 jours de la reprise de ses travaux (art. 246.43). L'Assemblée nationale peut, par résolution motivée, approuver, modifier ou rejeter en tout ou en partie les recommandations du comité. À défaut d'une telle résolution, le gouvernement prend les mesures requises pour mettre en œuvre ces recommandations (art. 246.44).

b) *Le recours aux comités de la rémunération des juges après 1997*

140 Les comités de la rémunération des juges qui ont fait rapport depuis 1997 ont été institués sous le régime de la *Loi sur les tribunaux judiciaires*. Le premier comité a été créé à la fin de 1997. Il était présidé par l'honorable Claude Bisson, ancien juge en chef du Québec. Le Comité Bisson a déposé son rapport en août 1998 (*Rapport du Comité de la rémunération des juges de la Cour du Québec et des cours municipales* (1998)). Il y recommandait d'importants rajustements aux traitements et avantages consentis aux juges. Dans sa première réponse, le gouvernement du Québec a rejeté les recommandations salariales, ce qui a donné lieu à des litiges. La Cour supérieure du Québec a statué que la réponse ne satisfaisait pas aux normes constitutionnelles et a renvoyé l'affaire à l'Assemblée nationale pour réexamen (*Conférence des juges du*

Government implemented this first report only after the Quebec Court of Appeal had held that it had a legal obligation to implement it, retroactively to July 1, 1998, in respect of judicial salaries (*Conférence des juges du Québec v. Québec (Procureure générale)*, [2000] R.J.Q. 2803).

141 In September 1999, the Bisson Committee filed a second report, on the judges' pension plan and benefits, which lead to a new round of litigation (*Rapport du Comité de la rémunération des juges de la Cour du Québec et des cours municipales (Régime de retraite et avantages sociaux reliés à ce régime et aux régimes collectifs d'assurances)* (1999)). At first, the Government rejected the recommendations. After a constitutional challenge, it reversed its stand and stated its intention to implement the recommendations. Nevertheless, litigation in respect of this second report continued in the Superior Court and in the Court of Appeal until 2003; this litigation related to delays in implementation and to remedies.

142 In the meantime, in March 2001, as required by the *Courts of Justice Act*, the Quebec government appointed a second committee, chaired by Mr. J. Vincent O'Donnell, Q.C. The Committee was split into two panels, both chaired by Mr. O'Donnell. The first one was to report on the salaries and benefits of judges of the Court of Québec 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

Québec c. Québec (Procureure générale), [2000] R.J.Q. 744). Le Gouvernement a mis en œuvre ce premier rapport seulement après que la Cour d'appel du Québec eut statué que la loi l'obligeait à le mettre en œuvre, rétroactivement au 1er juillet 1998, en ce qui concerne le traitement des juges (*Conférence des juges du Québec c. Québec (Procureure générale)*, [2000] R.J.Q. 2803).

En septembre 1999, le Comité Bisson a déposé un deuxième rapport, sur le régime de retraite et les avantages des juges, ce qui a donné lieu à une nouvelle série de litiges (*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)). Le Gouvernement a tout d'abord rejeté les recommandations. Après une contestation constitutionnelle, il est revenu sur sa position et a indiqué son intention de mettre en œuvre les recommandations. Les litiges concernant ce deuxième rapport se sont néanmoins poursuivis jusqu'en 2003 devant la Cour supérieure et devant la Cour d'appel à propos des retards dans la mise en œuvre et aux réparations.

Entre-temps, en mars 2001, conformément à la *Loi sur les tribunaux judiciaires*, le gouvernement du Québec a constitué un deuxième comité, présidé par M. J. Vincent O'Donnell, c.r. Le Comité a été séparé en deux formations, toutes deux présidées par M. O'Donnell. La première formation devait faire rapport sur les traitements et avantages consentis aux juges de la Cour du Québec et des cours municipales de Laval, de Montréal et de Québec. Le mandat de la seconde formation se limitait à la rémunération et aux avantages des juges des cours municipales auxquelles s'applique la *Loi sur les cours municipales*. Les deux formations ont remis leur rapport. L'Assemblée nationale y a répondu. Il s'est ensuivi des litiges. La Cour est maintenant appelée à se prononcer sur ces affaires.

c) *Les rapports des formations du Comité O'Donnell*

La partie principale du rapport du Comité O'Donnell a été rédigée par la première formation.

the salary and benefits of judges of the Court of Québec. 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.

The work of these panels appears to have been closely coordinated. The main recommendations concerned the salary of judges of the Court of Québec. 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 Québec and the positions and responsibilities of the different categories of municipal court judges.

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' finances, which remained in a fragile and unstable condition even though the budget had recently been balanced, should be taken into account.

Elle porte tout d'abord sur les traitements et avantages consentis aux juges de la Cour du Québec. Elle aborde ensuite la question de la rémunération des juges des cours municipales de Laval, de Montréal et de Québec. La deuxième partie, rédigée par la deuxième formation, examine les aspects particuliers de la rémunération des juges des cours municipales rémunérés à la séance.

144 Il semble que les travaux de ces deux formations ont été étroitement coordonnés. Les principales recommandations touchent le traitement des juges de la Cour du Québec. Les recommandations concernant les juges des cours municipales semblent reposer sur l'analyse comparative des propositions visant les juges de la Cour du Québec et des fonctions et responsabilités des différentes catégories de juges des cours municipales.

145 Le gouvernement du Québec s'était opposé à toute révision majeure des traitements recommandés par le Comité Bisson. Il a estimé, comme il l'a indiqué dans ses observations écrites, que l'acceptation des recommandations du Comité Bisson avait entraîné une hausse substantielle du traitement des juges. À son avis, le rôle du Comité O'Donnell consiste à proposer des modifications progressives mineures compte tenu des changements survenus, le cas échéant, depuis la publication du rapport Bisson. Aucun réexamen en profondeur de la rémunération des juges n'était justifié. Dans son exposé de position, le Gouvernement a recommandé une hausse se situant entre 4 et 8 pour 100 pour la première année ainsi que des rajustements mineurs en fonction de l'augmentation du coût de la vie pour les deux années suivantes. Le Gouvernement préconisait le maintien d'une quasi-parité, qui existait depuis au moins 1992, avec une catégorie de fonctionnaires de niveau supérieur, les « administrateurs d'État I, niveau 1 ». Il se dit préoccupé par les répercussions que pourrait avoir une hausse plus importante sur sa politique de rémunération dans le secteur public. Il a également soutenu qu'il fallait tenir compte de la situation financière précaire de la province. Celle-ci était toujours fragile et instable, même si on est récemment parvenu à un budget équilibré.

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 Québec. 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' 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 Québec 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.

Dans son rapport, la première formation du Comité O'Donnell a exprimé son profond désaccord avec la position du gouvernement du Québec. Elle estimait qu'en vertu du mandat qui lui avait été confié par la loi, elle devait examiner sur le fond les questions liées à la rémunération des juges en tenant dûment compte des facteurs pertinents énumérés à l'art. 246.42 de la *Loi sur les tribunaux judiciaire*s. Elle a accordé un poids considérable à l'étendue du champ de compétence de la Cour du Québec en matière civile et pénale. Elle a souligné que ce champ de compétence était beaucoup plus vaste que celui des autres cours provinciales au Canada et que la rémunération des juges de nomination provinciale restait, malgré tout, nettement inférieure au Québec que dans la plupart des autres provinces. Elle a mentionné que les contraintes résultant de l'état précaire des finances des provinces et de l'économie provinciale à l'époque de la publication du rapport du Comité Bisson n'étaient plus aussi déterminantes. Elle a en outre estimé essentiel d'élargir le bassin de recrutement pour la charge judiciaire. Elle a finalement recommandé de porter le traitement des juges de la Cour du Québec de 137 333 $ à 180 000 $, des hausses moins importantes étant prévues pour les deux années suivantes. Elle a aussi recommandé divers rajustements touchant d'autres aspects de la rémunération et des avantages des juges, en particulier leur régime de retraite.

147 On the basis of its findings and opinions regarding the nature of the jurisdiction of judges of the Court of Québec, 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 Québec. 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

S'appuyant sur ses constatations et opinions quant à la nature des compétences des juges de la Cour du Québec, la formation a ensuite examiné la situation des juges des cours municipales de Laval, de Montréal et de Québec. Selon une tradition de longue date, confirmée par des dispositions législatives, ces juges touchaient les mêmes traitements et avantages que leurs collègues de la Cour du Québec. Néanmoins, au cours de son analyse de la rémunération des juges, le Comité O'Donnell a décidé de soulever la question de la parité et a informé les intéressés de son intention d'examiner cette question. Il les a invités à lui faire part de leurs observations, tant orales qu'écrites. Il a reçu quelques mémoires, lesquels recommandaient le maintien de la parité. Certains se sont même opposés à tout examen de la question,

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 Québec, and this fact should be reflected in their salary and benefits.

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 Québec 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*

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" ("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

estimant que cette fonction ne relevait pas du mandat du Comité. Finalement, le Comité a recommandé dans son rapport l'élimination de la parité et a proposé une échelle salariale inférieure pour les juges municipaux. De l'avis des auteurs du rapport, le champ de compétence des cours municipales des trois villes en question était beaucoup moins vaste que celui de la Cour du Québec et les traitements et avantages accordés aux juges de ces cours municipales doivent refléter ce fait.

148 La deuxième formation du Comité O'Donnell a remis en septembre 2001 son rapport sur la rémunération des juges des cours municipales auxquelles s'applique la *Loi sur les cours municipales*. Ces juges sont rémunérés à la séance, la rémunération ne devant pas dépasser le plafond annuel. Ils restent inscrits au Barreau du Québec et ils peuvent continuer d'exercer le droit en cabinet privé. Après avoir examiné leur champ de compétence et la nature de leur travail, la formation a conclu que leur champ de compétence était beaucoup plus restreint et leur travail habituellement moins complexe que ceux des juges de la Cour du Québec et des juges à temps plein des cours municipales. La recommandation formulée dans le rapport partait du principe que la parité devait être abolie et que le barème de traitement devait refléter leurs responsabilités moins lourdes que celles des juges exerçant leurs fonctions à temps plein.

d) *La réponse de l'Assemblée nationale du Québec*

149 Le 18 octobre 2001, le ministre de la Justice du Québec a déposé le rapport devant l'Assemblée nationale. Il s'est alors abstenu de tout commentaire. Le 13 décembre 2001, il a déposé un document en réponse aux deux rapports des formations du Comité O'Donnell : « Réponse du gouvernement au Comité de la rémunération des juges de la Cour du Québec et des cours municipales » (« Réponse »). Dans ce document, le Gouvernement exposait sa position au sujet des recommandations émises par les formations du Comité. Il préconisait le rejet des recommandations les plus importantes et tentait de justifier sa décision concernant les propositions relatives à la rémunération des juges.

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 Québec 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 Québec 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 Québec, 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.

Après un débat le 18 décembre 2001, l'Assemblée nationale a, par résolution, approuvé sans modification la Réponse.

La Réponse portait principalement sur l'augmentation salariale recommandée pour les juges. Le Gouvernement a décidé de limiter la majoration à 8 pour 100 pour les juges de la Cour du Québec. Leur traitement s'établirait à 148 320 $ au lieu de 180 000 $ au 1er juillet 2001, des hausses annuelles de 2,5 pour 100 et de 2 pour 100 étant prévues pour 2002 et 2003. La Réponse acceptait l'élimination de la parité pour les juges des cours municipales de Laval, de Montréal et de Québec, mais limitait la hausse de leur traitement à 4 pour 100 en 2001 et leur accordait pour 2002 et 2003 les mêmes rajustements que pour les juges de la Cour du Québec. Elle rajustait en conséquence les honoraires payables aux juges des cours municipales auxquelles s'applique la *Loi sur les cours municipales* au lieu d'accepter les échelles salariales recommandées par le Comité O'Donnell. Elle rejetait également les recommandations portant sur le régime de retraite des juges provinciaux. Elle abordait diverses autres questions moins importantes pour lesquelles elle a retenu plusieurs des recommandations des formations du Comité O'Donnell. Les questions les plus importantes soulevées dans la Réponse portaient clairement sur le traitement, la pension et la parité entre les juges de la Cour du Québec, les juges des cours municipales à temps plein et les juges des cours municipales rémunérés à la séance. On trouvait dans la conclusion de la Réponse un résumé de la position du gouvernement du Québec (p. 24) :

Bien que le gouvernement fasse siennes plusieurs des recommandations du Comité O'Donnell, il s'en démarque de façon importante au niveau du traitement.

Les recommandations du Comité s'appuient beaucoup sur les critères de la *Loi sur les tribunaux judiciaires* qui traitent de la fonction judiciaire. Le gouvernement croit que le comité de rémunération précédent avait déjà pris en compte ces critères en 1998 et il comprend mal comment le Comité O'Donnell, à peine trois ans plus tard, peut en arriver à recommander une hausse de 31 % pour l'année 2001, alors que les juges avaient obtenu des hausses de 21 % pour la période 1998 à 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

The Response was quickly challenged in court. The Conférence des juges du Québec, which represents the judges of the Court of Québec and the judges of the municipal courts of Laval, Montreal and Quebec City, 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.

Le gouvernement fait aussi une lecture différente et plus globale des critères prévus dans la *Loi sur les tribunaux judiciaires*. Il accorde l'importance qui leur revient, aux termes de cette loi, aux critères qui font référence à la richesse collective des Québécois et à l'équité prise dans un sens plus large que celle applicable au seul milieu juridique et à la pratique privée du droit. Enfin, le gouvernement conteste l'appréciation faite par le Comité quant au critère relatif à la nécessité d'attirer d'excellents candidats, constatant que le Comité O'Donnell a commis, à cet égard, des erreurs qui ont faussé son appréciation.

En définitive, le gouvernement est d'avis que sa position, eu égard aux recommandations du Comité O'Donnell, tient compte, d'une part, du droit des justiciables à des tribunaux indépendants et, d'autre part, de l'intérêt général de la collectivité québécoise dont il demeure le gardien et de sa richesse collective.

(2) Contestations judiciaires de la Réponse et leur issue

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La contestation de la Réponse devant les tribunaux ne s'est pas fait attendre. La Conférence des juges du Québec, qui représente les juges de la Cour du Québec et les juges des cours municipales de Laval, de Montréal et de Québec, a déposé devant la Cour supérieure du Québec deux demandes distinctes de contrôle judiciaire de la Réponse. On a soulevé dans ces deux demandes la rationalité de la Réponse en ce qui a trait aux traitements, affirmant qu'elle ne satisfaisait pas au critère de la rationalité établi dans le *Renvoi*. Dans leur demande, les juges des cours municipales ont en outre soulevé la question de la parité. Il s'agissait davantage dans ce cas d'une contestation du processus et du rapport du Comité O'Donnell que de la Réponse elle-même. On a allégué que la question de la parité ne relevait pas du mandat du Comité, celui-ci l'ayant soulevé de son propre chef, et qu'il y a eu violation des principes de justice naturelle. La demande contestait donc la rationalité de la Réponse parce que celle-ci n'avait pas rejeté cette recommandation particulière. Les juges des autres cours municipales n'ont pas demandé le contrôle judiciaire. Comme l'ont reconnu leurs avocats à l'audience devant la Cour, ils ont tenté de trouver des solutions à leurs difficultés par d'autres moyens, vu les nombreux problèmes auxquels ils devaient faire face à l'époque et les ressources limitées dont ils disposaient.

152 The outcome of the litigation in the Quebec courts was that the Response was quashed. The Superior Court and the Court of Appeal held in their judgments that the Response did not meet the test of rationality. The Government would have been required to implement the O'Donnell Committee's first 11 recommendations if the judgments had not been appealed to our Court.

153 Despite disagreements on certain aspects of these cases, the Superior Court and the Court of Appeal agreed that the Government of Quebec had failed to establish a rational basis for rejecting the O'Donnell Committee's recommendations in respect of judicial compensation and pensions. In their opinion, the Response had addressed neither the recommendations nor the basis for them. The Superior Court went further and would have imposed an additional burden on the appellants. It asserted that the Response should have demonstrated that the recommendations of the compensation commission were unreasonable. The Court of Appeal disagreed on this point. Nevertheless, applying the simple rationality test, it held that the Government had not stated and demonstrated proper grounds for rejecting the recommendations. In its view, the Response came down to an expression of disagreement with the recommendations and a restatement of the positions advanced by the Government during the Committee's deliberations.

154 The Quebec courts also faulted the Response for failing to reject the recommendations on parity between judges of the Court of Québec 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.

Les litiges devant les tribunaux du Québec ont eu pour résultat l'annulation de la Réponse. La Cour supérieure et la Cour d'appel ont statué que celle-ci ne satisfaisait pas au critère de la rationalité. Le Gouvernement aurait été tenu de mettre en œuvre les 11 premières recommandations du Comité O'Donnell si les jugements n'avaient pas été portés en appel devant la Cour.

Malgré leur divergence d'opinion sur certains aspects de ces causes, la Cour supérieure et la Cour d'appel ont convenu que le gouvernement du Québec n'avait pas démontré l'existence d'un fondement rationnel justifiant le rejet des recommandations du Comité O'Donnell se rapportant au traitement et à la pension des juges. Elles ont estimé que la Réponse ne tenait compte ni des recommandations et ni de leur fondement factuel. La Cour supérieure est allée plus loin et aurait imposé un fardeau additionnel aux appelants. Elle a affirmé que la Réponse aurait dû démontrer le caractère déraisonnable des recommandations du Comité de la rémunération. La Cour d'appel n'était pas d'accord sur ce point. Quoi qu'il en soit, appliquant le critère de la simple rationalité, elle a conclu que le Gouvernement n'avait pas démontré l'existence de motifs justifiant le rejet des recommandations. Elle a considéré que la Réponse se ramenait à une désapprobation des recommandations et à une reformulation des positions qu'avait fait valoir le Gouvernement devant le Comité.

Les tribunaux du Québec ont également trouvé matière à critiquer la Réponse parce qu'elle ne rejetait pas les recommandations concernant la parité entre les juges de la Cour du Québec et ceux des cours municipales de Laval, de Montréal et de Québec. Ils se sont attaqués dans leurs motifs au mécanisme suivi par le Comité O'Donnell. Ils ont estimé que le Comité n'avait même pas pour mandat d'examiner la question de la parité. De plus, la manière dont il avait soulevé cette question et l'avait analysée contrevenait aux principes fondamentaux de justice naturelle. Les tribunaux d'instance inférieure ont estimé que l'avis donné était insuffisant et que les parties intéressées n'avaient pas vraiment eu l'occasion de faire valoir leurs points de vue.

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*

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*

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

155 Dans sa décision, la Cour d'appel a rejeté la dernière tentative de la Conférence des juges municipaux du Québec de contester la Réponse aux recommandations de la deuxième formation du Comité O'Donnell. La Conférence des juges municipaux avait demandé l'autorisation d'intervenir dans les deux appels en instance devant la cour afin de lui exposer les préoccupations de ses membres au sujet de la validité de la Réponse et du mécanisme suivi par le Comité. La Cour d'appel lui a refusé l'autorisation. Elle a statué que la demande constituait une tentative inacceptable de contester la constitutionnalité de la Réponse après l'expiration du délai normal et qu'elle contrevenait à toutes les règles pertinentes de procédure civile applicables au Québec.

(3) Analyse des questions en litige dans les pourvois en provenance du Québec et décision

a) *Les questions en litige*

156 Les questions soulevées par ces pourvois se rapportent pour la plupart à celles que nous avons examinées dans les autres affaires qui ont été jointes pour audition devant la Cour. Il reste essentiellement à examiner si la Réponse satisfait au critère de la rationalité que nous avons décrit précédemment, dans le cadre établi par la *Loi sur les tribunaux judiciaires*. Nous analyserons d'abord cette question, avant de passer à l'étude des questions plus limitées qui concernent les juges municipaux, soit la parité et le sort de la demande d'autorisation d'intervenir présentée par la Conférence des juges municipaux du Québec.

b) *La Réponse quant à la rémunération et aux pensions des juges*

157 La question de la rationalité de la Réponse est cruciale pour le sort des présents pourvois, sous réserve des difficultés d'ordre procédural soulevées dans le pourvoi interjeté par la Conférence des juges municipaux du Québec. Le procureur général du Québec prétend que le Gouvernement a satisfait au critère de la rationalité puisqu'il a fourni des motifs légitimes pour rejeter les recommandations. Il affirme que la Réponse tenait compte d'objectifs

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.

d'intérêt public qui n'entraînaient pas de discrimination à l'égard des juges. Son principal point de désaccord, dont découlaient toutes les autres divergences d'opinion, portait sur la hausse salariale, qui, à son avis, était déraisonnable et excessive.

Selon le procureur général, plusieurs facteurs justifiaient le rejet des recommandations salariales. Premièrement, aucune révision en profondeur n'était justifiée. Les recommandations du Comité Bisson venaient tout juste d'être mises en œuvre et les juges avaient déjà bénéficié de hausses substantielles. En l'absence de changements importants dans leurs fonctions et de la preuve qu'il était difficile de trouver des candidats pour combler les postes vacants, le Gouvernement estimait que, compte tenu de la conjoncture économique au Québec, la majoration limitée de 8 pour 100 recommandée dans la Réponse était justifiée. Deuxièmement, le procureur général souligne que le Gouvernement n'était pas tenu d'accorder le même poids que le Comité aux facteurs pertinents. Il pouvait s'en tenir à sa propre appréciation de l'importance relative de ces facteurs à l'époque. Les comités de la rémunération des juges restaient de nature consultative. La détermination de la rémunération des juges demeurait la responsabilité du Gouvernement et de l'Assemblée nationale.

Dans nos commentaires, nous avons insisté sur la nature limitée du contrôle judiciaire de la Réponse. Les tribunaux doivent prendre un certain recul et s'abstenir d'intervenir lorsqu'ils constatent l'existence de motifs légitimes. Nous reconnaissons qu'à cette étape de l'analyse la Réponse ne dénote pas l'existence d'un objectif politique illégitime ni une intention de manipuler ou d'influencer la magistrature. Toutefois, à propos de la question cruciale du traitement des juges, la Réponse ne satisfaisait pas au critère de la rationalité. En partie du moins, la Réponse ne tient pas compte des recommandations les plus importantes du Comité O'Donnell et de leur justification. Au lieu de répliquer à celles-ci, le Gouvernement semble s'être contenté de reformuler sa position initiale, sans opposer de réponse à certains des principaux motifs justifiant les recommandations.

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.

160 Le Gouvernement a d'abord soutenu que le Comité ne devait pas réexaminer en profondeur les traitements des juges parce que le Comité Bisson l'avait fait récemment. Il a également souligné la nécessité de conserver une corrélation avec les salaires versés à certaines catégories de hauts fonctionnaires. Il s'est dit préoccupé par l'incidence des recommandations sur sa politique globale en matière de relations du travail dans le secteur public au Québec. Dans ses observations, il semble avoir insisté davantage sur ses craintes quant aux répercussions de l'examen de la rémunération des juges par un comité que sur l'objectif même du processus, à savoir l'examen sur le fond des questions relatives à la rémunération des juges de la province. Après le dépôt du rapport du Comité, le Gouvernement a maintenu son point de vue et ses priorités. Sa position est viciée par son refus d'examiner quant au fond les questions relatives à la rémunération des juges et par son désir de continuer d'y appliquer les paramètres généraux de sa politique en matière de relations du travail dans le secteur public. Le Gouvernement n'a pas cherché à déterminer quel serait le niveau de traitement approprié pour les juges; sa principale préoccupation demeurait de ne pas élever les attentes dans d'autres secteurs de la fonction publique et de préserver la structure traditionnelle des échelles salariales.

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.

161 Le Comité O'Donnell avait examiné attentivement les facteurs régissant la rémunération des juges. Il a estimé que son rôle ne consistait pas simplement à mettre à jour les recommandations du Comité Bisson et que la loi lui avait confié un mandat plus large.

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

162 Comme nous l'avons vu, chaque comité doit procéder à son évaluation dans son propre contexte. À cet égard, aucune disposition de la *Loi sur les tribunaux judiciaires* ne limitait le mandat du Comité O'Donnell lorsqu'il a décidé d'effectuer un vaste examen de la rémunération des juges provinciaux. Les recommandations du Comité Bisson semblent indiquer que celui-ci avait conclu que les contraintes rigoureuses qui découlaient à l'époque de la situation financière et économique du Québec l'empêchaient de recommander ce qui aurait constitué le niveau approprié de rémunération et

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 Québec, 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 Québec 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 Québec and the impact of that scope on its work. The only response

avantages, compte tenu de tous les facteurs pertinents. Comme ces contraintes économiques et financières ne pesaient plus avec autant d'acuité, le Comité O'Donnell a estimé qu'il devait procéder à sa propre évaluation exhaustive de la rémunération des juges du Québec. Il s'agissait d'un exercice fondé et légitime du mandat qui lui était confié en vertu de la loi et de la Constitution. Une fois que le Comité O'Donnell eut décidé de remplir intégralement son mandat, les principes constitutionnels régissant la Réponse obligeaient le Gouvernement à porter toute son attention sur les recommandations et leur justification.

Le Comité O'Donnell a ensuite recommandé un redressement salarial substantiel pour les juges en plus de ce qui avait été recommandé par le Comité Bisson. Il n'est pas exagéré de dire que le Comité O'Donnell a examiné dans son rapport tous les facteurs énumérés à l'art. 246.42 de la *Loi sur les tribunaux judiciaires*. Il a insisté sur certains d'entre eux, notamment la nature de la compétence de la Cour du Québec, la comparaison avec les juges de nomination fédérale et les juges de nomination provinciale dans d'autres provinces ainsi que la nécessité d'élargir le bassin de recrutement pour la charge judiciaire. Le Comité a souligné que le champ de compétence de la Cour du Québec en matière civile et pénale était, à son avis, beaucoup plus vaste que celui des autres cours provinciales au Canada. En fait, il se rapprochait davantage de celui des cours supérieures. Cependant, en raison des contraintes qu'imposaient alors les conditions économiques sur le Comité Bisson, l'écart avec le traitement des juges de la Cour supérieure demeurait considérable. De plus, on a constaté que les traitements des juges nommés par le gouvernement du Québec étaient inférieurs à la plupart de ceux des autres juges de nomination provinciale. C'est ainsi que le Comité O'Donnell a recommandé le redressement substantiel qu'a rejeté le Gouvernement.

La Réponse ne fournissait pas de motifs rationnels justifiant le rejet des recommandations salariales. Il est notamment difficile d'y trouver des arguments solides au sujet de l'étendue du champ de compétence de la Cour du Québec en matière civile et pénale et de ses répercussions sur sa charge de

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.

travail. La seule réponse donnée était que la situation n'avait pas beaucoup évolué depuis la publication du rapport Bisson. Il ne s'agit pas seulement de déterminer si des changements s'étaient produits; il faut aussi se demander si le Gouvernement avait répondu comme il se devait aux recommandations du Comité O'Donnell, satisfaisant ainsi aux normes constitutionnelles à cet égard. En fin de compte, le Gouvernement n'avait pas répondu de manière légitime aux importantes préoccupations qui étayaient les principales recommandations du Comité O'Donnell. Cette lacune se trouvait au cœur même du processus. Elle se répercutait sur la validité de l'essentiel de la Réponse, ce qui signifiait que celle-ci ne satisfaisait pas aux normes constitutionnelles, même s'il faut admettre qu'elle n'était pas totalement déficiente.

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.

165 À certains égards, nous n'allons pas aussi loin que la Cour d'appel dans ses critiques de la Réponse. Nous reconnaissons au Gouvernement le droit d'accorder un poids différent à certains facteurs, mais il doit motiver sa réponse aux recommandations. Mentionnons, par exemple, les critères et facteurs de comparaison utilisés pour l'établissement d'un bassin de recrutement et son évaluation. Citons également le rejet des recommandations se rapportant aux régimes de retraite. Le Gouvernement a expliqué ce sur quoi reposait sa position et il s'est attaqué de front aux recommandations du Comité. Cependant, une réponse satisfaisante à des questions plus accessoires ne saurait justifier une réponse déficiente quant à certaines questions cruciales. Ainsi, l'appréciation globale de la Réponse confirme qu'elle ne satisfait pas à la norme constitutionnelle de la rationalité. Nous devons passer maintenant à l'analyse de questions particulières, qui ne concernent que les juges municipaux du Québec.

(c) *The Parity Issue*

c) *La question de la parité*

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

Nous avons abordé plus haut la question de la parité salariale pour les juges des cours municipales de Laval, de Montréal et de Québec. Le Gouvernement a reconnu dans sa Réponse qu'il fallait éliminer ce principe. En raison de l'importance de cette question pour l'analyse et la

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.

détermination futures des traitements des juges, il convient de l'examiner même si la Réponse est annulée. Je regrette de ne pouvoir souscrire au point de vue de la Cour d'appel, car l'acceptation de la recommandation formulée à cet égard dans les rapports des formations du Comité O'Donnell ne contreviendrait pas aux normes constitutionnelles. Les juges des cours municipales de Laval, de Montréal et de Québec ont contesté la validité du rapport du Comité O'Donnell en demandant le contrôle judiciaire de la Réponse. À cet égard, celle-ci était rationnelle. Le Gouvernement n'avait pas à justifier sa décision de souscrire à des recommandations déjà bien expliquées. Le désaccord et la déception que soulèvent les recommandations formulées au sujet de certaines questions dans un rapport ne sauraient servir de motif pour contester la Réponse dans laquelle ces recommandations sont acceptées.

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 Québec. 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.

À notre avis, cette contestation indirecte du mandat du Comité et du mécanisme suivi est dénuée de fondement. La tâche confiée par la loi au Comité consistait à examiner tous les aspects de la rémunération des juges. Le Comité a beaucoup insisté sur la charge de travail de la Cour du Québec. Même si cette question n'avait pas été expressément mentionnée, il était logique qu'il décide si les mêmes considérations devaient s'appliquer aux juges des cours municipales. Cette question relevait du processus d'examen, même si cela pouvait entraîner l'abandon d'une tradition sacrée. La reconnaissance de ce principe dans la loi n'empêchait pas cet examen. Après tout, la mise en œuvre des recommandations des comités de rémunération des juges a souvent nécessité la modification de plusieurs lois et règlements.

168 The respondents' other arguments regarding a breach of natural justice fail 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

Les autres arguments soulevés par les intimés au sujet de la violation des principes de justice naturelle sont également rejetés. Tout d'abord, nous avons fait remarquer plus haut que les comités ne constituent pas des cours de justice ni des organismes décisionnels. Leur procédure est souple et ils disposent d'une latitude considérable dans la conduite de leurs enquêtes et de leurs délibérations. De toute façon, le Comité a donné avis de son intention d'examiner cette question, il a invité

process and no breach of any relevant principle of natural justice.

les parties intéressées à lui faire part de leurs observations et il a entendu celles qui ont voulu comparaître devant lui. Nous ne constatons aucun manquement dans la procédure suivie par le Comité ni aucune violation des principes pertinents de justice naturelle.

(d) *Procedural Issues in the Appeal of the Conférence des juges municipaux du Québec*

d) *Les problèmes d'ordre procédural dans le pourvoi interjeté par la Conférence des juges municipaux du Québec*

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.

169 Les juges municipaux représentés par la Conférence des juges municipaux du Québec étaient aussi mécontents que leurs collègues des cours municipales de Laval, de Montréal et de Québec de la Réponse aux rapports des formations du Comité O'Donnell. Ils ont néanmoins décidé de ne pas demander un contrôle judiciaire. Lorsque les demandes de leurs confrères sont arrivées en Cour d'appel, ils ont tenté d'entrer dans la mêlée. Ils se sont heurtés à un obstacle d'ordre procédural lorsque l'autorisation d'intervenir dans ce litige leur a été refusée.

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 Québec. 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

170 Cette dernière décision crée une situation impossible à cause du résultat des demandes de contrôle judiciaire présentées par les autres parties. Les recommandations visant les trois groupes de juges sont étroitement liées. Les recommandations se rapportant aux niveaux de rémunération des juges municipaux à temps plein reposent sur une comparaison avec le traitement des juges de la Cour du Québec. La situation des membres de la Conférence est ensuite comparée avec celle des juges municipaux à temps plein. De plus, la Réponse est globale. Les parties qui concernent la rémunération de cette catégorie de juges municipaux sont déficientes en raison des lacunes que nous avons examinées plus haut. Les sections pertinentes ne forment qu'une partie de la Réponse que nous avons jugée inconstitutionnelle. Elles ne se suffisent pas en elles-mêmes. Elles n'ont pas plus de poids que le reste de la Réponse. La contestation constitutionnelle engagée par les deux autres groupes de juges profite donc à cet égard aux membres de la Conférence. Pour ce motif, leur pourvoi devrait être accueilli et leur intervention autorisée, à seule fin de déclarer que la

respect of the compensation of judges of municipal courts to which the *Act respecting municipal courts* applies.

IV. Remedies and Disposition

171 For these reasons, we would dismiss the Attorney General's appeals with costs. However, those portions of the orders below which are not in accordance with these reasons must be set aside and the matter must be remitted to the Government and the National Assembly for reconsideration in accordance with these reasons. We would allow the appeal of the Conférence des juges municipaux du Québec in part and grant its application for leave to intervene, with costs, for the sole purpose of declaring that the invalidity of the Response extends to those parts of it which affect judges of the municipal courts to which the *Act respecting municipal courts* applies.

APPENDIX

[N.B.] 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;

Réponse est également annulée en ce qui concerne la rémunération des juges des cours municipales auxquelles s'applique la *Loi sur les cours municipales.*

IV. Réparations et dispositif

Pour ces motifs, nous sommes d'avis de rejeter avec dépens les appels interjetés par le procureur général. Toutefois, les dispositions des ordonnances rendues par les juridictions inférieures qui sont incompatibles avec les présents motifs doivent être infirmées et l'affaire doit être renvoyée au Gouvernement et à l'Assemblée nationale pour réexamen conformément à ces motifs. Nous sommes d'avis d'accueillir en partie le pourvoi de la Conférence des juges municipaux du Québec et de faire droit à sa demande d'autorisation d'intervenir, avec dépens, à seule fin de déclarer que l'invalidité de la Réponse vise également les parties de la Réponse qui touchent les juges des cours municipales auxquelles s'applique la *Loi sur les cours municipales.*

ANNEXE

Réponse du gouvernement [du Nouveau-Brunswick] aux recommandations de la CRJ de 2001

Le gouvernement a examiné attentivement le rapport de la Commission sur la rémunération des juges de 2001 et regrette d'être dans l'impossibilité d'accepter intégralement les recommandations.

1) Attendu que la CRJ précédente a établi qu'un niveau de rémunération de 141 206 $ était suffisant, conformément à la décision de la Cour suprême du Canada sur la question, et que rien n'a changé depuis la recommandation en question pour justifier d'importantes augmentations additionnelles;

2) attendu que le traitement des juges de la Cour provinciale a augmenté de 49,24 %, passant de 94 614 $ à 141 206 $ pendant la décennie de 1990 à 2000;

3) attendu que le traitement des juges rémunérés par la province et les salaires des sous-ministres principaux étaient identiques jusqu'en 1993;

4) attendu que les salaires de la plupart des sous-ministres principaux du Nouveau-Brunswick ont augmenté de 18,93 %, passant de 94 614 $ à 112 528 $ pendant la décennie de 1990 à 2000;

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;

5) attendu que la conjoncture économique au Nouveau-Brunswick depuis le dépôt des recommandations de la CRJ précédente ne permet pas d'envisager l'augmentation de traitement proposée par la CRJ de 2001, qui accorderait aux juges de la Cour provinciale une augmentation de 12,67 % pour 1 année, soit une augmentation globale de 68,16 % pour les 11 années depuis 1990;

6) attendu que la CRJ de 2001 semble ne pas avoir abordé l'objectif principal d'établir de façon indépendante la rémunération des juges afin d'assurer l'indépendance de la magistrature et « afin d'empêcher que les traitements des juges ne tombent sous le minimum suffisant garanti par le principe de l'indépendance de la magistrature »;

7) attendu que la CRJ de 2001 ne semble pas avoir reconnu l'importance d'établir les traitements de la magistrature selon la situation du Nouveau-Brunswick, étant donné surtout que les augmentations proposées par la CRJ de 2001 dépassent de loin les changements des indicateurs économiques au Nouveau-Brunswick depuis l'établissement du traitement actuel;

8) attendu que la CRJ de 2001 semble avoir fondé son évaluation principalement sur la perspective des traitements des juges des Cours supérieures nommés et rémunérés par le gouvernement fédéral qui, à compter de 2001, passeront à plus de 200 000 $ au cours des trois prochaines années;

9) attendu que la CRJ de 2001 semble avoir accepté la proposition voulant que le traitement des juges de la Cour provinciale au Nouveau-Brunswick ait un niveau de parité avec celui des juges de la Cour du Banc de la Reine du Nouveau-Brunswick, ce qui est en contradiction avec les positions que les commissions sur la rémunération des juges ont prises dans les autres provinces;

10) attendu que la question de ce que verse le gouvernement fédéral aux juges qu'il nomme partout au Canada ne devrait pas être un facteur si déterminant dans l'établissement du traitement des juges rémunérés par les provinces;

11) attendu que la CRJ de 2001 ne semble pas avoir reconnu que le traitement actuel de 141 206 $, allié à un régime généreux de retraite, a été recommandé par la CRJ précédente et, en outre, que la CRJ de 2001 n'a [pas] démontré que la sécurité financière des juges de la Cour provinciale ait été grandement réduite depuis l'augmentation;

12) attendu que la CRJ de 2001 n'a pas montré qu'une augmentation additionnelle de près de 13 % pour 2001 soit nécessaire pour maintenir ou atteindre une telle sécurité;

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

13) attendu que la CRJ de 2001 semble avoir recommandé des augmentations portant le traitement à 161 709 $ et à 169 805 $ pour les années 2002 et 2003 respectivement ainsi qu'une augmentation additionnelle en fonction du coût de la vie, non pour assurer la sécurité financière des juges de la Cour provinciale, mais plutôt pour maintenir un niveau de parité avec les juges de la Cour du Banc de la Reine;

14) attendu que, même s'il pouvait être montré qu'une augmentation de près de 13 % pour 2001 était nécessaire pour atteindre la sécurité financière, la CRJ de 2001 n'a pas montré que les augmentations additionnelles qu'elle a recommandées pour chacune des deux prochaines années sont justifiées pour maintenir la sécurité financière des juges de la Cour provinciale;

15) attendu que la recommandation de la CRJ de 2001 en vue de modifier les dispositions de la *Loi sur la Cour provinciale* portant sur la pension de retraite va a l'encontre de la recommandation de la CRJ de 1998 visent à donner aux juges ayant de longs états de service le choix entre l'ancien régime de pension et le nouveau régime, recommandation que l'Association des juges de la Cour provinciale a acceptée comme étant raisonnable, surtout étant donné l'absence de tout changement qui justifierait une bonification additionnelle du régime;

16) attendu que la CRJ de 2001 semble n'avoir guère accordé d'importance à la sécurité considérable qu'assure aux juges de la Cour provinciale leur régime de pension;

17) attendu que la CRJ de 2001 n'a pas abordé la question de savoir si la rémunération actuelle suffit pour écarter toute possibilité raisonnable ou concevable que les juges de la Cour provinciale soient tentés d'obtenir un avantage financier en rendant des décisions touchant le gouvernement et qu'ils perdent ainsi la confiance du public à l'égard de leur indépendance;

18) attendu que, depuis le 31 janvier 2001, le régime actuel de rémunération a suffi pour attirer 50 candidates et candidats très qualifiés, qui sont membres du Barreau depuis 20,45 années en moyenne et admissibles à une nomination à la Cour provinciale du Nouveau-Brunswick;

19) attendu que le traitement que recommande la CRJ de 2001 pour l'année en cours placerait les juges de la Cour provinciale du Nouveau-Brunswick au 3e rang parmi les mieux rémunérés du pays, après ceux de l'Ontario et de l'Alberta, alors que la rémunération moyenne des salariés du Nouveau-Brunswick les place au 8e rang sur 10;

20) attendu que les juges de la Cour provinciale ont maintenant accumulé près de 2 000 jours de vacances non

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.

New Brunswick appeal dismissed with disbursement costs. Ontario appeal dismissed with costs.

utilisés, ce qui représente pour la province un passif à court terme de 1 080 859 $ et un report moyen de plus de 79 jours par juge;

21) attendu que la compagnie d'assurance-vie du secteur privé ne fournira pas le niveau de couverture recommandé par la CRJ de 2001 et ne fournira une couverture améliorée que moyennant une augmentation de prime pour tous les membres des services publics provinciaux qui participent au régime d'assurance-vie collective;

22) attendu que les juges de la Cour provinciale du Nouveau-Brunswick sont actuellement parmi les 5 % les mieux rémunérés du Nouveau-Brunswick, selon leur traitement actuel;

23) attendu que le gouvernement a accepté que la CRJ de 1998 établisse un traitement suffisant pour maintenir le statut, la dignité et les responsabilités de la charge d'un juge de la Cour provinciale et qu'un rajustement fondé sur le taux de l'inflation suffirait pour maintenir ce statut;

24) attendu que la recommandation de la CRJ de 2001 portant que le traitement d'un juge de la Cour provinciale soit augmenté de 12 812 $, plus le taux de l'inflation, dépasse largement le montant requis pour maintenir le statut, la dignité et les responsabilités de la charge;

25) attendu que, traditionnellement, le traitement des juges de la Cour provinciale du Nouveau-Brunswick n'a jamais été lié aux salaires des juges nommés et rémunérés par le gouvernement fédéral;

26) attendu que les augmentations salariales des membres non syndiqués des services publics, contrairement à celles des juges de la Cour provinciale, sont limitées à 0,0 % ou à 1,5 % par année depuis plus d'une décennie, sans rajustement en fonction du coût de la vie;

27) attendu que la CRJ n'a pas établi les coûts de ses recommandations et qu'elle ne pouvait donc pas savoir quelle incidence ces coûts auraient sur les finances du gouvernement provincial;

28) attendu que les coûts connus des recommandations de la CRJ de 2001 pour la période de trois années s'élèveront à plus de 3 millions de dollars et qu'ils auront une importante incidence négative sur le budget de la province;

29) attendu que le gouvernement du Nouveau-Brunswick est responsable envers les contribuables de la province de la gestion financière judicieuse des affaires de la province et qu'il doit leur en rendre compte.

Pourvoi du Nouveau-Brunswick rejeté avec paiement des débours. Pourvoi de l'Ontario rejeté

Alberta appeal allowed with costs throughout. Appeals of the Attorney General of Quebec and the Minister of Justice of Quebec dismissed with costs. Appeal of the Conférence des juges municipaux du Québec allowed in part with costs.

Solicitors for the appellants the Provincial Court Judges' Association of New Brunswick, the Honourable Judge Michael McKee and the Honourable Judge Steven Hutchinson: Myers Weinberg, Winnipeg.

Solicitor for the respondent Her Majesty the Queen in Right of the Province of New Brunswick, as represented by the Minister of Justice: Attorney General of New Brunswick, Fredericton.

Solicitors for the appellants the Ontario Judges' Association, the Ontario Family Law Judges' Association and the Ontario Provincial Court (Civil Division) Judges' Association, and for the intervener the Ontario Conference of Judges: Sack Goldblatt Mitchell, Toronto.

Solicitor for the respondent Her Majesty the Queen in Right of the Province of Ontario, as represented by the Chair of Management Board: Attorney General of Ontario, Toronto.

Solicitors for the appellants Her Majesty the Queen in Right of Alberta and the Lieutenant Governor in Council: Emery Jamieson, Edmonton.

Solicitors for the respondents Chereda Bodner et al.: Code Hunter, Calgary.

Solicitors for the appellant/respondent/intervener the Attorney General of Quebec and the appellant the Minister of Justice of Quebec: Robinson Sheppard Shapiro, Montreal.

Solicitors for the respondent/intervener Conférence des juges du Québec, the respondents Maurice Abud et al., and the intervener the

avec dépens. Pourvoi de l'Alberta accueilli avec dépens dans toutes les cours. Pourvois du procureur général du Québec et du ministre de la Justice du Québec rejetés avec dépens. Pourvoi de la Conférence des juges municipaux du Québec accueilli en partie avec dépens.

Procureurs des appelants l'Association des juges de la Cour provinciale du Nouveau-Brunswick, l'honorable juge Michael McKee et l'honorable juge Steven Hutchinson : Myers Weinberg, Winnipeg.

Procureur de l'intimée Sa Majesté la Reine du chef de la province du Nouveau-Brunswick, représentée par le ministre de la Justice : Procureur général du Nouveau-Brunswick, Fredericton.

Procureurs des appelantes l'Association des juges de l'Ontario, l'Association ontarienne des juges du droit de la famille et Ontario Provincial Court (Civil Division) Judges' Association, et de l'intervenante la Conférence des juges de l'Ontario : Sack Goldblatt Mitchell, Toronto.

Procureur de l'intimée Sa Majesté la Reine du chef de la province de l'Ontario, représentée par le président du Conseil de gestion : Procureur général de l'Ontario, Toronto.

Procureurs des appelants Sa Majesté la Reine du chef de l'Alberta et le Lieutenant-gouverneur en conseil : Emery Jamieson, Edmonton.

Procureurs des intimés Chereda Bodner et autres : Code Hunter, Calgary.

Procureurs de l'appelant/intimé/intervenant le procureur général du Québec et l'appelant le ministre de la Justice du Québec : Robinson Sheppard Shapiro, Montréal.

Procureurs de l'intimée/intervenante la Conférence des juges du Québec, des intimés Maurice Abud et autres, et de l'intervenante

Canadian Association of Provincial Court Judges: Langlois Kronström Desjardins, Montreal.

Solicitors for the respondents Morton S. Minc et al.: McCarthy Tétrault, Montreal.

Solicitors for the appellant Conférence des juges municipaux du Québec: Cain Lamarre Casgrain Wells, Sept-Îles.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of New Brunswick: Attorney General of New Brunswick, Fredericton.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Solicitor for the intervener the Attorney General for Saskatchewan: Attorney General for Saskatchewan, Regina.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Solicitors for the intervener the Canadian Bar Association: Gerrand Rath Johnson, Regina.

Solicitors for the intervener the Federation of Law Societies of Canada: Joli-Coeur Lacasse Geoffrion Jetté St-Pierre, Québec.

Solicitors for the intervener the Canadian Superior Court Judges Association: Ogilvy Renault, Montreal.

l'Association canadienne des juges de cours provinciales : Langlois Kronström Desjardins, Montréal.

Procureurs des intimés Morton S. Minc et autres : McCarthy Tétrault, Montréal.

Procureurs de l'appelante la Conférence des juges municipaux du Québec : Cain Lamarre Casgrain Wells, Sept-Îles.

Procureur de l'intervenant le procureur général du Canada : Procureur général du Canada, Ottawa.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Procureur de l'intervenant le procureur général du Nouveau-Brunswick : Procureur général du Nouveau-Brunswick, Fredericton.

Procureur de l'intervenant le procureur général de la Colombie-Britannique : Procureur général de la Colombie-Britannique, Victoria.

Procureur de l'intervenant le procureur général de la Saskatchewan : Procureur général de la Saskatchewan, Regina.

Procureur de l'intervenant le procureur général de l'Alberta : Procureur général de l'Alberta, Edmonton.

Procureurs de l'intervenante l'Association du Barreau canadien : Gerrand Rath Johnson, Regina.

Procureurs de l'intervenante la Fédération des ordres professionnels de juristes du Canada : Joli-Coeur Lacasse Geoffrion Jetté St-Pierre, Québec.

Procureurs de l'intervenante l'Association canadienne des juges des cours supérieures : Ogilvy Renault, Montréal.

Solicitors for the intervener the Association of Justices of the Peace of Ontario: Blake Cassels & Graydon, Toronto.

Solicitors for the intervener the Judicial Justices Association of British Columbia: Berardino & Harris, Vancouver.

Procureurs de l'intervenante l'Association des juges de paix de l'Ontario : Blake Cassels & Graydon, Toronto.

Procureurs de l'intervenante Judicial Justices Association of British Columbia : Berardino & Harris, Vancouver.

SUPREME COURT OF CANADA

CITATION: British Columbia (Attorney General) *v.* Provincial Court Judges' Association of British Columbia, 2020 SCC 20

APPEAL HEARD: December 9, 2019
JUDGMENT RENDERED: July 31, 2020
DOCKET: 38381

BETWEEN:

Attorney General of British Columbia
Appellant

and

Provincial Court Judges' Association of British Columbia
Respondent

- and -

Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of Saskatchewan, Attorney General of Alberta, Canadian Superior Courts Judges Association, Canadian Bar Association, Canadian Association of Provincial Court Judges, Canadian Taxpayers Federation and Canadian Civil Liberties Association
Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

REASONS FOR JUDGMENT: (paras. 1 to 121) Karakatsanis J. (Wagner C.J. and Abella, Moldaver, Côté, Brown, Rowe, Martin and Kasirer JJ. concurring)

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

Attorney General of British Columbia *Appellant*

v.

Provincial Court Judges' Association of British Columbia *Respondent*

and

Attorney General of Canada,
Attorney General of Ontario,
Attorney General of Quebec,
Attorney General of Saskatchewan,
Attorney General of Alberta,
Canadian Superior Courts Judges Association,
Canadian Bar Association,
Canadian Association of Provincial Court Judges,
Canadian Taxpayers Federation and
Canadian Civil Liberties Association *Interveners*

Indexed as: British Columbia (Attorney General) *v.* Provincial Court Judges' Association of British Columbia

2020 SCC 20

File No.: 38381.

2019: December 9; 2020: July 31.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Judicial independence — Judicial remuneration — Judicial compensation commission making recommendations to provincial Attorney General about remuneration, allowances and benefits of provincial judges — Attorney General making submission to Cabinet concerning commission's recommendations and government's response — Legislative Assembly passing resolution rejecting commission's recommended increase in salary — Judges petitioning for judicial review of Legislative Assembly's resolution — Whether Cabinet submission should form part of record on judicial review.

In October 2016, the British Columbia judicial compensation commission recommended an 8.2 percent increase in the salary of provincial judges in 2017-18. The Attorney General made a submission to Cabinet concerning the commission's recommendations, and then tabled the government's proposed response to the commission's report and proposed a resolution rejecting the commission's recommended salary increase and adopting a 3.8 percent increase instead. The Legislative Assembly passed the resolution. The Provincial Court Judges' Association petitioned for judicial review of the resolution and sought an order to require the Attorney General to produce the Cabinet submission relied on in preparing the government's response. The master hearing the motion ordered the Attorney

General to produce the Cabinet submission. Appeals by the Attorney General from the master's decision to the Supreme Court of British Columbia and then to the Court of Appeal were dismissed.

Held: The appeal should be allowed and the master's order for production of the Cabinet submission quashed.

A government must give specific reasons justifying any departure from the recommendations of a judicial compensation commission. The government's response to the commission's recommendations is subject to a limited form of judicial review as described in *Bodner v. Alberta*, 2005 SCC 44, [2005] 2 S.C.R. 286. *Bodner* review is the mechanism for ensuring that the government respects the commission process and for safeguarding the public confidence in the administration of justice that process serves to protect. The standard of justification to uphold the government's response is that of rationality. *Bodner* sets out a three-part test for determining whether a government's decision to depart from a commission's recommendation meets this standard: (1) whether the government has articulated a legitimate reason for departing from the commission's recommendations; (2) whether the government's reasons rely upon a reasonable factual foundation; and (3) whether the commission process has been respected and its purposes — preserving judicial independence and depoliticizing the setting of judicial remuneration — have been achieved.

The limited nature of *Bodner* review, the role of the reviewing court and the purpose of the process have implications for the evidence considered by the reviewing court. The rules of evidence and production must be applied in a manner that reflects the unique features of *Bodner* review, and respects both judicial independence and the confidentiality of Cabinet decision making. The record on *Bodner* review necessarily includes any submissions made to the commission by the government, judges and others; the commission's report, including its recommendations; and the government's response to the recommendations. Certain forms of additional evidence are admissible if they are relevant to determining whether any part of the *Bodner* test has been met, including evidence aimed at calling into question the reasonableness of the factual foundation relied on by the government, the government's lack of meaningful engagement with or respect for the commission process or whether the government's response was grounded in an improper or colourable purpose. To those ends, the party seeking review can ask that the government produce evidence in its possession. Since a *Bodner* review often concerns decisions in which Cabinet plays a part, a party seeking review may request the production of a confidential Cabinet document.

Generally, what is in issue in a *Bodner* review is whether a government failed to meet its constitutional obligations flowing from the principle of judicial independence in its response to a commission's recommendations. The relevance of any proposed additional evidence must therefore be tested in relation to the issues that the court must determine on such a review. To be relevant, the proposed evidence

must contain something that tends to address a fact concerning one of the steps of the test established in *Bodner*.

However, something more than relevance is needed to strike the appropriate balance between respecting Cabinet confidentiality and maintaining the overall integrity of *Bodner* review. Although any inspection of a confidential Cabinet document undermines Cabinet confidentiality to some extent, judicial inspection of a document that concerns Cabinet deliberations about the judiciary would undermine it more significantly. Accordingly, special considerations arise when the party seeking *Bodner* review asks the government to produce a document related to Cabinet decision making. The party seeking review must point to something in the record, including otherwise admissible evidence, that supports its view that the document may tend to show that the government response failed to meet one or more parts of the *Bodner* test. It is not enough to simply say that the document was before the decision-maker or that it would provide additional background or context for the reviewing court.

If the party seeking review makes the requisite showing — that there is some basis to believe that the document may contain evidence which tends to show that the government failed to meet one of the requirements described in *Bodner* — the government must produce it for the court's examination. The reviewing court must then examine the document in private to determine whether it, in fact, provides some evidence which tends to show that the government failed to meet one of the parts of

the *Bodner* test. The document must be of assistance in challenging the legitimacy of the government's reasons, the reasonableness of the factual foundation it relied on, the respect it has shown the commission process or whether the objectives of the process have been achieved.

Even if the document meets this test, its production remains subject to any other rule of evidence that bars its disclosure, such as public interest immunity. This doctrine prevents the disclosure of a document where the court is satisfied that the public interest in keeping the document confidential outweighs the public interest in its disclosure. Public interest immunity requires a careful balancing of these competing public interests, which must be weighed with reference to a specific document in the context of a particular proceeding. The government has the burden of establishing that a document should not be disclosed because of public interest immunity. In the case of confidential Cabinet documents, since there will be a strong public interest in keeping a document concerning Cabinet deliberations confidential, it must be outweighed by a still stronger public interest to warrant disclosure. The main factors relevant to balancing the public interests in confidentiality and disclosure are identified in *Carey v. Ontario*, [1986] 2 S.C.R. 637: the level of the decision-making process; the nature of the policy concerned; the contents of the documents; the timing of disclosure; the interests of the administration of justice; and whether the party seeking the production of the documents alleges unconscionable behaviour on the part of the government.

In the *Bodner* review context, various factors will often weigh in favour of keeping a document confidential. The Cabinet decision-making process is among the highest levels of decision making within the executive. Judicial remuneration is an important and sensitive area of public policy. The contents of a document concerning Cabinet deliberations may well reflect the views of individual ministers of the Crown and reveal disagreement among ministers; as a result, its contents will frequently be highly sensitive. Depending on the contents of the document, the timing may also weigh in favour of keeping the document confidential.

The interests of the administration of justice encompass a broad set of considerations, including the importance of the case and the need or desirability of producing the document. In the *Bodner* review context, these considerations cut both ways. Although such reviews are of great importance, the fact that a party seeks production of a relevant confidential Cabinet document in this context is not itself a general basis for disclosure. When considering the interests of the administration of justice, the focus must remain on the degree to which the document bears on what is at issue in the litigation. If the document tends to establish that the government set out to provide misleading public reasons for its response to the commission's recommendations, relied on a fundamentally flawed factual foundation, acted with an improper or colourable purpose, or was indifferent or disrespectful towards the commission process, this bears so directly — and so determinately — on the outcome of the *Bodner* review that to exclude the document would be contrary to the interests of the administration of justice. By contrast, if a Cabinet document's impact on the

Bodner review would be limited, and if its exclusion from the record could hardly keep the reviewing court from adjudicating the issues on their merits, the probative value of such evidence might not weigh heavily enough to warrant disclosure.

In the instant case, the Association did not meet the threshold necessary to compel production of the Cabinet document for judicial inspection. The Association failed to provide any evidence or point to any circumstances that suggest that the Cabinet submission may indicate that the government did not meet the standard required by *Bodner*. There is nothing on the face of the record that indicates the Cabinet submission may contain some evidence which tends to show that the government failed to meet a constitutional requirement. Furthermore, it is not sufficient to point to prior litigation in which the government relied on an inappropriate consideration — as revealed in a past Cabinet submission produced as part of the record — in order to make the Cabinet submission in the present case relevant. Something more would be required for there to be reason to believe that the submission may contain evidence that would tend to show that the government failed to meet a requirement described in *Bodner*.

Since the Association has failed to make the requisite threshold showing, the Attorney General need not produce the document for examination by the Court. It is unnecessary to determine whether any other rule of evidence, such as public interest immunity, would apply so as to permit the Attorney General to refuse to produce the Cabinet submission.

Cases Cited

By Karakatsanis J.

Explained: *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice)*; *Ontario Judges' Assn. v. Ontario (Management Board); Bodner v. Alberta; Conférence des juges du Québec v. Quebec (Attorney General); Minc v. Quebec (Attorney General)*, 2005 SCC 44, [2005] 2 S.C.R. 286; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *Carey v. Ontario*, [1986] 2 S.C.R. 637; **referred to:** *Nova Scotia (Attorney General) v. Judges of the Provincial Court and Family Court of Nova Scotia*, 2020 SCC 21; *Stonechild, Re*, 2007 SKCA 74, 304 Sask R. 1; *Beauregard v. Canada*, [1986] 2 S.C.R. 56; *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21, [2014] 1 S.C.R. 433; *Conférence des juges de paix magistrats du Québec v. Quebec (Attorney General)*, 2016 SCC 39, [2016] 2 S.C.R. 116; *Ell v. Alberta*, 2003 SCC 35, [2003] 1 S.C.R. 857; *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525; *Wells v. Newfoundland*, [1999] 3 S.C.R. 199; *Delios v. Canada (Attorney General)*, 2015 FCA 117, 100 Admin L.R. (5th) 301; *Sobeys West Inc. v. College of Pharmacists of British Columbia*, 2016 BCCA 41, 80 B.C.L.R. (5th) 243; *R. v. White*, 2011 SCC 13, [2011] 1 S.C.R. 433; *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, [2011] 3 S.C.R. 535; *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2012 BCSC 1022; *Canada (Auditor General) v. Canada (Minister of*

Energy, Mines and Resources), [1989] 2 S.C.R. 49; *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3; *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796; *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667; *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, [2018] 2 S.C.R. 687; *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1998] 1 S.C.R. 3; *Quebec (Commission des droits de la personne) v. Attorney General of Canada*, [1982] 1 S.C.R. 215; *R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402; *R. v. Ahmad*, 2011 SCC 6, [2011] 1 S.C.R. 110; *Smallwood v. Sparling*, [1982] 2 S.C.R. 686; *Bisaillon v. Keable*, [1983] 2 S.C.R. 60; *Ainsworth Lumber Co. v. Canada (Attorney General)*, 2003 BCCA 239, 14 B.C.L.R. (4th) 302; *Telezone Inc. v. Canada (Attorney General)* (2004), 69 O.R. (3d) 161; *Michaud v. Quebec (Attorney General)*, [1996] 3 S.C.R. 3; *R. v. Barros*, 2011 SCC 51, [2011] 3 S.C.R. 368; *Somerville v. Scottish Ministers*, [2007] UKHL 44, [2007] 1 W.L.R. 2734; *Al Rawi v. Security Service*, [2011] UKSC 34, [2012] 1 A.C. 531; *Conway v. Rimmer*, [1968] A.C. 910; *Nova Scotia Provincial Judges' Association v. Nova Scotia (Attorney General)*, 2018 NSSC 13, 409 C.R.R. (2d) 117; *Nova Scotia (Attorney General) v. Judges of the Provincial Court and Family Court of Nova*

Scotia, 2018 NSCA 83, 429 D.L.R. (4th) 359; *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66, [2004] 3 S.C.R. 381; *Commonwealth v. Northern Land Council*, [1993] HCA 24, 176 C.L.R. 604; *Air Canada v. Secretary of State for Trade*, [1983] 2 A.C. 394.

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APPEAL from a judgment of the British Columbia Court of Appeal (Bauman C.J.B.C. and Harris and Dickson JJ.A.), 2018 BCCA 394, 19 B.C.L.R. (6th) 188, 430 D.L.R. (4th) 660, 48 Admin L.R. (6th) 279, [2018] B.C.J. No. 3445 (QL), 2018 CarswellBC 2776 (WL Can.), affirming a decision of Hinkson C.J.S.C., 2018 BCSC 1390, 19 B.C.L.R. (6th) 168, [2018] B.C.J. No. 2995 (QL), 2018 CarswellBC 2158 (WL Can.), affirming an order of Master Muir, 2018 BCSC 1193, [2018] B.C.J. No. 1410 (QL), 2018 CarswellBC 1891 (WL Can.). Appeal allowed.

Stein K. Gudmundseth, Q.C., Andrew D. Gay, Q.C., and *Clayton J. Gallant*, for the appellant.

Joseph J. Arvay, Q.C., and *Alison M. Latimer*, for the respondent.

Michael H. Morris and *Marilyn Venney*, for the intervener the Attorney General of Canada.

Sarah Kraicer and *Andrea Bolieiro*, for the intervener the Attorney General of Ontario.

Brigitte Bussières and *Robert Desroches*, for the intervener the Attorney General of Quebec.

Thomson Irvine, Q.C., for the intervener the Attorney General of Saskatchewan.

Doreen C. Mueller, for the intervener the Attorney General of Alberta.

Pierre Bienvenu, *Azim Hussain* and *Jean-Simon Schoenholz*, for the intervener the Canadian Superior Courts Judges Association.

Guy J. Pratte, *Ewa Krajewska* and *Neil Abraham*, for the intervener the Canadian Bar Association.

Steven M. Barrett and *Colleen Bauman*, for the intervener the Canadian Association of Provincial Court Judges.

Adam Goldenberg and *Stephanie Willsey*, for the intervener the Canadian Taxpayers Federation.

Andrew K. Lokan and *Lauren Pearce*, for the intervener the Canadian Civil Liberties Association.

The judgment of the Court was delivered by

KARAKATSANIS J. —

[1] This appeal arises in litigation that implicates the relationship between two branches of the state. It requires this Court to balance several constitutional imperatives relating to the administration of justice and the separation of powers between the executive, legislative and judicial branches of the state: the financial dimension of judicial independence; the shared responsibility of the executive and legislature to make decisions about public money; and the public interest in ensuring the executive can conduct its internal business in confidence.

[2] This appeal, along with its companion appeal, *Nova Scotia (Attorney General) v. Judges of the Provincial Court and Family Court of Nova Scotia*, 2020 SCC 21, asks whether a Cabinet submission concerning a government's response to a judicial compensation commission's recommendations is properly part of the record on a judicial review of the government's response. If so, the further issue arises whether the Attorney General of British Columbia should nevertheless be permitted to refuse to produce the submission on grounds of public interest immunity.

[3] The British Columbia courts found that the confidential Cabinet document requested by the Provincial Court Judges' Association of British Columbia was relevant and not protected by public interest immunity, and ordered that the Attorney General produce it.

[4] In my view, they were wrong to do so.

[5] In its judicial independence case law, this Court has consistently sought to strike a balance between several competing constitutional considerations by establishing a unique process for setting judicial remuneration, backed up by a focused, yet robust form of judicial review described in *Bodner v. Alberta*, 2005 SCC 44, [2005] 2 S.C.R. 286.[1] In resolving this appeal, the rules of evidence and production must be applied in a manner that reflects the unique features of the limited review described in *Bodner*, and respects both judicial independence and the confidentiality of Cabinet decision making.

[6] For the reasons that follow, where a party seeking *Bodner* review requests that the government produce a document relating to Cabinet deliberations, it must first establish that there is some basis to believe that the document may contain evidence which tends to show that the government failed to meet one of the requirements described in *Bodner*. Only then would the government be required to

[1] *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice); Ontario Judges' Assn. v. Ontario (Management Board); Bodner v. Alberta; Conférence des juges du Québec v. Quebec (Attorney General); Minc v. Quebec (Attorney General)*, 2005 SCC 44, [2005] 2 S.C.R. 286 (*Bodner*).

produce the document for judicial inspection. If the document does in fact provide some evidence which tends to show that the government's response does not comply with the constitutional requirements, the court can then determine whether its production is barred by public interest immunity or another rule of evidence invoked by the government.

[7] Public interest immunity requires a careful balancing between the competing public interests in confidentiality and disclosure. Since there will be a strong public interest in keeping a document concerning Cabinet deliberations confidential, it must be outweighed by a still stronger public interest to warrant the document's disclosure. In the *Bodner* context, the strength of the public interest in disclosure will often depend on the importance of the document to determining the issues before the court in the *Bodner* review.

[8] Here, the Provincial Court Judges' Association did not meet the threshold necessary to compel production of a confidential Cabinet document for judicial inspection. While this is not a high bar, it is not met simply by showing that the government considered the Cabinet document before making its response. I would allow the appeal and quash the order for production of the Cabinet submission.

I. Background

A. *Judicial Compensation Act, S.B.C. 2003, c. 59*

[9] In the *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 (*Provincial Judges Reference*), this Court set out the constitutional baseline for making changes to judicial remuneration. The *Judicial Compensation Act* implements that baseline in British Columbia.

[10] The *Judicial Compensation Act* provides for the appointment of a triennial judicial compensation commission to make recommendations about the remuneration, allowances and benefits of provincial judges and judicial justices: ss. 2 and 5(1). The commission must consider a prescribed set of factors and may consider other factors, provided it justifies their relevance: s. 5(5), (5.1) and (5.2). The commission communicates its recommendations in a final report to the Attorney General: s. 5(3).[2]

[11] Upon receipt of the commission's report, the Attorney General must then lay the report before the Legislative Assembly of British Columbia within a statutory timeline: s. 6(1). The Attorney General must also advise the Assembly that if it does not reject the commission's recommendations within a statutory timeline, the recommendations will go into effect: s. 6(1) and (3). The Assembly can then pass a resolution rejecting one or more recommendations and set judicial remuneration, allowances and benefits: s. 6(2). The resolution has binding legal effect: ss. 6(4) and 8(1).

[2] The Attorney General is the minister responsible for the *Judicial Compensation Act* designated by O.C. 213/2017, Appendix B; see also *Attorney General Act*, R.S.B.C. 1996, c. 22, s. 2(j); *Constitution Act*, R.S.B.C. 1996, c. 66, s. 10(3).

B. *Judicial Compensation Commission's Recommendations and Government's Response*

[12] In October 2016, the Judicial Compensation Commission submitted its final report to the Attorney General and made recommendations for the 2017-20 period. The commission recommended an 8.2 percent increase in the salary of provincial judges in 2017-18 and a 1.5 percent increase in both 2018-19 and 2019-20.[3] The commission also recommended that the Provincial Court Judges' Association be reimbursed for the entirety of its costs of participating in the commission process.

[13] At some point after the commission submitted its report, the Attorney General made a submission to Cabinet concerning the commission's recommendations and the government's response. The Cabinet submission is not in the record before this Court and was not put before the courts below. Moreover, there is no evidence in the record about what the submission might contain.

[14] Having laid the commission's report before the Legislative Assembly in September 2017, the Attorney General tabled the government's proposed response to the commission's report in October 2017. The Attorney General did not table the Cabinet submission and there is no indication in the record that any member of the

[3] The baseline salary used by the commission in making its recommendations was $244,112 for the 2016-17 fiscal year, but the Legislative Assembly later retrospectively increased the salary for 2016-17 by 3.4 percent to $252,290, thereby reducing the effect of the increase recommended by the commission for the 2017-20 period.

Legislative Assembly other than those serving in Cabinet was aware of the contents of the submission.

[15] The Attorney General moved to pass a resolution rejecting the commission's recommended increase in the salary of provincial judges and adopting a 3.8 percent increase in 2017-18 and a 1.5 percent increase in both 2018-19 and 2019-20.[4] The Attorney General also proposed reducing the recommended reimbursement for the Provincial Court Judges' Association's costs of participating in the commission process from approximately $93,000 to about $66,000 in accordance with the formula established by s. 7.1 of the *Judicial Compensation Act*. With the support of government and opposition members, the Legislative Assembly passed the resolution.

[16] The Provincial Court Judges' Association petitioned for judicial review of the Legislative Assembly's resolution. Among other things, the Provincial Court Judges' Association asked to have the resolution quashed and sought a declaration that the government's response and the resolution were inconsistent with the *Judicial Compensation Act* and with the constitutional principle of judicial independence.

[17] In anticipation of the hearing of their petition on the merits, the Provincial Court Judges' Association asked the Attorney General to produce the Cabinet submission relied on in preparing the government's response. The Attorney General

[4] The retrospective salary increase for 2016-17 similarly reduces the effect of the increase adopted by the Legislative Assembly for the 2017-20 period.

refused, so the Association sought an order to require the Attorney General to produce the submission: see *Supreme Court Civil Rules*, B.C. Reg. 168/2009, r. 22-1(4)(c).

II. Procedural History

A. *Supreme Court of British Columbia, 2018 BCSC 1193 (Master Muir)*

[18] The Provincial Court Judges' Association's motion was initially heard by a Supreme Court of British Columbia master. The master noted that the Attorney General did not contest that the government's response was informed by a detailed submission to Cabinet: para. 9 (CanLII).

[19] Turning to relevance, while acknowledging that the government had not referred to or relied on the submission to Cabinet in making its decision, the master concluded that the submission was relevant to the *Bodner* review and specifically to whether the government relied on a reasonable factual foundation in developing its response to the commission's recommendation, and whether its response demonstrates meaningful engagement with the commission process: paras. 9 and 18-21.

[20] Regarding public interest immunity, the master explained that the Attorney General did not provide any specific evidence of harm that would result from the production of the Cabinet submission: para. 23. The importance of review of

the government's response and the need for transparency outweighed the public interest in its remaining confidential: paras. 23 and 27. The master ordered the Attorney General to produce the Cabinet submission: para. 28.

B. *Supreme Court of British Columbia, 2018 BCSC 1390, 19 B.C.L.R. (6th) 168 (Hinkson C.J.S.C.)*

[21] The Supreme Court of British Columbia dismissed the appeal from the master's decision. Like the master, the court did not examine the Cabinet submission: para. 45.

[22] Hinkson C.J.S.C. found no error in the master's conclusion that the Cabinet submission was relevant, agreeing that the submission was relevant to the issue whether the government respected the commission process such that the overall objectives of the process were achieved: paras. 34-35.

[23] The court found no error in the master's conclusion that public interest immunity did not apply based on the factors identified in *Carey v. Ontario*, [1986] 2 S.C.R. 637. The court emphasized that the submission related to the subject matter of the litigation and that the Attorney General did not offer in any evidence that any particular harm would flow from disclosure: para. 46.

C. *Court of Appeal for British Columbia, 2018 BCCA 394, 19 B.C.L.R. (6th) 188 (Bauman C.J.B.C., Harris and Dickson JJ.A.)*

[24] The Court of Appeal for British Columbia dismissed the Attorney General's further appeal from the Supreme Court's decision. Writing for the Court of Appeal, Bauman C.J.B.C. explained that although the Legislative Assembly is the decision-maker under the *Judicial Compensation Act*, the Attorney General prepares the government's draft response for approval by Cabinet before presenting it to the Legislative Assembly: para. 9. Cabinet is thus directly involved in the decision-making process.

[25] The Court of Appeal concluded that the Cabinet submission was necessarily relevant given that it informed the government's response to the commission's recommendations: paras. 9 and 16. Since Cabinet was "a primary actor in the impugned 'government response' . . . the Cabinet submission is clearly 'evidence which was before the administrative decision-maker'" and should be included in the record on judicial review: para. 19, quoting *Stonechild, Re*, 2007 SKCA 74, 304 Sask. R. 1, cited as *Hartwig v. Saskatchewan (Commission of Inquiry)*, at para. 33. The Court of Appeal also affirmed Hinkson C.J.S.C.'s analysis on public interest immunity: para. 22.

III. Issues

[26] This appeal raises two issues: (a) whether the Cabinet submission in this case should form part of the record on *Bodner* review and (b) whether the Cabinet submission is protected by public interest immunity.

IV. Analysis

A. *Judicial Independence and the Nature of Bodner Review*

[27] This appeal arises in the context of review of a government's response to a judicial compensation commission's recommendations. Such review aims to safeguard judicial independence.

[28] The constitutional principle of judicial independence flows from the recital in the preamble to the *Constitution Act, 1867* that our country is to have a "Constitution similar in Principle to that of the United Kingdom", ss. 96 to 101 of the *Constitution Act, 1867*, s. 11(*d*) of the *Canadian Charter of Rights and Freedoms* and s. 42(1)(*d*) of the *Constitution Act, 1982*: *Beauregard v. Canada*, [1986] 2 S.C.R. 56, at pp. 72-73; *Provincial Judges Reference*, at paras. 84 and 105-9; *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21, [2014] 1 S.C.R. 433, at para. 94; *Conférence des juges de paix magistrats du Québec v. Quebec (Attorney General)*, 2016 SCC 39, [2016] 2 S.C.R. 116, at para. 31.

[29] These provisions and the broader principle of judicial independence serve not only to protect the separation of powers between the branches of the state and thus, the integrity of our constitutional structure, but also to promote public confidence in the administration of justice: *Ell v. Alberta*, 2003 SCC 35, [2003] 1 S.C.R. 857, at paras. 21-23; *Conférence des juges de paix magistrats*, at para. 31. They are fundamental to the rule of law and to democracy in Canada.

[30] The overarching principle of judicial independence applies to all courts, whether of civil or criminal jurisdiction and whether their judges are appointed by federal, provincial or territorial authorities: *Provincial Judges Reference*, at para. 106; *Ell*, at paras. 21-24; *Conférence des juges de paix magistrats*, at para. 32.

[31] The three core characteristics of judicial independence are security of tenure, financial security and administrative independence: *Provincial Judges Reference*, at para. 118. The characteristic at issue in this appeal — financial security — in turn has three components, "which all flow from the constitutional imperative that . . . the relationship between the judiciary and the other branches of government be depoliticized": para. 131 (emphasis in original). First, absent a "dire and exceptional financial emergency precipitated by unusual circumstances", a government cannot change judicial remuneration parameters without first seeking the recommendations of an independent body, a "commission": paras. 133 and 137. (Government can, depending on the context, mean the executive, legislature or legislative assembly.) Second, judges cannot engage in negotiations with the government over remuneration: para. 134. Finally, judicial remuneration cannot fall below the basic minimum level required for the office of a judge: para. 135.

[32] More specifically, this appeal concerns the first component of financial security: the convening of a judicial compensation commission to make recommendations concerning judicial remuneration. The commission charged with

making such recommendations must be independent, effective and objective: *Provincial Judges Reference*, at para. 133.

[33] The effectiveness requirement means that the commission must be regularly convened, that no changes can be made to remuneration until the commission submits its report and that "the reports of the commission must have a meaningful effect on the determination of judicial salaries": *Provincial Judges Reference*, at paras. 174-75 and 179; see also *Bodner*, at para. 29.

[34] To ensure that the commission's recommendations have a meaningful effect, the government must formally respond to the commission's report: *Provincial Judges Reference*, at para. 179; *Bodner*, at para. 22. Because of the executive and legislature's shared constitutional responsibility to make decisions about the expenditure of public money,[5] the commission's recommendations are not binding (unless the legislature so provides). The government must, however, give specific reasons justifying any departure from the recommendations: *Provincial Judges Reference*, at para. 180; *Bodner*, at paras. 18 and 20-21; *Conférence des juges de paix magistrats*, at para. 35.

[35] To hold a government to its constitutional obligations in jurisdictions where a commission's recommendations are not binding, the government's response to the commission's recommendations is subject to what this Court described in *Bodner* as a "limited form of judicial review": paras. 29 and 42. The standard of

[5] See *Constitution Act, 1867*, ss. 54, 90 to 92, 100 to 102, 106 and 126.

justification to uphold the government's response is that of "rationality": *Provincial Judges Reference*, at paras. 183-84; *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405, at para. 57; *Bodner*, at para. 29. Both the standard of justification and the test used to measure the government's response against that standard are "deferential": *Bodner*, at paras. 30, 40 and 43. Both the fact that the government remains ultimately responsible for setting judicial compensation and the fact that the nature of a *Bodner* review is limited serve to balance the constitutional interests at stake.

[36] Building on the approach established by the *Provincial Judges Reference*, in *Bodner*, at para. 31, this Court set out a three-part test for determining whether a government's decision to depart from a commission's recommendation meets the rationality standard:

(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?

[37] Under the first two parts of the test, the focus is on the reasons given by government for departing from the commission's recommendations: *Bodner*, at paras. 32-33 and 36. The government "must respond to the [commission's] recommendations" by "giv[ing] legitimate reasons for departing from or varying them": paras. 23 and 24. The reasons must "show that the commission's recommendations have been taken into account and must be based on [a reasonable factual foundation] and sound reasoning": paras. 25 and 26. The reasons must also "articulat[e] the grounds for rejection or variation", "reveal a consideration of the judicial office and an intention to deal with it appropriately", "preclude any suggestion of attempting to manipulate the judiciary" and "reflect the underlying public interest in having a commission process, being the depoliticization of the remuneration process and the need to preserve judicial independence": para. 25.

[38] The third part of the *Bodner* test looks to whether the government has respected the commission process and, more broadly, whether the purposes of that process have been achieved: paras. 30-31, 38 and 43. This new part of the test was added by this Court in an effort to achieve the "unfulfilled" hopes this Court had in the *Provincial Judges Reference* of depoliticizing the process of setting judicial remuneration and thereby preserving judicial independence: paras. 10-12 and 31. The third step in the *Bodner* test requires the court to take a global perspective and ask whether the government demonstrated respect for the judicial office by engaging meaningfully with the commission process: see paras. 25, 31 and 38.

[39] However, this addition in *Bodner* was not intended to transform the analysis into a probing review of the process through which the government developed its response, whether it took place within the executive, the legislature or both. As a result, I cannot agree with the Provincial Court Judges' Association that references to the "totality" or "whole of the process" in *Bodner*, at para. 38, were meant to expand the scope of review such that the Cabinet decision-making process must necessarily be scrutinized in every case.

[40] There is no doubt that the *Provincial Judges Reference* and *Bodner* require that the reviewing court focus on the government's response. In *Bodner* itself, this Court looked at the Alberta, New Brunswick and Ontario governments' responses to commission recommendations to determine whether the third part of the *Bodner* test had been met: paras. 83, 100 and 130-31. That said, the third part of the *Bodner* test is not necessarily limited to consideration of the government's public reasons.

[41] Moreover, this does not mean that the government can hide behind reasons that conceal an improper or colourable purpose. The *Provincial Judges Reference* and *Bodner* cannot be interpreted to mean that as long as the government's public reasons are facially legitimate and appear grounded in a reasonable factual foundation, the government could provide reasons that were not given in good faith. Indeed, it is implicit in the third part of the *Bodner* test itself that, presented with evidence that the government's response is rooted in an improper or colourable purpose and has accordingly fallen short of the constitutional benchmark set in this

Court's jurisprudence, the reviewing court cannot simply accept the government's formal response without further inquiry.

[42] This is nothing new. In *Beauregard*, at p. 77, this Court made clear that "[i]f there were any hint that a federal law dealing with [the fixing of salaries and pensions of superior court judges] . . . was enacted for an improper or colourable purpose, or if there was discriminatory treatment of judges *vis-à-vis* other citizens, then serious issues relating to judicial independence would arise and the law might well be held *ultra vires* s. 100 of the *Constitution Act, 1867*" (emphasis added). This is true of all judges to whom the constitutional principle of judicial independence applies: see *Provincial Judges Reference*, at paras. 145 and 165.

[43] Considerations of legitimacy and respect for the process — and conversely, considerations of impropriety or colourability — permeate the entire *Bodner* analysis. Indeed, in *Bodner*, which concerned the remuneration of provincially-appointed judges, this Court considered whether the reasons given by the Alberta, New Brunswick, Ontario and Quebec governments were "based on purely political considerations", "reveal political or discriminatory motivations" or "evidence any improper purpose or intent to manipulate or influence the judiciary": paras. 66, 96 and 159; see also paras. 68 and 123.

[44] Reasons that reveal an improper or colourable purpose would fail the first step of the *Bodner* test which requires that a government articulate a legitimate reason for departing from a commission's recommendations. Similarly, in reviewing whether

a government had relied on a reasonable factual foundation, this Court acknowledged the possibility that the government might also rely on "affidavits containing evidence of good faith and commitment to the process, such as information relating to the government's study of the commission's recommendations": *Bodner*, at para. 36. Finally, a government's conduct and the adequacy of its response are also directly engaged in the third part of the *Bodner* test, which looks to whether the government has respected the commission process and, more broadly, whether the purposes of that process have been achieved.

[45] Thus, even if a government's public reasons appear to satisfy the requirements of *Bodner*, the government's response remains subject to challenge on the basis that it is grounded in an improper or colourable purpose.

[46] In *Bodner*, this Court underscored that "[t]he limited nature of judicial review [of the government's response] dictates the choice of remedies. The remedies must be consistent with the role of the reviewing court and the purpose of the commission process": para. 42. In my view, the limited nature of *Bodner* review, the role of the reviewing court and the purpose of the process also have implications for the evidence considered by the reviewing court.

B. *Evidence on Bodner Review*

[47] The limited nature of *Bodner* review implies that the record for this type of review is narrower than it would be on ordinary judicial review. It also means that

relevance must be assessed in relation to the specific issues that are the focus of the court's inquiry on *Bodner* review: the legitimacy of the reasons given by government, the reasonableness of the factual foundation relied on by government, and the respect for the commission process by government such that the objectives of the process have been achieved. Further, since *Bodner* review tends to oppose two branches of the state, special considerations arise where the party seeking *Bodner* review requests the production of a confidential Cabinet document. As I detail below, those considerations require that the party seeking production establish that there is some basis to believe that the document may contain evidence which tends to show that the government failed to meet a requirement described in this Court's jurisprudence, including *Bodner*. Only then will the reviewing court examine the document to determine whether it should be produced.

(1) Scope of the Record on *Bodner* Review

[48] Like the Court of Appeal, the Provincial Court Judges' Association invokes the rule that the record on judicial review generally includes any evidence that was before the decision-maker, subject to limited exceptions that either add to or subtract from the record. According to the Provincial Court Judges' Association, since the submission was put before Cabinet and since Cabinet approved the resolution introduced by the Attorney General and ultimately passed by the Legislative Assembly, the Cabinet submission was part of the evidence before the decision-maker and is thus relevant to the judicial review. The Provincial Court

Judges' Association argues that the submission must therefore be included in the record on judicial review.

[49] The Attorney General argues that the decision-maker was the Legislative Assembly, not Cabinet, so the Cabinet submission was not before the decision-maker and therefore should not be included in the record. More fundamentally, the Attorney General rejects the suggestion that the administrative law notion of the record on judicial review applies in this context.

[50] With respect to the identification of the formal decision-maker, neither the *Provincial Judges Reference* nor *Bodner* prescribes that a particular institution must make the decision to respond to a commission's recommendations. In some cases, it may be clear that only a single institution is involved, but in a jurisdiction like British Columbia where both the executive and Legislative Assembly play a substantive role, it would be artificial to focus solely on the Legislative Assembly's part and ignore the executive's involvement. Indeed, in this case the executive's proposed reasons for departing from the commission's recommendations were incorporated by reference into the resolution passed by the Legislative Assembly.

[51] More importantly, in my view, the *Provincial Judges Reference* and *Bodner* describe a unique form of review distinct from judicial review in the ordinary administrative law sense. In contrast to judicial review, *Bodner* review is available even when the decision-maker is the legislature (or any part of the legislature): see *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 558; *Wells v.*

Newfoundland, [1999] 3 S.C.R. 199, at para. 59. Further, the grounds for a *Bodner* review are narrower than those for a usual judicial review. The *Bodner* grounds centre on the legitimacy and sufficiency of a government's reasons for departing from a commission's recommendations, whether the government has respected the commission process more generally and whether the objectives of the process have been achieved.

[52] In the usual context of judicial review, the record generally consists of the evidence that was before the decision-maker: see *Delios v. Canada (Attorney General)*, 2015 FCA 117, 100 Admin L.R. (5th) 301, at para. 42; *Sobeys West Inc. v. College of Pharmacists of British Columbia*, 2016 BCCA 41, 80 B.C.L.R. (5th) 243, at para. 52. However, the rule that the record generally consists of the evidence that was before the decision-maker cannot be automatically transposed into the limited context of *Bodner* review.

[53] The record on *Bodner* review necessarily includes any submissions made to the commission by the government, judges and others; the commission's report, including its recommendations; and the government's response to the recommendations, which, as the *Provincial Judges Reference* recognized, at para. 180, may take different forms depending on which institution is charged with responding.

[54] As *Bodner* itself acknowledged, the record may also include certain forms of additional evidence put in by the government: paras. 27 and 36. The

government may be permitted to "provide details [concerning the factual foundation of its response], in the form of affidavits, relating to economic and actuarial data and calculations" and "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": para. 36; see also paras. 63-64 and 103. But the government cannot use the additional evidence to "advance reasons other than those mentioned in its response" or to cure defects in the factual foundation it relied on in its response: paras. 27 and 36.

[55] Although the point was not made explicitly in *Bodner*, the party seeking *Bodner* review, which will usually be the judges whose remuneration is at stake, can also put in certain forms of additional evidence relevant to the issues the reviewing court must decide. The party seeking review can, for example, seek to introduce evidence to counter relevant evidence put in by a government. It may put in evidence aimed at calling into question the reasonableness of the factual foundation relied on by the government, the government's lack of meaningful engagement with or respect for the commission process or whether the government's response was grounded in an improper or colourable purpose. To those ends, the party seeking review can ask that the government produce evidence in its possession. For the government's part, provided it respects the rule against supplementing its reasons and bolstering their factual foundation, it can respond with additional evidence of its own to refute the allegations made by the party seeking review.

(2) Relevance of Evidence to a *Bodner* Review

[56] The Attorney General contends that the British Columbia courts were wrong to conclude that the Cabinet submission is relevant to the *Bodner* review sought by the Provincial Court Judges' Association. The attorneys general of Canada and of several provinces intervened to make similar submissions.

[57] Evidence is relevant when it has "some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than the proposition would be in the absence of that evidence": *R. v. White*, 2011 SCC 13, [2011] 1 S.C.R. 433, at para. 36, quoting D. M. Paciocco and L. Stuesser, *The Law of Evidence* (5th ed. 2008), at p. 31. Put another way, [TRANSLATION] "a fact is relevant, in particular, if it is a fact in issue, if it contributes to rationally proving a fact in issue or if its purpose is to help the court assess the probative value of testimony": J.C. Royer and C. Piché, *La preuve civile* (5th ed. 2016), at para. 215.

[58] Evidence is thus relevant to a proceeding when it relates to a fact that is in issue in the proceeding. The pleadings, which must be read generously and in light of the governing law, define what is in issue: see *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, [2011] 3 S.C.R. 535, at para. 41.

[59] Generally, what is in issue in a *Bodner* review is whether a government failed to meet its constitutional obligations flowing from the principle of judicial independence in its response to a commission's recommendations. The relevance of

any proposed additional evidence must therefore be tested in relation to the issues that the court must determine on *Bodner* review.

[60] To be relevant, the proposed evidence must contain something that tends to establish a fact concerning one of the steps of the test established in *Bodner*. For instance, if the party seeking *Bodner* review contests the reasonableness of the factual foundation relied on by a government, the proposed evidence must either tend to support or undermine the reasonableness of that foundation. Likewise, if the party seeking *Bodner* review alleges disrespect for the commission process or that the government's response is grounded in an improper or colourable purpose, the proposed evidence must either tend to establish the legitimacy of the government's response or its illegitimacy. Finally, if the government introduces evidence of its good faith and commitment to the process, the applicant's proposed evidence may be tendered to undermine that evidence: see, e.g., *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2012 BCSC 1022.

[61] However, as I will explain, the requirement of relevance alone — even as it pertains to the limited set of issues properly considered on a *Bodner* review — fails to adequately protect the competing constitutional imperatives that arise when a party seeking *Bodner* review requests production of a confidential Cabinet document.

(3) Confidential Cabinet Documents in the *Bodner* Context

[62] Since a *Bodner* review often concerns decisions in which Cabinet plays a part, a party seeking review may request the production of a confidential Cabinet document as additional evidence to show that the government's response does not meet the applicable constitutional requirements. Although the normal course would be for the judge to consider a description of the proposed evidence or examine it to determine whether it is relevant to the *Bodner* review, special considerations arise when the party seeking *Bodner* review asks the government to produce a document related to Cabinet deliberation and decision making.

[63] Unlike an action or an application for judicial review brought against the government by a private party, a *Bodner* review usually opposes two different branches of the state — the judiciary and the executive — as parties in the application. In the *Provincial Judges Reference*, at para. 7, Lamer C.J. underscored that while litigation is always "a very serious business", "it is even more serious where it ensue[s] between two primary organs of our constitutional system — the executive and the judiciary — which both serve important and interdependent roles in the administration of justice". Such litigation may prove necessary to hold the government to its constitutional obligations in jurisdictions where the commission's recommendations have not been made binding. *Bodner* review is the mechanism for ensuring that the government respects the commission process and for safeguarding the public confidence in the administration of justice that process serves to protect.

[64] But as this Court warned in *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49, at pp. 89, 97-98, 103 and 109, the outcome of an action brought by one branch of the state against another can effectively alter the separation of powers. Such proceedings call for special prudence to keep courts from overstepping the bounds of the judicial role.

[65] Canadian constitutional law has long recognized that sovereign power in this country is divided not only between Parliament and the provincial legislatures, but also among the executive, legislative and judicial branches of the state: *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, at pp. 469-70; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, at p. 389; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 33. Although there are limited areas of overlap, the branches play fundamentally distinct roles and have accordingly developed different core competencies: *Provincial Judges Reference*, at para. 139; *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at para. 29.

[66] As this Court underscored in *Criminal Lawyers' Association*, at para. 29, "each branch will be unable to fulfill its role if it is unduly interfered with by the others". Several doctrines work to prevent undue interference, including the secrecy afforded judicial deliberations (*MacKeigan v. Hickman*, [1989] 2 S.C.R. 796), and the recognition of the privileges, powers and immunities enjoyed by the Senate, the

House of Commons and the legislative assemblies: *Constitution Act, 1867*, preamble and s. 18; *New Brunswick Broadcasting Co.*; *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667; *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, [2018] 2 S.C.R. 687. These doctrines are a corollary to the separation of powers because they help to protect each branch's ability to perform its constitutionally-assigned functions.

[67] The executive, too, benefits from a degree of protection against undue interference. Deliberations among ministers of the Crown are protected by the constitutional convention of Cabinet confidentiality. Constitutional conventions do not have direct legal effect: *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, at pp. 880-83; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 98. However, as I will explain in greater detail, the common law respects the confidentiality convention and affords the executive public interest immunity over deliberations among ministers of the Crown: see *Carey*; *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3, at paras. 18-19 and 60.

[68] Where the executive plays a role in formulating a government's response to a judicial compensation commission's recommendations, Cabinet will generally determine the position taken by the executive. Ministers' deliberations concerning their appreciation of the recommendations and how the government should respond will usually be protected by Cabinet confidentiality.

[69] A document reflecting on Cabinet deliberations concerning a government's response may well be relevant, even if only to negate the claim that the government failed to meet its constitutional obligations. If the government sought to have the document admitted in support of an affidavit speaking to its good faith and its commitment to the process of the sort described in *Bodner*, at para. 36, the document would undoubtedly be considered relevant. It is difficult, then, to see why the same should not also be true where the party seeking *Bodner* review looks to have the document admitted to challenge the government's claims of good faith and commitment to the process or to raise the question whether the government acted for legitimate reasons or with an improper or colourable purpose.

[70] Thus, if relevance were the sole consideration, confidential Cabinet documents would routinely be part of the record in every *Bodner* review. For example, the Cabinet document would either tend to lend credence to the contention that a government's response failed to meet its constitutional requirements — or tend to refute that contention. In my view, something more than relevance is needed to strike the appropriate balance between respecting Cabinet confidentiality and maintaining the overall integrity of *Bodner* review.

[71] As I have said, *Bodner* review generally opposes two branches of the state: the members of the judiciary challenging the government's response and the attorney general defending it. Where the response is the product of the legislature or a collaboration between the executive and legislature, the interests of the three branches

may, whether directly or indirectly, be at stake. Yet, given our constitutional structure, a member of the judiciary will also necessarily be charged with hearing and determining the application for *Bodner* review: see *Provincial Judges Reference*, at para. 180; *Bodner*, at para. 29. Owing to the doctrine of necessity, this is so even if the judge charged with hearing the application is directly affected by the commission's recommendations and the government's response: see *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1998] 1 S.C.R. 3, at para. 5.

[72] Routine judicial inspection of a confidential Cabinet document would reveal to a member of the judiciary the content of Cabinet deliberations. Although any inspection of a confidential Cabinet document undermines Cabinet confidentiality to some extent, judicial inspection of a document that concerns Cabinet deliberations about the judiciary would undermine it more significantly. That is especially so where the judge is directly affected by the response resulting from those deliberations. As with adjudication of the *Bodner* review itself, judicial inspection is appropriate in this context only where it is strictly necessary.

[73] In my view, these special considerations should be accommodated at two distinct stages.

[74] First, a threshold showing is required.

[75] Before the reviewing court can examine the document, the party seeking *Bodner* review must first establish that there is some basis to believe that the Cabinet document in question may contain evidence which tends to show that the government failed to meet a requirement described in *Bodner*.

[76] This threshold is met if the party seeking review can show that there is reason to believe that the Cabinet document may contain something that would undermine the validity of the government response. This requires the party seeking review to point to something in the record, including otherwise admissible evidence, that supports its view that the document may tend to show that the government response failed to meet one or more parts of the test established in *Bodner*.

[77] Meeting this threshold does not require the party to have knowledge or information about the content of the Cabinet submission. Nor does it require that the party point to something in the record that explicitly refers to the Cabinet submission or its contents. It would be unfair to require the party to establish the contents of a confidential document: see, in the public interest immunity context, *Carey*, at p. 678.

[78] The party can, however, rely on additional evidence and the rest of the record, including submissions to the commission, to support its contention that the threshold is met. For instance, the party might point to statements made by ministers or others that suggest that the government's response may have been grounded in reasons other than those formally expressed, that the government may have relied on a flawed or incomplete factual foundation or that the government may have shown

disrespect for the commission process. The party may also be able to rely on additional evidence introduced by the government that suggests that a document concerning Cabinet deliberations may disclose reliance on improper purpose. But it is not enough to simply say that the document was before the executive in its capacity as decision-maker or that it would provide additional background or context for the reviewing court.

[79] If the party seeking review makes the requisite showing — that there is some basis to believe that the document may contain evidence which tends to show that the government failed to meet one of the requirements described in *Bodner* — the government must produce it for the court's examination.

[80] Second, the reviewing court must then examine the document in private to determine whether it, in fact, provides some evidence which tends to show that the government failed to meet one of the parts of the test mandated in *Bodner*. In other words, the document must, taken with the record as a whole and in light of the applicant's theory of the case, be of assistance in challenging the legitimacy of the government's reasons, the reasonableness of the factual foundation it relied on, the respect the government has shown the commission process or whether the objectives of the process have been achieved. It may suggest that the government response was based upon an improper or colourable purpose. To be clear, the cogency of the evidence need not be considered at this stage of the analysis.

[81] Even if the document meets this test, production of the document remains subject to any other rule of evidence that bars its disclosure, such as solicitor-client privilege (which was raised in the courts below in the companion appeal) or public interest immunity (which was raised in this Court in both appeals).

[82] The Provincial Court Judges' Association submits that *Bodner* review is meaningless without the production of confidential Cabinet documents to illuminate the true reasons for the government's response, which may differ from its publicly-articulated reasons. The Provincial Court Judges' Association says that without an understanding of the actual basis on which the decision rests, the reviewing court will be unable to determine whether the government's response satisfies constitutional requirements.

[83] I do not agree that *Bodner* review is ineffective without any relevant Cabinet submission being included in the record. Though necessarily limited in scope, *Bodner* review is a robust form of review. The test requires that the government justify a *departure* from the commission's recommendations. The government must give legitimate and rational reasons for doing so and sound reasoning must be supported by a reasonable factual foundation. The government's response must demonstrate respect for the judicial office, for judicial independence, and for the commission process; as well, the broader objectives of the process must be achieved.

[84] Thus, the party seeking *Bodner* review may well be able to make a strong case for overturning a government's response based on the public reasons given by the government. The party seeking *Bodner* review may also rely on additional admissible evidence to make their case, such as statements made by ministers or others, including more general statements made outside the commission process, about judges or their remuneration, and historical patterns, including the government's responses to past commission recommendations. Those forms of evidence might well support the contention that the government relied on an illegitimate reason for departing from the commission's recommendations or that its response does not "reveal a consideration of the judicial office and an intention to deal with it appropriately": *Bodner*, at para. 25. They might also support the contention that the government did not show appropriate respect for the underlying public interest in judicial independence and in having an effective commission process.

[85] I underscore that it is never enough for the government to simply repeat the submissions it made to the commission: *Bodner*, at para. 23. That does not justify a departure from the commission's recommendations. Similarly, a government that consistently rejects a commission's recommendations will put in question whether it is respecting the commission process and, as a result, whether the process is achieving its objectives. Although across-the-board salary increases or reductions that affect judges have been found to meet the rationality standard, a government that does not take into account the distinctive nature of judicial office and treats judges simply

as a class of civil servant will fail to engage with the principle of judicial independence: *Provincial Judges Reference*, at paras. 143, 157 and 184; *Bodner*, at para. 25. More rarely, the level of remuneration itself may call the government's response into question: see *Provincial Judges Reference*, at para. 135.

[86] A government response that does not *meaningfully* engage with the commission process and its recommendations risks failing the *Bodner* test. As *Bodner*, at para. 31, makes clear, the reviewing court must ultimately be satisfied that the objectives of the commission process — namely, depoliticizing decisions about judicial remuneration and preserving judicial independence — have been met.

[87] To summarize, the object of *Bodner* review is the government's response to the commission's recommendations, which will generally consist of the government's decision to depart from the commission's recommendations and the reasons given for that decision. The submissions to the commission, the commission's recommendations, and the government's response accordingly form the core of the record on *Bodner* review. Certain forms of additional evidence are admissible if they are relevant to determining whether any part of the *Bodner* test has been met, including whether the government's response is grounded in an improper or colourable purpose. However, where a party seeking *Bodner* review requests the production of a confidential Cabinet document, the party must first establish there is some basis to believe that the document may contain evidence which tends to show that the government failed to meet a requirement described in *Bodner*. Only then will

the reviewing court examine the document in private to determine whether it, in fact, provides some evidence which tends to show that the government failed to meet its constitutional obligations. If the document does provide such evidence, the court must then determine whether any other rule of evidence, such as public interest immunity, bars its production.

(4) Application

[88] Since the Provincial Court Judges' Association seeks production of a confidential Cabinet submission, the first issue is whether it has made the requisite threshold showing.

[89] The Provincial Court Judges' Association points to prior litigation involving judicial remuneration in which the Attorney General produced a Cabinet submission concerning the government's response to a commission's recommendations: see *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2012 BCSC 1022. The Supreme Court of British Columbia in that case found that the submission revealed an "inappropriate emphasis" on the need to maintain a link between judicial salaries and public sector salaries: para. 81. The Provincial Court Judges' Association argues that this history makes the Cabinet submission in the present case relevant to resolve the issue of whether the government engaged with and showed respect for the commission process.

[90] I am not persuaded. The case relied on by the Provincial Court Judges' Association was decided nearly a decade ago. It does not follow that because a Cabinet submission revealed that the government relied on an inappropriate consideration 10 years ago, it may have relied on a like consideration in the present case. Indeed, the government would be expected to learn from its past mistakes. Something more would be required for there to be reason to believe that the submission may contain evidence that would tend to show that the government failed to meet a requirement described in *Bodner*.

[91] Although it is not determinative, I note that neither the executive nor the Legislative Assembly put the Cabinet submission in issue. Neither the government's response nor the Legislative Assembly's resolution refers to the Cabinet submission. Nor, in contrast with the affidavit filed in a past round of litigation opposing the Attorney General and Provincial Court Judges' Association, is there any reference to the Cabinet submission in the affidavit filed in support of the Attorney General's response to the petition for review. Nor is there anything on the face of the record that indicates the Cabinet submission may contain some evidence which tends to show that the government failed to meet a constitutional requirement.

[92] In my view, the Provincial Court Judges' Association has failed to make the requisite showing. It has not provided any evidence or pointed to any circumstances that suggest that the Cabinet submission may indicate that the government did not meet the standard required by *Bodner*. It was therefore not

necessary for the Attorney General to produce the document for examination by this Court.

[93] This would effectively dispose of this appeal.

[94] It is therefore unnecessary in this case to determine whether public interest immunity would otherwise apply so as to permit the Attorney General to refuse to produce the Cabinet submission. However, since the parties and interveners in both appeals have made extensive submissions about the law of public interest immunity, I will examine how public interest immunity applies to confidential Cabinet documents sought in a *Bodner* review and why, in my view, it is not necessary to revisit this Court's public interest immunity doctrine as it applies in this context.

C. *Public Interest Immunity*

[95] There is a strong public interest in maintaining the confidentiality of deliberations among ministers of the Crown: *Carey*, at pp. 647 and 656-59; *Babcock*, at paras. 18-19. As a matter of constitutional convention, Cabinet deliberations are confidential: N. d'Ombrain, "Cabinet secrecy" (2004), 47(3) C*anadian Public Administration* 332, at pp. 334-35. Federal ministers swear an oath as Privy Counsellors to "honestly and truly declare [their] mind and [their] opinion" and to "keep secret all matters . . . secretly treated of" in Cabinet: see C. Forcese and A. Freeman, *The Laws of Government: The Legal Foundations of Canadian*

Democracy (2nd ed. 2011), at p. 352. Provincial and territorial ministers swear a similar oath as executive counsellors.

[96] Ministers enjoy freedom to express their views in Cabinet deliberations, but are expected to publicly defend Cabinet's decision, even where it differs from their views: see A. Heard, *Canadian Constitutional Conventions: The Marriage of Law & Politics* (2nd ed. 2014), at pp. 106-7; d'Ombrain, at p. 335. The confidentiality of Cabinet deliberations helps ensure that they are candid and frank and that what are often difficult decisions and hard-won compromises can be reached without undue external interference: see Forcese and Freeman, at p. 352; d'Ombrain, at p. 335. If Cabinet deliberations were made public, ministers could be criticized for publicly defending a policy inconsistent with their private views, which would risk distracting ministers and undermining public confidence in government.

[97] Grounded in constitutional convention as much as in practical considerations, this confidentiality applies whether those deliberations take place in formal meetings of the Queen's Privy Council for Canada,[6] or a province or territory's Executive Council, or in meetings of Cabinet or of committees composed of ministers, such as Treasury Board. The confidentiality extends not only to records of Cabinet deliberations, but also to documents that reflect on the content of those deliberations: *Babcock*, at para. 18.

[6] Although the Queen's Privy Council for Canada established by s. 11 of the *Constitution Act, 1867*, includes members who are not ministers of the Crown, confidentiality also extends to its proceedings.

[98] The common law protects the confidentiality of Cabinet deliberations through the doctrine of public interest immunity: *Babcock*, at para. 60. Public interest immunity forms part of federal common law and the common law of each province and territory: see *Babcock*, at paras. 19, 23 and 26. As with any common law rule, Parliament or a legislature may limit or do away with public interest immunity, provided it clearly expresses its intention to do so: *Quebec (Commission des droits de la personne) v. Attorney General of Canada*, [1982] 1 S.C.R. 215, at p. 228; *Babcock*, at para. 20; see, more generally, *R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402, at para. 21.[7]

[99] In *Smallwood v. Sparling*, [1982] 2 S.C.R. 686, and in *Carey*, this Court rejected absolute Crown privilege and instead recognized a qualified public interest immunity. Public interest immunity prevents the disclosure of a document where the court is satisfied that the public interest in keeping the document confidential outweighs the public interest in its disclosure: see *Carey*, at pp. 653-54 and 670; *Babcock*, at para. 19; see also *Bisaillon v. Keable*, [1983] 2 S.C.R. 60, at p. 97.[8]

[7] Provincial legislatures have generally preserved public interest immunity: see, e.g., *Code of Civil Procedure*, CQLR, c. C-25.01, art. 283; *Crown Liability and Proceedings Act, 2019*, S.O. 2019, c. 7, Sch. 17, s. 13(2); *Crown Proceeding Act*, R.S.B.C. 1996, c. 89, s. 9; *Proceedings against the Crown Act*, R.S.N.S. 1989, c. 360, s. 11. By contrast, Parliament has partially displaced public interest immunity in ss. 37 to 39 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5: see *Babcock*, at paras. 21 et seq.; *R. v. Ahmad*, 2011 SCC 6, [2011] 1 S.C.R. 110.

[8] The same considerations generally apply to testimony. However, ministers and former ministers serving as members of the Senate, House of Commons or a legislative assembly benefit from a limited form of testimonial immunity as a matter of parliamentary privilege: see *Vaid* at para. 29; *Ainsworth Lumber Co. v. Canada (Attorney General)*, 2003 BCCA 239, 14 B.C.L.R. (4th) 302; *Telezone Inc. v. Canada (Attorney General)* (2004), 69 O.R. (3d) 161 (C.A.).

[100] Although this Court rejected claims of absolute Crown privilege in *Smallwood* and *Carey*, it did not "accord the individual an automatic right to discovery of sensitive and confidential documents held by the state": *Michaud v. Quebec (Attorney General)*, [1996] 3 S.C.R. 3, at para. 54. *Smallwood* and *Carey* thus require a careful balancing of the competing public interests in confidentiality and disclosure: see *Babcock*, at para. 19; *R. v. Barros*, 2011 SCC 51, [2011] 3 S.C.R. 368, at para. 35. These competing public interests must be weighed with reference to a specific document in the context of a particular proceeding.

[101] In *Carey*, at pp. 670-73, this Court described the main factors relevant to balancing the public interests in confidentiality and disclosure of documents concerning public decision making, including at the Cabinet level:

(1) the level of the "decision-making process";

(2) the "nature of the policy concerned";

(3) the "particular contents of the documents";

(4) the timing of disclosure;

(5) the "importance of producing the documents in the interests of the administration of justice"; and

(6) whether the party seeking the production of the documents "alleges unconscionable behaviour on the part of the government".

[102] Although public interest immunity may be raised by any party or by the reviewing court itself, the government has the burden of establishing that a document should not be disclosed because of public interest immunity: *Carey*, at pp. 653 and 678. The government should put in a detailed affidavit to support its claim of public interest immunity: pp. 653-54.

[103] As a general rule, when it is clear to the reviewing court, based on a government's submissions, that public interest immunity applies to a document, it need not inspect the document: *Carey*, at pp. 671 and 681. If, however, the court has doubts about whether public interest immunity applies, the court should inspect the document in private to resolve its doubts: pp. 674 and 681; see also *Somerville v. Scottish Ministers*, [2007] UKHL 44, [2007] 1 W.L.R. 2734, at paras. 156 and 204; *Al Rawi v. Security Service*, [2011] UKSC 34, [2012] 1 A.C. 531, at para. 145. Indeed, even if the court is persuaded that public interest immunity does not apply, the court should nevertheless inspect the document in private to ensure that it does not inadvertently order the disclosure of a document which should in fact remain confidential: see *Conway v. Rimmer*, [1968] A.C. 910 (H.L.), at p. 971. If, having inspected the document, the court concludes that the contents, or any part of the contents, are not protected by public interest immunity, the court can order production accordingly.

(1) Public Interest Immunity in the Context of *Bodner* Review

[104] As noted in *Carey*, the determination of public interest immunity often requires the reviewing court to examine the document in question. Since in the *Bodner* context the court will generally have examined the document to determine whether it should otherwise be part of the record, the document will usually already be before the court.

[105] Accordingly, the court must, looking to the factors identified in *Carey* and any other pertinent factors, determine whether the public interest in the Cabinet document's disclosure outweighs the public interest in its remaining confidential. In such a context, at least three *Carey* factors — the level of decision-making process to which the document relates, the nature of the policy on which the document bears and the contents of the document — will often weigh in favour of keeping the document confidential.

[106] Aside from decisions made by the Queen or her representatives, the Cabinet decision-making process is the highest level of decision making within the executive: see *Carey*, at p. 670; *Reference re Canada Assistance Plan (B.C.)*, at pp. 546-47.

[107] As the British Columbia courts acknowledged in the present case, judicial remuneration is an important and sensitive area of public policy, implicating not only the use of public money, but also the administration of justice and ultimately, judicial

independence. The British Columbia courts did not find this to be a factor weighing in favour of continued confidentiality: BCSC Reasons, at para. 42; C.A. Reasons, at para. 22; for similar statements by the Nova Scotia courts in the proceedings that gave rise to the companion appeal, see also *Nova Scotia Provincial Judges' Association v. Nova Scotia (Attorney General)*, 2018 NSSC 13, 409 C.R.R. (2d) 117, at para. 144; *Nova Scotia (Attorney General) v. Judges of the Provincial Court and Family Court of Nova Scotia*, 2018 NSCA 83, 429 D.L.R. (4th) 359, at paras. 44-46. I cannot agree with such an approach. As this Court explained in *Carey*, at pp. 671-72, the nature of the policy on which the document bears may weigh in favour of continued confidentiality to varying degrees depending on its sensitivity and significance. A government's decision about how to respond to a judicial compensation commission's recommendations concerns not merely a matter of implementation, but involves the "formulation of policy on a broad basis": see *Carey*, at p. 672; see also *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66, [2004] 3 S.C.R. 381, at para. 58. That said, as I explain below, when the policy concerns a constitutional requirement relating to the justice system, and, thus, the administration of justice, as is the case in the *Bodner* context, this may *also* weigh in favour of disclosure.

[108] The contents of a document concerning Cabinet deliberations may well reflect the views of individual ministers of the Crown and reveal disagreement among ministers. Cabinet documents may also reveal considerations that were put before Cabinet. As a result, their contents will frequently be highly sensitive: see *Babcock*, at para. 18.

[109] Depending on the contents of the document, the timing may also weigh in favour of keeping the document confidential. A document that simply reveals that Cabinet made a decision to reject a recommendation made by a judicial compensation commission will bear little confidentiality once that decision is publicly announced. By contrast, ministers can rightly expect that a document that weighs several different possible responses to the commission's recommendations and proposes a particular response will remain confidential for some prolonged time even after the decision is publicly announced.

[110] In this case, the British Columbia courts appear to have treated the government's failure to assert a specific harm that would result from the Cabinet submission's disclosure as being conclusive of the need for disclosure: see Master Reasons, at para. 23; BCSC Reasons, at para. 46; C.A. Reasons, at para. 22.

[111] Because of the strong public interest in Cabinet confidentiality, the disclosure of a Cabinet document undermines that confidentiality and is, at least to some degree, harmful. As *Carey* recognized, certain Cabinet documents may, owing to their contents, raise additional concerns, as might be the case where they relate to defence or national security or refer to specific points of disagreement among ministers. It will often be helpful to the court for the government to be as specific as possible in raising the potential for such harm: pp. 653-54 and 671. But the government's failure to identify some specific harm resulting from a confidential Cabinet document's disclosure does not *automatically* mean the document must be

disclosed. The focus must remain on whether the public interest in the document's disclosure outweighs the public interest in its remaining confidential.

[112] Given the strong public interest in keeping documents concerning Cabinet deliberations confidential, a strong countervailing public interest will usually be necessary to justify their disclosure. The strength of the public interest in disclosure will often turn on the interests of the administration of justice, a factor identified in *Carey*.

[113] The notion of the "interests of the administration of justice" undoubtedly encompasses a broad set of considerations: see *Carey*, at pp. 647-48 and 671. Two stand out in the *Bodner* context: "the importance of the case and the need or desirability of producing the documents to ensure that [the case] . . . can be adequately and fairly presented": *Carey*, at p. 671.

[114] In the companion case, the Nova Scotia Court of Appeal concluded that disclosure of the report is in the public interest because the government knew its response to the commission's recommendations would be subject to review and because the review would focus on matters vital to the administration of justice and to the relationship between two branches of government: paras. 44-46.

[115] These considerations cut both ways. Although there is no doubt that *Bodner* reviews are of great importance, the fact that a party seeks production of a relevant confidential Cabinet document in the context of a *Bodner* review is not itself

a general basis for disclosure. Such an approach would effectively trump the public interest in the confidentiality of Cabinet deliberations in every *Bodner* review. It would also conflate the importance of the *issues* canvassed on such a review with the importance of the *evidence* provided by the Cabinet document to the disposition of those issues.

[116] In the *Bodner* context, the reviewing court's analysis of the factors bearing on the public interest in disclosure must necessarily be informed by its conclusion on the nature and probative value of the evidence. A document may provide some evidence that the government failed to meet one of the parts of the *Bodner* test, but the importance of the evidence may vary widely. When considering the interests of the administration of justice, the focus must therefore remain on the degree to which the document bears on what is at issue in the litigation.

[117] A document may contain information not otherwise available such that its exclusion from evidence would undermine the court's ability to adjudicate the issues on their merits: see *Carey*, at pp. 654 and 673; *Commonwealth v. Northern Land Council*, [1993] HCA 24, 176 C.L.R. 604, at p. 619. A document that tends to establish that the government set out to provide misleading public reasons for its response to the commission's recommendations; that the government relied on a fundamentally flawed factual foundation; that the government acted with an improper or colourable purpose; or that the government was indifferent or disrespectful towards the commission process will be highly probative. Such a document bears so directly

— and so determinately — on the issues that the reviewing court needs to resolve on *Bodner* review that to exclude the document would be contrary to the interests of the administration of justice: see *Air Canada v. Secretary of State for Trade*, [1983] 2 A.C. 394 (H.L.), at p. 435. Given the important constitutional interests at stake, the public interest in disclosure would almost certainly outweigh the public interest in the document's remaining confidential. Excluding such a document from evidence would keep the court from fulfilling its judicial role, jeopardize public confidence in the administration of justice, and ultimately threaten the rule of law. In such cases, where the probative value of the document is high, the public interest immunity analysis will lead to the same result as the production analysis set out above.

[118] By contrast, the public interest immunity analysis may lead to a different result for a Cabinet document that supports the contention that the government failed to meet one of its constitutional requirements, but whose impact on the *Bodner* review would be limited. The probative value of such evidence might not weigh heavily enough to warrant disclosure, especially if there were strong public interest in its remaining confidential. But such a document's exclusion from the record could hardly keep the reviewing court from adjudicating the issues on their merits. The public interest in disclosure of such a Cabinet document would thus not outweigh the public interest in its remaining confidential.

[119] As a general matter, the notion of "unconscionable behaviour" referred to in *Carey*, at p. 673, will only be pertinent in a limited set of cases. This factor is

superadded to more general considerations involving the administration of justice. The conduct in question must be "harsh" or "improper"; though it need not be criminal, it must nevertheless be of a similar degree of seriousness: p. 673. In the *Bodner* context, this factor does little work independent from the factor relating to the interests of the administration of justice. The harshness or impropriety of the government's conduct would be canvassed in assessing whether the government acted with an improper or colourable purpose. A document that demonstrates unconscionable behaviour on the government's part would tend to establish its failure to meet its constitutional requirements in a highly probative manner and, for that reason, the public interest in its disclosure would almost certainly outweigh the public interest in its remaining confidential.

[120] Accordingly, I disagree with the suggestion of the Attorney General of British Columbia and other attorneys general that this Court's public interest immunity case law results in routine, almost inevitable, disclosure of confidential Cabinet documents, and should thus be revisited. Properly applied in the *Bodner* context, public interest immunity requires a careful balancing of the public interests in confidentiality and disclosure. Since the public interest in the confidentiality of documents concerning Cabinet deliberations is often particularly strong, the public interest in their disclosure will usually need to be stronger still to warrant their disclosure.

V. Disposition

[121] I would allow the appeal without costs and quash the master's order for production of the Cabinet submission. The Provincial Court Judges' Association's petition can now be adjudicated on its merits without consideration of the Cabinet submission.

Appeal allowed without costs.

Solicitors for the appellant: Gudmundseth Mickelson, Vancouver.

Solicitors for the respondent: Arvay Finlay, Vancouver.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Toronto.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Québec.

Solicitor for the intervener the Attorney General of Saskatchewan: Attorney General of Saskatchewan, Regina.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Solicitors for the intervener the Canadian Superior Courts Judges Association: Norton Rose Fulbright Canada, Montréal.

Solicitors for the intervener the Canadian Bar Association: Borden Ladner Gervais, Toronto.

Solicitors for the intervener the Canadian Association of Provincial Court Judges: Goldblatt Partners, Toronto.

Solicitors for the intervener the Canadian Taxpayers Federation: McCarthy Tétrault, Toronto.

Solicitors for the intervener the Canadian Civil Liberties Association: Paliare Roland Rosenberg Rothstein, Toronto.

SUPREME COURT OF CANADA

CITATION: Nova Scotia (Attorney General) *v.* Judges of the Provincial Court and Family Court of Nova Scotia, 2020 SCC 21

APPEAL HEARD: December 9, 2019
JUDGMENT RENDERED: July 31, 2020
DOCKET: 38459

BETWEEN:

Attorney General of Nova Scotia representing Her Majesty The Queen in Right of the Province of Nova Scotia and Governor in Council
Appellants

and

Judges of the Provincial Court and Family Court of Nova Scotia, as represented by the Nova Scotia Provincial Judges' Association
Respondents

- and -

Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of Saskatchewan, Attorney General of Alberta, Canadian Superior Courts Judges Association, Canadian Bar Association, Canadian Association of Provincial Court Judges, Canadian Taxpayers Federation and Canadian Civil Liberties Association
Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

REASONS FOR JUDGMENT: (paras. 1 to 73) Karakatsanis J. (Wagner C.J. and Abella, Moldaver, Côté, Brown, Rowe, Martin and Kasirer JJ. concurring)

Attorney General of Nova Scotia representing Her Majesty The Queen in Right of the Province of Nova Scotia and Governor in Council *Appellants*

v.

Judges of the Provincial Court and Family Court of Nova Scotia, as represented by the Nova Scotia Provincial Judges' Association *Respondents*

and

Attorney General of Canada,
Attorney General of Ontario,
Attorney General of Quebec,
Attorney General of Saskatchewan,
Attorney General of Alberta,
Canadian Superior Courts Judges Association,
Canadian Bar Association,
Canadian Association of Provincial Court Judges,
Canadian Taxpayers Federation and
Canadian Civil Liberties Association *Interveners*

Indexed as: Nova Scotia (Attorney General) *v.* Judges of the Provincial Court and Family Court of Nova Scotia

2020 SCC 21

File No.: 38459.

2019: December 9; 2020: July 31.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NOVA SCOTIA

Constitutional law — Judicial independence — Judicial remuneration — Judicial compensation commission making recommendations to provincial government concerning salaries, benefits and pensions of provincial judges — Attorney General providing report to Cabinet concerning commission's recommendations — Order in council varying commission's recommendation concerning judges' salaries — Judges applying for judicial review of order in council — Whether Attorney General's report should form part of record on judicial review — Whether production of report precluded on grounds of public interest immunity.

In November 2016, the Nova Scotia judicial compensation commission recommended an approximately 5.5 percent increase in the salaries of provincial judges in 2017-18, a 1.2 percent increase in 2018-19 and a 2.2 percent increase in 2019-20. The provincial Attorney General provided a report to Cabinet concerning the commission's recommendations. The Lieutenant Governor in Council then made an order in council, based on the report and recommendation of the Attorney General, reducing the rate of salary increase to nil in 2017-18 and 2018-19 and to one percent in 2019-20. The Provincial Court Judges' Association applied for judicial review of

the order in council, and moved for a declaration that the Attorney General's report should be part of the record on judicial review. The motion judge granted the declaration in part, concluding that all but the portions of the report that were protected by solicitor-client privilege should form part of the record on judicial review. The Court of Appeal dismissed the Attorney General's appeal.

Held: The appeal should be allowed in part and the motion judge's declaration modified such that only the discussion of government-wide implications in the Attorney General's report and the communications plan should be included in the record.

The framework that governs whether confidential Cabinet documents can form part of the record on a review pursuant to *Bodner v. Alberta*, 2005 SCC 4, [2005] 2 S.C.R. 286, was developed in the companion appeal, *British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia*, 2020 SCC 20. Applying that framework in the present appeal, there is some basis to believe that certain components of the Attorney General's report — the discussion of government-wide implications and the communications plan — may contain evidence which tends to show that the government failed to meet a requirement of the *Bodner* test. Production of these components of the report is not precluded on grounds of public interest immunity, as the public interest in these parts remaining confidential is outweighed by the public interest in their being disclosed.

The party seeking to have a confidential Cabinet document produced must first establish that there is some basis to believe that the document may contain evidence which tends to show that the government failed to meet one of the requirements described in *Bodner*. Only then will the government be required to produce the document for judicial inspection.

In the present case, the government's reasons for varying the commission's salary increase recommendation may raise some concerns about whether the government failed to meaningfully engage with the commission's recommendations and about the government's respect for the commission process. Further, the government appears to have implemented precisely the increase it proposed in its submissions to the commission, again raising the issue of whether the government respected the commission process. Finally, there is also a reference to the Attorney General's report in the preamble to the order in council that provides the government's response, indicating that the Lieutenant Governor in Council may have relied on the report in formulating the response. In these circumstances, the Association meets the threshold for judicial inspection.

The next step in the analysis is to determine whether the Attorney General's report does in fact provide some evidence which tends to show that the government's response does not comply with the requirements set out in *Bodner*. The paragraph in the report that discusses government-wide implications and the communications plan appendix set out the bases on which the decision to accept or

vary the commission's recommendations could be criticized, as well as related political considerations, including the impacts of salary increases for judges on labour negotiations with public sector unions. The inclusion of these considerations provides some basis to support the contention that the government's response fell short of its constitutional requirements and could be of assistance to the Association in calling into question the respect the government has shown the commission process and the propriety of the government's motivation for rejecting the commission's recommendations. Thus, subject to public interest immunity, the discussion of government-wide implications in the Attorney General's report and the communications plan appendix should be included in the record.

Public interest immunity protects the confidentiality of Cabinet deliberations if the public interest in the document remaining confidential outweighs the public interest in its being disclosed. The companion appeal explains the main factors relevant to balancing these interests, and how they apply in the context of a *Bodner* review.

In the instant case, several factors weigh in favour of the government-wide implications and communications plan remaining confidential. These components of the Attorney General's report relate to a decision at the highest level of the executive. The government's response to the commission's recommendations involves important policy choices. In terms of the timing of disclosure, although the decision to vary the commission's recommended salary

increase has already been made and publicly announced, the details of the considerations before Cabinet have not yet been made public and can be expected to remain confidential. As well, the documents' contents may reveal matters that were discussed in Cabinet, and can be expected to remain confidential.

However, in terms of the interests of the administration of justice, this factor favours the disclosure of the government-wide implications in the Attorney General's report and the communications plan appendix. Some of the considerations mentioned in these components of the report were not rational or legitimate bases on which to vary or reject the commission's recommendations. Their inclusion in the record would help the reviewing court determine whether the government's response was grounded in an improper purpose and whether the commission process has been respected and its purposes have been achieved. By contrast, their exclusion would undermine the reviewing court's ability to deal with central issues on *Bodner* review. Thus, the public interest in disclosure outweighs the public interest in continued confidentiality.

Cases Cited

By Karakatsanis J.

Applied: *British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia*, 2020 SCC 20; *Carey v. Ontario*, [1986] 2 S.C.R. 637; **explained:** *Provincial Court Judges' Assn. of New Brunswick v. New*

Brunswick (Minister of Justice); *Ontario Judges' Assn. v. Ontario (Management Board); Bodner v. Alberta; Conférence des juges du Québec v. Quebec (Attorney General); Minc v. Quebec (Attorney General)*, 2005 SCC 44, [2005] 2 S.C.R. 286; **referred to:** *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525; *Beauregard v. Canada*, [1986] 2 S.C.R. 56; *Conférence des juges de paix magistrats du Québec v. Quebec (Attorney General)*, 2016 SCC 39, [2016] 2 S.C.R. 116; *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3.

Statutes and Regulations Cited

Act to Amend Chapter 238 of the Revised Statutes, 1989, the Provincial Court Act, S.N.S. 1998, c. 7, s. 1 [en. 1989, c. 238, ss. 21J, 21K].

Financial Measures (2016) Act, S.N.S. 2016, c. 2, s. 9 [rep. & sub. 1989, c. 238, ss. 21J, 21K].

Interpretation Act, R.S.N.S. 1989, c. 235, s. 7(1)(q) "Lieutenant Governor in Council".

Nova Scotia Civil Procedure Rules, r. 7.10(a).

O.C. 2017-24, preamble.

Proceedings against the Crown Act, R.S.N.S. 1989, c. 360, s. 11.

Provincial Court Act, R.S.N.S. 1989, c. 238, ss. 21E, 21H(2), 21J, 21K.

Public Service Act, R.S.N.S. 1989, c. 376, s. 29.

Authors Cited

Nova Scotia Provincial Judges' Salaries and Benefits Tribunal (2017-2020). *Report and Recommendations for the Period April 1, 2017 to March 31, 2020*. Halifax, November 2016 (online: https://novascotia.ca/just/Court_Services/_docs/Judges-Salaries-2017-2020.pdf; archived version: https://www.scc-csc.ca/cso-dce/2020SCC-CSC21_1_eng.pdf).

APPEAL from a judgment of the Nova Scotia Court of Appeal (Fichaud, Oland and Beveridge JJ.A.), 2018 NSCA 83, 429 D.L.R. (4th) 359, 30 C.P.C. (8th) 1, 48 Admin. L.R. (6th) 315, [2018] N.S.J. No. 448 (QL), 2018 CarswellNS 814 (WL Can.), affirming a decision of Smith J., 2018 NSSC 13, 409 C.R.R. (2d) 117, 20 C.P.C. (8th) 112, [2018] N.S.J. No. 76 (QL), 2018 CarswellNS 154 (WL Can.). Appeal allowed in part.

Edward A. Gores, Q.C., and *Andrew D. Taillon*, for the appellants.

Susan Dawes and *Kristen Worbanski*, for the respondents.

Michael H. Morris and *Marilyn Venney*, for the intervener the Attorney General of Canada.

Sarah Kraicer and *Andrea Bolieiro*, for the intervener the Attorney General of Ontario.

Brigitte Bussières and *Robert Desroches*, for the intervener the Attorney General of Quebec.

Thomson Irvine, Q.C., for the intervener the Attorney General of Saskatchewan.

Doreen C. Mueller, for the intervener the Attorney General of Alberta.

Pierre Bienvenu, *Azim Hussain* and *Jean-Simon Schoenholz*, for the intervener the Canadian Superior Courts Judges Association.

Guy J. Pratte, *Ewa Krajewska* and *Neil Abraham*, for the intervener the Canadian Bar Association.

Steven M. Barrett and *Colleen Bauman*, for the intervener the Canadian Association of Provincial Court Judges.

Adam Goldenberg and *Stephanie Willsey*, for the intervener the Canadian Taxpayers Federation.

Andrew K. Lokan and *Lauren Pearce*, for the intervener the Canadian Civil Liberties Association.

The judgment of the Court was delivered by

KARAKATSANIS J. —

[1] This appeal, along with its companion appeal, *British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia*, 2020 SCC 20, requires that this Court balance several constitutional imperatives: the financial dimension of judicial independence, the shared responsibility of the executive and legislature to make decisions about public money, and the public interest in having the executive conduct its internal business in confidence.

[2] The appeals concern whether a confidential Cabinet document can form part of the record on judicial review of a government's response to a judicial compensation commission's recommendations. Further, they raise the issue of whether the production of such a Cabinet document is nevertheless precluded on grounds of public interest immunity.

[3] In this case, the Nova Scotia courts examined the report to Cabinet of the Attorney General of Nova Scotia, found that it was relevant and concluded that it was not protected by public interest immunity. The courts declared that the portions of the report not subject to solicitor-client privilege form part of the record on judicial review and must be produced by the Attorney General.

[4] This appeal falls to be resolved in accordance with the framework developed in the companion appeal. That framework governs whether confidential Cabinet documents can form part of the record on a review pursuant to *Bodner v.*

Alberta, 2005 SCC 44, [2005] 2 S.C.R. 286,[1] a limited form of judicial review of a government's response to a judicial compensation commission's recommendations.

[5] Applying that framework in this appeal, I conclude that there is some basis to believe that the Attorney General's report may contain evidence which tends to show that the government failed to meet a requirement of the *Bodner* test. The public reasons given for the government's decision to depart from the commission's recommended increase in judicial remuneration provide some basis to believe that the government may have relied on improper considerations and may not have respectfully engaged with the commission process.

[6] Having inspected the Attorney General's report, I find that only two components, the discussion of government-wide implications and the communications plan, provide some evidence that the government may have failed to meet the *Bodner* test. The rest of the report is either protected by solicitor-client privilege or provides no such evidence, and will not form part of the record.

[7] Since the discussion of government-wide implications and the communications plan reflect matters that may have been considered by Cabinet, I turn finally to public interest immunity, and find that the public interest in these parts of the Attorney General's report remaining confidential is outweighed by the public

[1] *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice); Ontario Judges' Assn. v. Ontario (Management Board); Bodner v. Alberta; Conférence des juges du Québec v. Quebec (Attorney General); Minc v. Quebec (Attorney General)*, 2005 SCC 44, [2005] 2 S.C.R. 286.

interest in their being disclosed. Although there are several factors weighing in favour of these parts' continued confidentiality, they are outweighed by their importance to the court's determination of the merits of the application for *Bodner* review.

[8] As a result, only components of the Attorney General's report — the discussion of government-wide implications and the communications plan — should be produced as part of the evidence on *Bodner* review. That said, these excerpts are merely some evidence for the Supreme Court of Nova Scotia to consider in deciding the merits of the judicial review of the government's response.

[9] For the following reasons, I would allow the appeal in part.

I. Background

A. *Provincial Court Act, R.S.N.S. 1989, c. 238*

[10] In the *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 (*Provincial Judges Reference*), this Court set out the constitutional baseline for making changes to judicial remuneration. The *Provincial Court Act* implements that baseline in Nova Scotia.

[11] In Nova Scotia, the triennial Provincial Judges' Salaries and Benefits Tribunal (the commission) is charged with making recommendations concerning the salaries, benefits and pensions of judges of the Provincial Court and Family Court based on prescribed factors and other factors the commission considers relevant:

Provincial Court Act, s. 21E. The commission makes its recommendations in a report to the Minister of Justice who forwards the report to the Lieutenant Governor in Council: ss. 21H(2) and 21K(1).[2]

[12] Before 2016, the commission's recommendations were binding. The recommendations were automatically implemented, unless they required legislative changes. If so, the Minister of Justice was to introduce the necessary legislation in the House of Assembly: see *An Act to Amend Chapter 238 of the Revised Statutes, 1989, the Provincial Court Act*, S.N.S. 1998, c. 7, s. 1, enacting *Provincial Court Act*, ss. 21J and 21K.

[13] In 2016, the Nova Scotia legislature amended the *Provincial Court Act* to give the Lieutenant Governor in Council the power to vary or reject the commission's recommendations: see *Financial Measures (2016) Act*, S.N.S. 2016, c. 2, s. 9, repealing and replacing *Provincial Court Act*, ss. 21J and 21K.

[14] Once it receives the commission's report, the Lieutenant Governor in Council "shall, without delay, confirm, vary or reject each of the recommendations" made by the commission: *Provincial Court Act*, s. 21K(2). If a recommendation is varied or rejected, reasons for so doing must be provided: s. 21K(3). The Lieutenant

[2] In Nova Scotia, the offices of Attorney General and Minister of Justice are held by the same person: *Public Service Act*, R.S.N.S 1989, c. 376, s. 29. The *Provincial Court Act* employs the term "Governor in Council", which the *Interpretation Act*, R.S.N.S. 1989, c. 235, s. 7(1)(q) defines as interchangeable with the term "Lieutenant Governor in Council". To avoid confusion with the Governor General in Council, usually referred to in federal law as "Governor in Council", and to ensure these reasons can more easily be understood by readers in other provinces, I will refer to Nova Scotia's Lieutenant Governor in Council.

Governor in Council "shall, without delay, cause the confirmed and varied recommendations to be implemented": s. 21K(4).

B. *Government's Response*

[15] In its submissions to the commission, the Nova Scotia government took the position that a salary increase "consistent with the public service wage mandate" of no increase in the first two years and a one percent rise in the final year "would be appropriate in all of the circumstances": Nova Scotia Provincial Judges' Salaries and Benefits Tribunal (2017-2020), *Report and Recommendations for the Period April 1, 2017 to March 31, 2020* (November 2016) (online), at para. 39.

[16] In its November 2016 report, the commission noted that the salary of Provincial Court judges was lower than that of judges in every other province and territory, save Newfoundland and Labrador. The commission recommended an approximately 5.5 percent increase in the salaries of Provincial Court judges in the 2017-18 fiscal year and an increase in line with Statistics Canada's Consumer Price Index for Nova Scotia in 2018-19 and 2019-20. Based on the methodology prescribed by the commission, this recommendation would have resulted in a 1.2 percent increase in 2018-19 and a 2.2 percent increase in 2019-20, for a total increase of approximately 8.9 percent over three years.[3]

[3] The government's response, which was prepared a few months after the commission's report, estimates that the commission's recommendation would result in an approximately 9.5 percent

[17] In December 2016, the Attorney General provided a report to Cabinet concerning the commission's recommendations. The report was filed under seal in this Court, as it had been in the courts below. The Supreme Court of Nova Scotia included a detailed summary of the report in its reasons: 2018 NSSC 13, 409 C.R.R. (2d) 117, at paras. 146-76.

[18] In February 2017, the Lieutenant Governor in Council made an order varying the commission's recommendation concerning the salaries of provincial judges: O.C. 2017-24. The order in council reduces the rate of salary increase to nil in the 2017-18 and 2018-19 fiscal years and to one percent in the 2019-20 fiscal year. The preamble to the order states that the order is made by the Lieutenant Governor in Council "on the report and recommendation of the Attorney General and Minister of Justice".

[19] The respondents, the Judges of the Provincial Court and Family Court, represented by the Nova Scotia Provincial Court Judges' Association, applied for judicial review of the order in council, seeking an order quashing the order in council, an order confirming the commission's recommendations and declarations that the government has interfered with judicial independence. In their application, the judges requested production of the Attorney General's report referred to in the order in council.

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increase: A.R., vol. 2, Tab 2A, at p. 7. Had it gone into effect, the actual increase would have been 0.6 percent less because inflation was slightly lower than the 2.0 percent per year the government estimated: see the methodology described by the commission in the *Report and Recommendations for the Period April 1, 2017 to March 31, 2020*, at para. 53.

[20] The Attorney General filed a record in the Supreme Court of Nova Scotia that did not include the report. The Provincial Court Judges' Association moved for a declaration that the report is part of the record on judicial review under the *Civil Procedure Rules*, r. 7.10(a).

II. Procedural History

A. *Supreme Court of Nova Scotia, 2018 NSSC 13, 409 C.R.R. (2d) 117 (Smith J.)*

[21] The Supreme Court of Nova Scotia granted in part the declaration sought by the Provincial Court Judges' Association. Justice Smith explained that the review contemplated by *Bodner* requires that the reviewing court determine whether the government's participation and response in the totality of the process demonstrates good faith and meaningful participation. The court referred to the general rule that the record on judicial review includes every document that was before a decision-maker and relied on by it in reaching its decision, subject to exceptions that subtract from the record, such as deliberative secrecy, which did not apply here.

[22] Turning to public interest immunity, Smith J. found that, while the decision making process took place at a very high level, the balance of the factors identified in *Carey v. Ontario*, [1986] 2 S.C.R. 637, favoured disclosure. The court concluded that portions of the report contain legal advice from the Attorney General and are protected by solicitor-client privilege. The court declared that all but these

portions of the report should form part of the record on judicial review and directed the Attorney General to produce the non-privileged portions of the report.

B. *Nova Scotia Court of Appeal, 2018 NSCA 83, 429 D.L.R. (4th) 359 (Fichaud, Oland and Beveridge JJ.A.)*

[23] The Nova Scotia Court of Appeal found no error in the reviewing court's conclusion that the report was relevant or in its analysis of public interest immunity. The Court of Appeal added that disclosure of the report was in the public interest because the government knew its response to the commission's recommendations would be subject to judicial review and because the review would focus on matters vital to the administration of justice and to the relationship between two branches of government. Justice Fichaud, writing for the Court of Appeal, affirmed the conclusion that portions of the report are protected by solicitor-client privilege.

III. Issues

[24] This appeal raises two issues: (a) whether the Attorney General's report should form part of the record on *Bodner* review and (b) whether the report is nevertheless protected by public interest immunity such that it should not be produced.

[25] The Provincial Court Judges' Association did not cross-appeal the Court of Appeal's holding that portions of the report are subject to solicitor-client privilege,

that there was no waiver of such privilege and that those portions would therefore not form part of the record on *Bodner* review. Accordingly, the Court of Appeal's conclusions on these points are not on appeal before this Court. They are final.

IV. Analysis

[26] I begin with a preliminary point. Although the government's response takes the form of an order made by the Lieutenant Governor in Council under the *Provincial Court Act*, that order is based on advice given by Cabinet. Since its advice is nearly always binding, Cabinet effectively determines what decision will be made by the Lieutenant Governor in Council: see *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at pp. 546-47. The document at issue in this appeal concerns the process Cabinet followed to settle on its advice.

[27] This appeal falls to be decided in accordance with the framework governing the production of confidential Cabinet documents on *Bodner* review established in the companion appeal, *B.C. Provincial Court Judges*. Although the parties to this appeal framed the debate as being concerned with relevance, as I explained in *B.C. Provincial Court Judges*, relevance alone is not sufficient to balance the competing constitutional interests at stake when a party seeking *Bodner* review requests the production of a confidential Cabinet document.

[28] Thus, the party seeking to have the confidential Cabinet document produced must first establish that there is some basis to believe that the document

may contain evidence which tends to show that the government failed to meet one of the requirements described in *Bodner*, understood, as they must be, as building on *Beauregard v. Canada*, [1986] 2 S.C.R. 56, and the *Provincial Judges Reference*. Only then will the government be required to produce the document for judicial inspection. Having inspected the document, the reviewing court determines whether the document in fact provides some evidence which tends to show that the government failed to comply with a requirement described in *Bodner*. If the document provides such evidence, the court can order production as part of the record, subject to public interest immunity or any other applicable rule of evidence invoked by the government.

A. *Should the Attorney General's Report Be Part of the Record on Bodner Review?*

[29] As I recounted in the companion appeal, *B.C. Provincial Court Judges*, the constitutional principle of judicial independence includes financial security as one of its core characteristics: *Provincial Judges Reference*, at para. 118. One component of financial security is that, absent a "dire and exceptional financial emergency precipitated by unusual circumstances", a government cannot change judicial remuneration parameters without first seeking the recommendations of a judicial compensation commission: *Provincial Judges Reference*, at paras. 133 and 137; *B.C. Provincial Court Judges*, at para. 31. For the commission to be effective, its recommendations must "have a meaningful effect on the determination of judicial

salaries": *Provincial Judges Reference*, at para. 175; see also *Bodner*, at para. 29, and *B.C. Provincial Court Judges*, at para. 33.

[30] The government must formally respond to the commission's report and give specific reasons justifying any departure from the commission's recommendations: *Provincial Judges Reference*, at paras. 179 and 180; *Bodner*, at paras. 18-22; *Conférence des juges de paix magistrats du Québec v. Quebec (Attorney General)*, 2016 SCC 39, [2016] 2 S.C.R. 116, at para. 35; *B.C. Provincial Court Judges*, at para. 34. The government's response is subject to "a limited form of judicial review" on a standard of "rationality": *Provincial Judges Reference*, at paras. 183-184; *Bodner*, at paras. 29 and 42; *B.C. Provincial Court Judges*, at para. 35.

[31] The test for determining whether the government's response meets the rationality standard is threefold:

(1) Has the government articulated a legitimate reason for departing from the commission's recommendations?

(2) Do the government's reasons rely on 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?
>
> (*Bodner*, at para. 31; *B.C. Provincial Court Judges*, at para. 36)

[32] As I explained in the companion appeal, although the *Bodner* test focuses on the government's response, this does not mean that the reviewing court can ignore the broader context and the court is not necessarily limited to consideration of the government's response: see *B.C. Provincial Court Judges*, at paras. 40-45. The third part of the *Bodner* test examines whether the government has respected the commission process such that its purposes have been achieved. And, importantly, the government's response cannot stand if it shown to have been grounded in an improper or colourable purpose, which reflects a concern that is deeply rooted in this Court's judicial independence case law and permeates the whole of the *Bodner* test. In *Bodner* itself, this Court considered whether the reasons given by the Alberta, New Brunswick, Ontario and Quebec governments were "based on purely political considerations", "reveal political or discriminatory motivations" or "evidence any improper political purpose or intent to manipulate or influence the judiciary": *Bodner*, at paras. 66, 96 and 159; see also paras. 68 and 123.

[33] Although the record on *Bodner* review consists primarily of submissions made to the commission, the commission's report and the government's response, the record can also include additional evidence relevant to the issues on *Bodner* review: *B.C. Provincial Court Judges*, at paras. 53-55.

[34] *Bodner* review generally opposes two branches of the state as parties to the litigation: the executive and the judiciary challenging the government's response. Determining the relevance of additional evidence where it is disputed may, in the normal course, require inspection of the proposed evidence by a member of the judiciary. Any inspection of a confidential Cabinet document has the potential to undermine Cabinet confidentiality. However, because the judiciary is directly interested in the litigation, the inspection of a confidential Cabinet document relating to the government's response to a judicial compensation commission's recommendations has the potential to significantly undermine Cabinet confidentiality: *B.C. Provincial Court Judges*, at paras. 70-72. As a result of these considerations, the companion appeal establishes a special set of rules that govern when a party applying for *Bodner* review seeks the production of a confidential Cabinet document.

[35] Before the reviewing court inspects the document, the party seeking a *Bodner* review must first point to some circumstance or evidence that supports its view that the document may tend to show that the government's response failed to meet one of the parts of the *Bodner* test: *B.C. Provincial Court Judges*, at para. 75. This does not require the party to have knowledge or information about the content of a confidential Cabinet document. As I explained in *B.C. Provincial Court Judges*, at para. 78, the party can rely on evidence of statements made by ministers or others and broader circumstances, including historical patterns in government responses to commission recommendations. The court may look to the entire record, including the submissions the government made to the commission, in determining whether the

circumstances meet the threshold for judicial inspection. The government's response itself may to supply some basis to believe that the confidential Cabinet document may contain evidence which tends to show that the government failed to meet a requirement described in *Bodner*.

[36] In its notice of application, the Provincial Judges' Association pleads that the government's reasons fail to explain the choice to *depart* significantly from the commission's recommendation of an 8.9 percent increase in judicial salaries over three years, which aimed to bring them more in line with salaries in other provinces. In the respondents' view, the reasons do not justify the government's decision to limit the increase to one percent in the last year of a triennial cycle.

[37] For their part, the government's reasons repeatedly criticize the commission process and the recommendations in strong terms. The reasons contend that the commission proceeded in a "results-oriented and formulaic manner to achieve an outcome", adding that there was "no rational basis for its conclusion": A.R., vol. 2, at pp. 8-10. The reasons also criticize the commission's reliance on an "adversarial interest arbitration" model drawn based on collective bargaining, warning that, "as a consequence", "public confidence in the actual and apparent independence, objectivity and effectiveness [of the commission] could be called into question": A.R. vol. 2, at pp. 12-13.

[38] Although the government acknowledges that the commission could have provided constitutionally valid reasons for not staying within the scope of the

province's fiscal plan, the government concludes that the commission erred or exceeded its jurisdiction in failing to stay within the fiscal plan and "chose to, in effect, usurp the statutory authority of the Minister of Finance": A.R., vol. 2, at p. 15 (emphasis added).

[39] As a result, the government varied the commission's recommendation substantially, freezing judicial salaries for 2017-18 and 2018-19 and adopting a one percent increase for 2019-20 "to approximate the salary already set for Crown Attorneys, the funding increase for physicians, and the proposed increase of other Nova Scotians receiving salaries out of public funds, including members of the Legislative Assembly": A.R., vol. 2, at pp. 18-19.

[40] The issue is whether these reasons, in the broader context of this case, supply some basis to believe that the Attorney General's report may contain evidence that tends to show that the government failed to comply with one of its constitutional requirements in responding to the commission's recommendations.

[41] It is open to the respondents to rely on the government's reasons to argue that the government did not take sufficient account of the distinctive nature of judicial office in concluding that judicial salaries should increase only in line with the rest of the public sector. While across-the-board restraints on increases in salaries could be found to be rational, this Court has cautioned that "judicial independence can be threatened by measures which treat judges . . . identically to other persons paid from the public purse": *Provincial Judges Reference*, at paras. 158 and 184. Similarly,

although this Court accepted in *Bodner* that comparisons with the salaries of civil servants could be appropriate, this Court also warned that the government's response must *always* take into account the distinctive nature of judicial office: *Bodner*, at paras. 26, 75 and 123-26.

[42] As this Court made clear in *Bodner*, at paras. 23, 25 and 38, the government must respond to the commission's recommendations, taking those recommendations into account and dealing with the issues at stake in a meaningful way. In *Bodner* itself, the Quebec government's failure to address certain key justifications for the commission's recommendations proved fatal to the rationality of its response: para. 159. Here, the government's reasons identify a number of possible errors in the commission's comparison with judicial salaries in New Brunswick. The government's study of the factual foundations relied on by the commission is appropriate and expressly contemplated by *Bodner*, at paras. 26 and 36. But it is also arguable that the government may not have engaged in a meaningful way with the commission's analysis of the increase in the cost of living in Nova Scotia or its broader comparison of judicial salaries in Nova Scotia with those across the country, which formed the central justification for its recommendation. The legitimacy of the Nova Scotia government's reasons may also be assessed in light of the extent of the departure from the commission's recommendation.

[43] The government may of course disagree with the commission's recommendations and its reasoning. However, the government is also expected to

show respect for the commission process such that the objectives of that process — depoliticization and judicial independence — can be achieved: *Bodner*, at paras. 25-26 and 30-31. Here, the government's reasons themselves may raise some concerns about whether the government failed to meaningfully engage with the commission's recommendations and about the government's respect for the commission process.

[44] Further, the government in this case appears to have implemented precisely the increase it proposed in its submissions to the commission, again raising the issue of whether the government respected the commission process: see *Bodner*, at para. 23; *B.C. Provincial Court Judges*, at para. 85. In doing so, like the Quebec government in *Bodner* itself, the Nova Scotia government "appears to have been content to restate its original position without answering certain key justifications for the [commission's] recommendations": para. 159. This is an important factor to consider in determining whether the threshold is met.

[45] Finally, I note that there is also a reference to the Attorney General's report in the preamble to the order in council that forms the government's response. While such a reference indicates that the Lieutenant Governor in Council may have relied on the Attorney General's report in formulating its response, this alone would not likely have been sufficient to meet the threshold. It remains simply a factor to be considered.

[46] In my view, in these circumstances, the Association meets the threshold for judicial inspection of the document in question. There is some basis to believe that

the Attorney General's report may contain evidence which tends to show that the government in fact fell short of its constitutional obligations as required under this Court's jurisprudence on judicial independence.

[47] The next step in the analysis is therefore to determine whether the Attorney General's report does in fact provide some evidence which tends to show that the government's response does not comply with the requirements set out in *Bodner*: *B.C. Provincial Court Judges*, at para. 80.

[48] The report, which was filed under seal, is available for examination by this Court. We are in a position to inspect the document and decide whether it should be produced, thus providing further guidance on the application of this framework. Like the Nova Scotia courts, I do not comment on the portions of the report protected by solicitor-client privilege and focus solely on the non-privileged portions.

[49] As the Supreme Court of Nova Scotia's summary of the report makes clear, most of the non-privileged portions of the report supply background information intended to provide context to the Lieutenant Governor in Council about the decision it had to make under the *Provincial Court Act*. Apart from the discussion of government-wide implications and the communications plan, the balance of the non-privileged portions of the report provides no evidence that the government's response fails to comply with the requirements described in *Bodner*. Those portions contain nothing bearing on the legitimacy of the public reasons given by the government for departing from the commission's recommendation. They shed no

light on the reasonableness of the factual foundation relied upon by government. They do not evince disrespect for the commission process. Nor do they suggest improper motivation. Those non-privileged portions of the report need not be produced.

[50] The paragraph under the heading "government-wide implications" in the Attorney General's report acknowledges that the commission's role is "unique" owing to judicial independence, but adds that "any salary increases provided to any group may have impacts on current labour negotiations for Government".

[51] As for the communications plan, it is an appendix to the Attorney General's report, which was prepared by the Department of Justice's Communications Director and approved by the Deputy Attorney General and the Attorney General. The communications plan does not provide any advice or recommendations, but rather identifies the "communications challenges" that would result from accepting, rejecting or varying the commission's recommendations. It was put before Cabinet for its consideration in determining the government's response to the commission's recommendations. The communications plan sets out the bases on which the decision to accept or vary the commission's recommendations could be criticized, as well as related political considerations.

[52] If the government were to accept the recommendations, the communications plan warns that the salary increase may not be acceptable to the public. The plan cautions that if the government accepts the recommendations, the

public may question why the government amended the legislation to make the commission's recommendations non-binding, if the government is not prepared to depart from them. Finally, the plan suggests that public sector unions may use the salary increase to "bolster [their] case for higher wages" because the recommended increase is higher than that for public sector employees more generally.

[53] The communications plan warns that if the government rejects or varies the recommendations, as it ultimately did, the Judges of the Provincial Court and Family Court will likely apply for judicial review. The plan explains that even so, the public will likely see the government as "firm and consistent on finances and wages for individuals supported by taxpayers" and that public sector unions will not be able to use the salary increase in support of their case for higher wages.

[54] In my view, the inclusion of these considerations in the discussion of government-wide implications and in the communications plan provides some basis to support the contention that government's response to the commission's recommendations fell short of its constitutional requirements. In particular, the suggestion that if the government accepts the commission's recommendations, it will be criticized for not availing itself of the option given to it by the Nova Scotia legislature to vary or reject the commission's recommendations, is hardly a rational basis for departing from those recommendations. It would undermine the legitimacy of the government's response if Cabinet relied on these considerations. Whether it did so will be a matter for the Supreme Court of Nova Scotia to decide on the merits.

[55] Of course, the government can undoubtedly take into account broader considerations of public policy in formulating its response to the commission's recommendations. Indeed, the government is due deference by the reviewing court, owing to its "unique position and accumulated expertise and its constitutional responsibility for management of the province's financial affairs": *Bodner*, at para. 30.

[56] But it is far from clear that the government can depart from the commission's recommendations simply because it fears that accepting them would have a detrimental impact on public sector labour negotiations. In *Bodner*, at para. 160, this Court described the Quebec government's response to a similar commission's recommendations in these terms:

> After the [commission] submitted its report, the [g]overnment'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 [g]overnment 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.

[57] Thus, in this case, the considerations highlighted in the discussion of government-wide implications and in the communications plan could be of assistance to the Association in calling into question the respect the government has shown the commission process and the propriety of the government's motivation for rejecting the commission's recommendations. These components of the Attorney General's

report provide sufficient context to enable the reviewing court to understand and assess this evidence.

[58] In the end, the Supreme Court of Nova Scotia will make the determination on the merits. It will reach a conclusion, based on the entire record, about whether and how these considerations informed the government's response.

[59] But, in my view, the discussion of government-wide implications and the communications plan provide some evidence that tends to show that the government failed to meet its constitutional requirements described in *Bodner*. Thus, subject to public interest immunity, these parts of the Attorney General's report should be included in the record.

B. *Public Interest Immunity*

[60] The government claims public interest immunity over the Attorney General's report as a document prepared for Cabinet discussion. Accordingly, the final issue is whether public interest immunity bars the production of the discussion of government-wide implications and the communications plan as part of the record.

[61] Public interest immunity protects the confidentiality of Cabinet deliberations: *Carey*, at pp. 655-59 and 670-71; *B.C. Provincial Court Judges*, at paras. 67 and 98. The Nova Scotia legislature has not displaced the common law doctrine of public interest immunity and, indeed, in the context of proceedings against

the Crown, has preserved it: *Proceedings against the Crown Act*, R.S.N.S. 1989, c. 360, s. 11.

[62] The common law test is whether the public interest in the document remaining confidential outweighs the public interest in its being disclosed: *Carey*, at pp. 653-54 and 670; *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3, at para. 19; *B.C. Provincial Court Judges*, at para. 99. The main factors relevant to balancing the competing public interests in confidentiality and disclosure of documents concerning Cabinet decision making were described in *Carey*, at pp. 670-73:

(1) the level of the "decision-making process";

(2) the "nature of the policy concerned";

(3) the "particular contents of the document";

(4) the timing of disclosure;

(5) the "importance of producing the documents in the interests of the administration of justice"; and

(6) whether the party seeking the production of the documents "alleges unconscionable behaviour on the part of the government".

In the companion appeal, I explained how these factors apply in the context of a *Bodner* review: see *B.C. Provincial Court Judges*, at paras. 106-19.

[63] The burden is on the government to establish that a document should not be disclosed because of public interest immunity: *Carey*, at pp. 653 and 678; *B.C. Provincial Court Judges*, at para. 102. The government should put in a detailed affidavit to support its claim of public interest immunity and it will often be helpful for the government to be as specific as possible in identifying harm that would result from disclosure: *Carey*, at pp. 653-54 and 671; *B.C. Provincial Court Judges*, at para. 102.

[64] Here, the Secretary of the Executive Council's affidavit simply confirms the communication of the Attorney General's report to Cabinet and confirms that the Nova Scotia government was asserting public interest immunity over the entire report and solicitor-client privilege over parts of it. While it provides evidence that the Attorney General's report was provided to Cabinet, such an affidavit provides scant assistance in assessing a claim of public interest immunity.

[65] Nonetheless, several of the factors identified in *Carey* weigh in favour of the government-wide implications and communications plan remaining confidential. These components relate to a decision at the highest level of the executive made by the Lieutenant Governor by and with the advice of the Executive Council. The government's response to a judicial compensation commission's recommendations involves important policy choices.

[66] Although the decision to vary the commission's recommended increase in judicial remuneration has been made and publicly announced, the details of the considerations that were before Cabinet, including those in the communications plan, have not been made public. Ministers are entitled to expect that those considerations will remain confidential for decades.

[67] The discussion of government-wide implications in the Attorney General's report must be taken to reflect her views. While the communications plan does not speak to the differing views of individual ministers, it is not simply factual background. Its contents may reveal matters that were discussed and considered in Cabinet. Such contents, too, can be expected to remain confidential. Thus, this factor also weighs in favour of preserving the confidentiality of these components of the report.

[68] Turning to the interests of the administration of justice, the most important consideration is the degree to which the document bears on what is at issue in the litigation and the extent to which its exclusion from the record would undermine the court's ability to adjudicate the issues on their merits.

[69] I am satisfied that the exclusion of these components of the Attorney General's report from the record would impact the reviewing court's ability to determine the merits of the *Bodner* review.

[70] Some of the considerations mentioned in the discussion of government-wide implications and in the communications plan were not rational or legitimate bases on which to vary or reject the commission's recommendations. If the Supreme Court of Nova Scotia concludes that Cabinet relied on these considerations in reaching its decision, then these documents would tend to show that one or more of the requirements from *Bodner* was not met. The fact that the legislature gave the Lieutenant Governor in Council the power to vary or reject the commission's recommendations is not itself a reason to vary recommendations. Likewise, the impact of accepting a recommendation on labour negotiations is generally not a legitimate basis for varying a recommendation made by a commission: see *Bodner*, at para. 160. The communications plan indicates that the government may have been concerned about the risk of an uninformed public reaction.

[71] Thus, the inclusion of these components of the Attorney General's report in the record would help the reviewing court determine whether the government's response was grounded in an improper purpose and whether the third part of the *Bodner* test, which considers whether the commission process has been respected such that the purposes of that process have been achieved, has been met. The exclusion of these parts of the report from the record may leave the reviewing court with an incorrect understanding of the considerations that may have informed the government's response. It may also raise the question of whether the government provided legitimate reasons for departing from the commission's recommendations. I am accordingly of the view that the interests of the administration of justice favour

the disclosure of the government-wide implications in the Attorney General's report and the communications plan appendix.

[72] The level of decision making, the nature of the policy concerned, the contents of the discussion of government-wide implications and of the communications plan and the timing of the disclosure all weigh in favour of these components of the Attorney General's report remaining confidential. Because the policy concerns a constitutional requirement relating to the justice system, and, thus, the administration of justice, it also weighs in favour of disclosure. The exclusion of this evidence from the record would undermine the reviewing court's ability to deal with central issues on *Bodner* review: whether the government articulated legitimate reasons for departing from the commission's recommendations; whether the government's response was grounded in improper considerations and whether the government respected the commission process. The interests of the administration of justice thus strongly favour the disclosure of these parts of the Attorney General's report. I conclude that the public interest in their disclosure outweighs the public interest in their remaining confidential.

V. Disposition

[73] I would allow the appeal in part, but only to modify the Supreme Court of Nova Scotia's declaration, such that only two components of the Attorney General's report — i.e. the components titled "government-wide implications" and "communications plan" — should be included in the record. I would award the

Provincial Judges' Association its costs in this Court. Within 10 days of this judgment, the Attorney General shall file in this Court a new redacted version of volume 3 of the appellants' record, amended in accordance with these reasons. The Association's application for review of the government's response can now be determined on the merits in light of the amended record.

Appeal allowed in part with costs to the respondents.

Solicitor for the appellants: Attorney General of Nova Scotia, Halifax.

Solicitors for the respondents: Myers, Winnipeg.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Toronto.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Québec.

Solicitor for the intervener the Attorney General of Saskatchewan: Attorney General of Saskatchewan, Regina.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Solicitors for the intervener the Canadian Superior Courts Judges Association: Norton Rose Fulbright Canada, Montréal.

Solicitors for the intervener the Canadian Bar Association: Borden Ladner Gervais, Toronto.

Solicitors for the intervener the Canadian Association of Provincial Court Judges: Goldblatt Partners, Toronto.

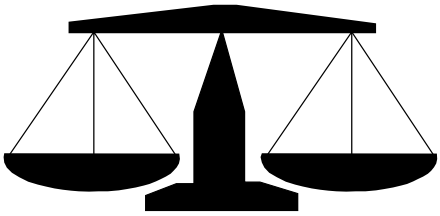
Solicitors for the intervener the Canadian Taxpayers Federation: McCarthy Tétrault, Toronto.

Solicitors for the intervener the Canadian Civil Liberties Association: Paliare Roland Rosenberg Rothstein, Toronto.

JUDICIAL COMPENSATION AND BENEFITS COMMISSION

REPORT

May 31, 2000



SUBMITTED TO THE
MINISTER OF JUSTICE OF CANADA

PREFACE

This is the first report of the Judicial Compensation and Benefits Commission established by 1998 amendments to the *Judges Act* to inquire into the adequacy of salaries and benefits of the federally-appointed judiciary. This new quadrennial process in part results from the Supreme Court of Canada's 1997 decision in *Reference Re Remuneration of Judges* calling for independent compensation commissions. The creation of this Commission also reflects recognition of the need to improve upon the previous process to determine judicial salary and benefits, which several triennial commissions had concluded was substantially inadequate. We undertook our responsibilities knowing that all parties were looking to this new process to produce results.

Our report is forward-looking. Past circumstances informed our deliberations; however, they were not determinative of our recommendations. The conclusions and recommendations in this report are the result of the Commissioners considering many relevant issues, weighing sometimes competing interests and making those choices that we believe are appropriate today and for the remainder of our mandate.

We believe that our recommendations, if fully implemented on a timely basis, will assist in ensuring the continued independence of the Judiciary and the ability to attract outstanding candidates for appointment to the Bench.

Acknowledgements

The Commission wishes to thank Guy Goulard, Commissioner for Federal Judicial Affairs, and the members of his organization, in particular, Marie Burgher, Jacqueline Desjardins, Wayne Osborne, Dave Poulin and Richard Saunders, for their support throughout the last nine months as we conducted our inquiry. As the Commission is now established on a permanent basis, the Office of the Commissioner for Federal Judicial Affairs has facilitated the establishment of offices and assisted in administrative matters since its inception. We would also like to thank the Information Technology staff at the Office of the Commissioner for Federal Judicial Affairs for their technical assistance in maintaining our computer links. Our thanks also to Daniel Poulin and others of LexUM in Montreal for the development and maintenance of our web site.

We also express our appreciation to the Office of the Chief Actuary, in particular Lou Cornelis, and to Raymond Gaudet and André Sauvé, of Morneau Sobeco, for their valuable assistance in actuarial, compensation and costing matters. The Commission also benefited from the constitutional expertise of Professor Patrick Monahan, of Osgoode Hall Law School, who was of great assistance in assessing the implications of the *Charter of Rights and Freedoms* on some of the issues raised during deliberations.

The Commission is most fortunate to have had as its Executive Director, Deborah Lapierre who was seconded to the Commission by Natural Resources Canada. Her previous experience with other boards and inquiries, together with her dedicated commitment to the organization and coordination of the Commission's research and proceedings made it possible to deliver this report within the legislated time limit. Ms Lapierre was ably assisted by Paula Carty, a Masters Degree graduate from Carleton University whose research, word processing and editing skills were relied upon in compiling our report. We are grateful to them both.

Richard Drouin, O.C., Q.C., Chair

Eleanore Cronk, Commissioner

Fred Gorbet, Commissioner

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CHAPTER 1

INTRODUCTION

1.1 The Commission

The Judicial Compensation and Benefits Commission (the "Commission") consists of three members: one nominated by federally-appointed judges (the "Judiciary") and another by the federal Minister of Justice, and a Chairperson chosen by the first two nominees. In September 1999, the Minister of Justice announced the appointments by the Governor in Council of Richard Drouin, O.C., Q.C., as Chair of the Commission, and Eleanore Cronk and Fred Gorbet as Commissioners, for terms ending on August 31, 2003. The next quadrennial inquiry will not commence until September 2003. Accordingly, the planning horizon of this report is four years, ending August 31, 2003. The process contemplates that the Commissioners, once appointed, will function independently of the parties that nominated them. We have conducted ourselves accordingly.

1.2 Background and Context

The legal authority of the Parliament of Canada to set the compensation of the Judiciary flows from Canada's Constitution. Section 100 of the *Constitution Act, 1867* specifically provides that the salaries, allowances and pensions of the judges "*of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the time being paid by Salary*", are to be fixed and provided by the Parliament of Canada. This section of the *Constitution Act, 1867* has remained unchanged through various phases of constitutional reform. The process to facilitate the fixing of such compensation is now provided for in the *Judges Act*, R.S. 1985, c. J-1, as amended, (the "*Judges Act*").

Before 1981, judges' salaries and benefits were reviewed by advisory committees, a process which was generally unsatisfactory to the Judiciary. Judges felt that the process merely amounted to petitioning the government to fulfill its constitutional obligations.

In 1982, section 26 was introduced to the *Judges Act*, establishing the "Triennial Commission". The intention was to create a body which would be independent of the Judiciary and Parliament, and which would present the Minister of Justice with objective and fair recommendations. The goal was to depoliticize the process, thus maintaining judicial independence.

There were five Triennial Commissions[1]. Despite extensive inquiries and research by each of them, many of their recommendations on judicial salaries and benefits, between 1987 and 1993, generally were unimplemented or ignored. The Government of Canada (the "Government") froze judges' salaries and suspended indexation in the mid-1990s. The last adjustment to judges' salaries was made in November 1998 pursuant to recommendations made by the Triennial Commission chaired by David Scott, Q.C. (the "Scott Commission")[2].

In its 1996 report, the Scott Commission described the problem with the triennial commission process by stating:

> *In spite of the thorough recommendation by successive Commissions, Parliament has failed, in a proactive sense, to fix judicial salaries and benefits for many years.*
>
> *Furthermore, successive reports have failed to generate any meaningful response from Government. The whole subject of judicial salaries and benefits has, in spite of best intentions, been politicized.*[3]

The Scott Commission's report and recommendations were tabled with the Minister of Justice in September 1996 and were then referred to the Standing Committee on Justice and Legal Affairs.

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[1] Lang (1983), Guthrie (1987), Courtois (1990), Crawford (1993) and Scott (1996). Dates refer to the year of the Report.
[2] In November 1998, the *Judges Act* was amended to increase judicial salaries by 4.1% effective April 1, 1997 and an additional 4.1% effective April 1, 1998.
[3] Scott (1996), at 8

While the Committee was considering that report, the Supreme Court of Canada ruled in *Reference Re Remuneration of Judges* (the "*PEI Reference Case")*.[4]

The PEI Reference Case

The *PEI Reference Case* involved litigation concerning judicial independence and the remuneration of provincial court judges in a series of cases in Prince Edward Island, Alberta and Manitoba. The common issue in these cases was the validity of provincial legislation purporting to reduce the compensation of provincial court judges as part of wider restraint measures involving a large number of other persons whose compensation was paid from public funds. Although the case arose in the context of provincial court judges, it is clear that the Court's statements pertain equally to federally-appointed judges and, hence, to the Judiciary whose compensation is the subject-matter of this report.

In its decision, the Supreme Court of Canada outlined a number of basic principles concerning the obligations of governments in establishing judicial compensation. Chief Justice Lamer concluded for the majority of the Court that provinces are under a fundamental constitutional obligation to establish judicial compensation commissions and, further, in the absence of prior recourse to such commissions, any change to or freeze in the remuneration of provincial court judges is unlawful.

The Foundational Principle of Judicial Independence

The analysis of Chief Justice Lamer began with an extensive discussion of the basis for judicial independence. He concluded that judicial independence, at root, is an unwritten constitutional principle, which traces its origins to the *Act of Settlement of 1701*. It is an unwritten norm, recognized and affirmed by the preamble to the *Constitution Act, 1867*. Thus, the express provisions of the *Constitution Act, 1867* are not an exhaustive code for the protection of judicial independence in Canada. Rather, the specific provisions of the *Constitution Acts*, 1867 to 1982,

[4] *Reference Re Remuneration of Judges* (1997), 150 D.L.R. (4th) 577 and [1998] 1 S.C.R. 3.

merely "*elaborate that principle in the institutional apparatus which they create or contemplate*" (at 617, para. 83).

The *PEI Reference Case* confirms that there are three core characteristics of judicial independence: security of tenure, financial security and administrative independence. "Financial security" has both an individual and an institutional or collective dimension (at 631-633, paras. 115 to 122). Collective or institutional financial security has three components, all of which flow from the requirement that, to the extent possible, the relationship between judges and the executive branch of government be depoliticized (at 637, para. 131).

The necessity to depoliticize the relationship between judges and the executive branch of government requires, at least, that:

i) no changes to or freezes in judicial remuneration be effected without prior recourse to an independent, effective and objective process for determining judicial remuneration. Thus, *"what judicial independence requires is an independent body, along the lines of the bodies that exist in many provinces and at the federal level to set or recommend the levels of judicial remuneration"* (at 637, para. 133);

ii) under no circumstances should the judiciary, either collectively through representative organizations or individually, engage in negotiations concerning remuneration with the executive or representatives of the legislature. To do so would be to act fundamentally at odds with judicial independence (at 638, para. 134); and

iii) judicial salaries cannot be reduced, in any circumstances, below a minimum level. According to the Court, *"…any reduction to judicial remuneration, including de facto reductions through the erosion of judicial salaries by inflation, cannot take those salaries below a basic minimum level of remuneration which is required for the office of a judge"* (at 638, para. 135).

Only in extraordinary and dire circumstances may governments avoid the requirement of prior recourse to a compensation commission before changing or freezing judges' remuneration. But for these rare and exceptional circumstances, as a matter of law, governments must adhere to the three components of the collective or institutional dimension of financial security identified above. Financial security, in turn, constitutes one of the three basic elements of judicial independence.

The Requirement for a Special Process

The *PEI Reference Case* did not dictate the exact shape and powers of the independent review body mandated by the Court's judgment. It did establish, however, certain of the required content of the norms of "independence, effectiveness and objectivity". Generally, such content includes at least the following:

i) members of compensation commissions must have some kind of security of tenure, which may vary in length;

ii) the appointments to compensation commissions must not be entirely controlled by any one branch of government;

iii) a commission's recommendations concerning judges' compensation must be made "*by reference to objective criteria, not political expediencies*";

iv) it is preferable that the enabling legislation or regulations creating compensation commissions stipulate a non-exhaustive list of relevant factors to guide the commission's deliberations;

v) the process of compensation commissions must be employed before implementation of any changes or freezes to judicial compensation;

vi) to guard against the possibilities that government inaction might lead to a reduction in judges' real salaries because of inflation, compensation commissions must convene at least every three to five years to ensure the adequacy of judges' salaries and benefits over time;

vii) the reports of compensation commissions must have a "*meaningful effect on the determination of judicial salaries*". Thus, while the report of a compensation commission need not be binding, at a minimum the responsible legislative or executive authority must formally respond to the report within a specified time; and

viii) finally, the executive or the legislature, as applicable, must be prepared to justify any decision rejecting one or more of the recommendations in a compensation commission's report, if necessary, in a court of law.

As envisaged by the *PEI Reference Case*, all provinces, as well as Yukon Territory, have established commissions to conduct reviews of the compensation and benefits of provincial and territorial court judges.

In 1998, Parliament enacted extensive amendments to the *Judges Act*. Certain of these amendments were intended specifically to respond to the requirement to assure an "independent, effective and objective" process for the determination of judicial compensation. The mandate of this Commission flows from the new process for review of judges' compensation established by the *Judges Act*, as amended.

1.3 Mandate

Section 26 of the *Judges Act* establishes the Commission. The Commission is permanent, with established offices and an independent structure. Its mandate is clearly set out in subsections 26(1) and (2) of the *Judges Act*:

> *26(1) The Judicial Compensation and Benefits Commission is hereby established to inquire into the adequacy of the salaries and other amounts payable under this Act and into the adequacy of judges' benefits generally.*
>
> *Factors to be considered*
>
> *(1.1) In conducting its inquiry, the Commission shall consider*
>
> *(a) the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government;*
>
> *(b) the role of financial security of the judiciary in ensuring judicial independence;*
>
> *(c) the need to attract outstanding candidates to the judiciary; and*
>
> *(d) any other objective criteria that the Commission considers relevant.*
>
> *26(2) The Commission shall commence an inquiry on September 1, 1999 and on September 1 of every fourth year after 1999, and shall submit a report containing its recommendations to the Minister of Justice of Canada within nine months after the date of commencement.*

Also included in the Commission's mandate under the *Act* is a new referral clause whereby the Minister of Justice can request other reports from the Commission:

> *26(4) In addition to its quadrennial inquiry, the Minister of Justice may at any time refer to the Commission for its inquiry a matter mentioned in subsection (1). The Commission shall submit to that Minister a report containing its recommendations within a period fixed by the Minister after consultation with the Commission.*

Subsections 26(6) and 26(7) of the *Act* outline the responsibilities of the Minister of Justice upon receiving a report from the Commission:

> *26(6) The Minister of Justice shall table a copy of the report in each House of Parliament on any of the first ten days on which that House is sitting after the Minister receives the report.*
>
> *26(7) The Minister of Justice shall respond to a report of the Commission within six months after receiving it.*

1.4 Operating Principles

In our deliberations, we were guided by our mandate as set out in section 26 of the *Judges Act*, described above. In particular, the *Act* requires that we determine whether judicial salaries and benefits are adequate and that we must consider, in arriving at this determination, the four factors set out in subsection 26(1.1).

In conducting our inquiry, we addressed each of these factors in a number of ways. We considered information presented to us in submissions from interested parties and in responses by those parties to our questions of clarification. Our staff undertook research on our behalf. We sought and received expert advice on some important issues. We also spent considerable time discussing among ourselves the issues, the evidence, how it could be interpreted, and our conclusions and recommendations.

It is important in the public interest and for the benefit of all interested persons, including the Judiciary and Government, that our report clearly outline the basis and rationale for our recommendations. For this reason, the specific context for our individual recommendations is discussed in more detail in subsequent chapters of this report. We believe it will also help the reader understand our overall report if we set out some of our basic conclusions and operating

principles to provide insight into how we approached the various issues we were asked to consider, in light of the statutory factors.

Our work was shaped and guided by the Supreme Court of Canada's articulation, in the *PEI Reference Case,* of the constitutional importance of the concept of judicial independence. From the outset we attempted to be alert and responsive to the requirements outlined by the Court for an "independent, effective and objective" special process for determining judicial compensation.

We strongly affirm the importance of an independent judiciary, and we recognize the role that financial security plays as a fundamental component of independence as set out in the second enumerated factor under subsection 26(1.1). We note, in this regard, that the *PEI Reference Case* does not provide explicit guidance as to the appropriate level of remuneration necessary to ensure judicial independence, other than to indicate that:

i) the basic minimum must be at a level that will not lead to perceptions that judges are susceptible to political pressure through economic manipulation (at 658, para. 193); and

ii) the salary level *"shall be adequate, commensurate with the status, dignity and responsibility of their office"* (at 659, para. 194).

We cite these references to illustrate an important point. There is, in our view, no single, objectively demonstrable answer to the question of what is adequate compensation for the Judiciary in light of the factors enumerated in subsection 26(1.1). This is not to say that the issues cannot be approached with objectivity. We believe that they can and we believe that we have done so. But, at the end of the day, judgments are required that necessitate compromise among sometimes competing objectives or interests.

For example, we were required explicitly by the first factor set out in subsection 26(1.1) to consider the economic situation and the financial position of the Government. We received material from the Government indicating that the economy is robust and the financial position is healthy. We concluded from this that there is no fiscal constraint that should impact on the ability of Parliament to ensure that judicial compensation is adequate. But the lack of fiscal constraint, while important and welcome, should not be viewed as an invitation to be profligate

with taxpayers' money. It is a condition that allowed us to recommend without constraint what we felt to be appropriate, but it did not help us determine what that recommendation should be.

Similarly, in interpreting the third factor identified in subsection 26(1.1), relating to recruitment of outstanding candidates to the Judiciary, it is important to note that there is no objective definition of "outstanding". An example of the need to compromise can be illustrated by considering this factor against the background of regional differences across Canada. Generally, all members of the Judiciary are paid the same salary, regardless of where they live and work. But it is a reality that attracting outstanding candidates in major metropolitan areas will require higher compensation than attracting outstanding candidates in rural areas of Canada. The Commission, therefore, considered whether judges should be differentially compensated, on a provincial or regional basis, as had been considered by various Triennial Commissions[5]. For reasons later outlined in this report, we concluded that we should not recommend regional variations in salaries. Nonetheless, we recognized that unless the Government compensates judges in all regions of the country according to the "highest paying" or most lucrative legal services market, which we do not believe to be realistic or responsible, uniform salaries will have a differential impact, in different regions of the country, on the ability to attract outstanding candidates to the Judiciary. After weighing what evidence was available and taking these realities into account, we had to make compromises that, in our view, best serve the broad public interest.

We sought, in accordance with the fourth factor enumerated in subsection 26(1.1), to inform ourselves with regard to a number of objective criteria that we believed relevant to our deliberations. These included, with regard to salaries, comparators that we considered in coming to conclusions about adequacy, particularly in light of the second and third enumerated factors. While we considered a number of comparators, we believe that the unique position of the Judiciary in Canada strongly militates against a formulaic approach to the determination of an

[5] The Lang Commission (1983) considered recommending regional variations in judicial salaries and rejected the concept, "*so as to avoid the creation of different classes within the judiciary*" (at 7). The Lang Commission, however, did recommend that "*the next triennial commission address the issue of regional and cost of living variations for judicial salaries and allowances*" (at 15). The successor Commission, Guthrie (1987), concluded that "*Having considered the matter, we are not disposed to recommend any changes*" (at 10).

adequate salary. With regard to annuities and other benefits, we also sought the advice of experts on practices that are generally followed within the private and public sectors. Once again, we stress that while such information was helpful and informative, it was not determinative.

Finally, we conclude this section by noting that not only are the role and responsibilities of the Judiciary unique in our society, they constantly evolve according to the dynamics and needs of Canadian society. In response to the *Charter of Rights and Freedoms* (the "*Charter*"), and the growing complexity of our social and economic relationships, the Judiciary is playing an increasingly public role in key decisions that affect us all. Moreover, the characteristics of the Judiciary have changed and continue to shift: judges are being appointed at a younger age, and more females are being appointed to the Bench. The caseload of judges has grown, as more cases move to the higher courts for determination. Many of these cases are high profile and controversial. They capture the public interest and become the focus of media attention. Judicial decisions often generate considerable political debate. The reality of these trends must be recognized when considering the salary and benefits that are adequate to secure judicial independence and attract outstanding candidates to the Bench.

1.5 Operating Process

The Commission sought to establish an open and accessible process for all those interested in participating in our inquiry, or in keeping abreast of the Commission's proceedings. A web site was created and any documents that were accessible electronically were posted on the site (see http://www.quadcom.gc.ca). Links were made to other relevant sites and documents. An e-mail address was incorporated to allow for communication directly with the Commission and with the Commission's Executive Director in our Ottawa office.

In November 1999, a notice announcing the Commission's inquiry and process was published in major newspapers across the country. This notice invited anyone who was interested to make written submissions to the Commission and indicated that an oral hearing would be held. A copy of the notice is attached at Appendix 1. In addition, the Chair wrote letters to provincial and

territorial Ministers of Justice and Attorneys General and to law societies informing them of the Commission's inquiry and inviting submissions or comments on issues covered by our mandate.

The Commission received submissions from 20 parties. Submissions from the Canadian Judges Conference and the Canadian Judicial Council (the "Conference and Council"), representing the Judiciary, and from the Government covered a broad range of compensation and benefits matters. Submissions from other parties addressed a more limited range of specific issues. A list of those persons who provided written submissions is set out at Appendix 2.

The Commission held a public hearing on February 14, 2000 in the Government of Canada Conference Centre on Rideau Street in Ottawa. The hearing was continued on March 20, 2000 in the same location. A copy of the notices of hearing and a list of participants can be found at Appendix 3. Copies of the transcripts of these hearings are available for perusal at the Office of the Commission. Access can be arranged through the Executive Director.

CHAPTER 2

JUDICIAL SALARIES

The determination of compensation for judges is grounded in the constitutional imperative that the independence of the judiciary be fostered and maintained. This necessarily means that the evaluation of judicial salaries, and benefits, must begin with recognition of the special role in Canada occupied by judges and the unique responsibilities they bear. As described in the submission of the Government, the role and responsibilities of judges are "*sui generis*", that is, in a category or class of their own.[1] For our purposes, their role and responsibilities require that they be paid a salary and be provided with benefits that are adequate to ensure them a reasonable standard of living, both prior to and after retirement, in relation to their position and duties in our society, in order that they might continue to function impartially and fearlessly in the advancement of the administration of justice.

We detail in this Chapter those considerations underlying our approach to evaluation of the adequacy of current judicial salaries, our assessment of the issues raised before us and those other matters which we regarded as relevant and useful.

2.1 The Legal Framework

The constitutionally-mandated requirement of judicial independence has resulted in special provisions under our law relating to judges. Some of these provisions deny to judges, basic rights and opportunities available generally to most other Canadians. Other provisions establish special entitlements for judges. Some of the indicators of the unique responsibilities and role of judges are embodied in the Constitution itself, and in our constitutional jurisprudence. Others

[1] Submission of the Government dated December 20, 1999, at para. 31.

flow from general statutory provision as, for example, under the *Judges Act*. In combination, they define the legal parameters within which compensation policy for judges is to be determined.

Constitutional Principles

The primary constitutional indicator of the importance of judicial independence is found in section 100 of the *Constitution Act, 1867*. By this provision, Canadian judges are the only persons in Canadian society whose compensation, by constitutional requirement, is to be set by Parliament. As discussed in section 1.2 of Chapter 1, constitutional jurisprudence, established most recently by the *PEI Reference Case*, requires that this be done following a process of review by independent compensation commissions.

Constitutional principles also protect judicial salaries from falling below an acceptable minimum level. As stated by Chief Justice Lamer:

> *…Public confidence in the independence of the judiciary would be undermined if judges were paid at such a low rate that they could be perceived as susceptible to political pressure through economic manipulation, as is witnessed in many countries.*[2]

In *The Queen v. Beauregard*,[3] Chief Justice Dixon quoted with approval the following provision of the Universal Declaration of the Independence of Justice (1983), which affirmed that the salaries of judges:

> *…[must be adequate] commensurate with the status, dignity and responsibility of their office, and be regularly adjusted to account fully for price increases.*[4]

However, as noted by the Department of Justice in its submissions to the Crawford Commission in 1993:

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[2] *Supra*, Chapter 1, fn. 4, at para. 135, and Submission of the Government dated December 20, 1999, at para. 24.
[3] [1986] 2 S.C.R. 56.
[4] *Ibid*., at para. 33.

> *There is no certain way of determining what amount of salary is necessary to provide the degree of financial security required for judicial independence. The amount of salary has always been, and will always be, a judgment call, and the unique responsibility for making that judgment call is placed, by our constitution, on Parliament. …*[5]

Also relevant is the constitutional prohibition against judges negotiating any part of their compensation arrangements, including salaries, with the executive or representatives of the legislature. This prohibition on negotiation is exceptional. No similar restraint applies to any other class of persons in Canada. Except for the process of compensation commissions, it requires that judges refrain from negotiating or lobbying for improvements in their compensation arrangements. Under our traditions and laws, judges do not publicly advocate on such matters. As noted by Chief Justice Lamer in the *PEI Reference Case:*

> *I recognize that the constitutional prohibition against salary negotiations places the judiciary at an inherent disadvantage compared to other persons paid from the public purse, because they cannot lobby the executive and the legislature with respect to their level of remuneration. The point is put very well by Douglas A. Schmeiser and W. Howard McConnell in The Independence of Provincial Court Judges: A Public Trust (Toronto: Canadian Association of Provincial Judges, 1996), at p. 13:*
>
> > *Because of the constitutional convention that judges should not speak out on political matters, judges are at a disadvantage vis-à-vis other groups when making a case to governments for increments in salaries.*
>
> *I have no doubt that this is the case, although to some extent, the inability of judges to engage in negotiations is offset [by the constitutional guarantees requiring an independent compensation commission process]. In particular, the mandatory involvement of an independent commission serves as a substitute for negotiations, because it provides a forum in which members of the judiciary can raise concerns about the level of their remuneration that might have otherwise been advanced at the bargaining table…*[6]

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[5] *1975 Equivalence – An Explanation*, Department of Justice, October 1992, at 7, contained at Appendix 3 to the February 14, 2000 Submission of the Conference and Council.

[6] *Supra*, fn. 2, at para. 189.

While the *PEI Reference Case* makes it clear that this prohibition on negotiation does not preclude expressions of concern or representations by Chief Justices and Chief Judges, and organizations that represent judges, to governments regarding the adequacy of judicial remuneration, nonetheless, the prohibition means that judges do not enjoy a basic right of other Canadians – the right to openly assert the need, and engage in negotiations, for improvements in compensation.

In part to offset the prohibition on negotiation, and the politicization that would otherwise result with respect to judicial compensation, the Judiciary enjoys the benefit of mandatory annual indexation of their salaries, as a matter of law. This entitlement, established by section 25 of the *Judges Act*, is also unique. Since 1981, automatic indexation according to the Industrial Aggregate Index (then known as the Industrial Composite Index) effective each April 1st, has been provided for by statute.[7]

Statutory Provisions

The special position of judges in our society is also reflected in a number of statutory provisions. For example, under our laws:

i) judges are precluded from engaging in any other occupation or business other than their judicial duties;[8] and

ii) entry to the class of persons comprising the Judiciary is confined to lawyers of at least ten years standing at the bar of any province in Canada. This constitutes an entry level eligibility requirement particular to judges.[9]

[7] The Industrial Aggregate Index (the "IAI") is a measure of wages. It is intended to, and in many years does, encompass more than changes in the cost of living as reflected in the consumer price index (the "CPI"). Over the period 1992-1998, the cumulative increase in the IAI was 14.51%, compared to a cumulative increase in the CPI of 10.2%. The IAI, however, does not always exceed the CPI in every year. For example, the increase in the IAI used to index judges' salaries as of April 1, 2000 was only 0.67%, compared to an increase of 1.7% in the CPI over the same period. This was the lowest level for the IAI experienced since 1981.

[8] Section 55 of the *Judges Act* (Canada).

[9] Section 3 of the *Judges Act* (Canada). This provision, of course, is designed to ensure that candidates for appointment to the Bench have achieved the requisite level of experience, judgment and skill, as well as seniority and profile within the legal profession, as to warrant consideration of their candidacy for appointment. In essence, it represents a statutory form of competency threshold.

Other Considerations

All of the constitutional and statutory factors described above contribute to the overall legal framework within which any analysis of the adequacy of judicial salaries must be undertaken. We were mindful of these factors, and this framework, in approaching our task.

Other considerations are also relevant, however, to the assessment of judicial salaries. Foremost among these, arguably, is the fact that the nature of the job required and expected of Canadian judges has undergone significant change over the years. There are increasing, and ever-shifting, demands placed upon the Judiciary. As a result of the introduction of the *Charter*, the growth in litigation in Canada, the complexity of the matters which actually proceed before the courts, and intensified public scrutiny of judicial decisions, the process and requirements of "judging" have become more onerous at both the trial and appellate levels. There is no reason to conclude that this will change during the planning period relevant to our report.

We also recognized the constraints facing judges should they become dissatisfied with working conditions or compensation arrangements. In practical terms, should the morale of members of the Judiciary deteriorate because of such matters following appointment to the Bench, there is no ready forum or remedy, short of resignation by individual judges or litigation, by which the Judiciary may seek to achieve a negotiated resolution of complaints or dissatisfaction. Once again, under our constitutional system, the Judiciary does not speak publicly on such issues. They are limited to seeking redress once every four years, in the process of a compensation commission review. This constitutes a further limitation on the options of judges, in contrast to those available to other Canadians.

Moreover, many concepts and mechanisms that are basic and useful in the setting of compensation policy in the private and public sectors traditionally have not applied, and in some cases cannot apply, to the Judiciary. While this emanates from sound public policy and, in some instances, in consequence of constitutional requirements, it does mean that the potential for utilizing flexible or creative approaches to compensation policy for the Judiciary is constrained. For example:

i) in the private corporate sector, it is common to set compensation policy, including salary levels, for senior managers and executives taking into account and integrating where appropriate some combination of bonus plan arrangements, profit-sharing, gain-sharing, merit awards, long-term cash incentives, stock purchase plans and stock options. Some of these mechanisms can and do apply to lawyers engaged in the practice of law with law firms or corporations. They have no application, however, to the Judiciary;

ii) similarly, resort cannot easily be had to compensation techniques sometimes utilized in the public service. While performance pay, bonus arrangements, "at-risk" or variable pay and recruitment or signing bonuses all potentially play a role in the determination of compensation for senior managers or Order-In-Council appointees within the Government, such concepts are not easily imported into the design of a judicial compensation scheme. In any event, the application of some of these mechanisms to the Judiciary, in our view, would not be in the public interest; and

iii) concepts of promotion and merit pay have no application in the judicial context.

These factors make the evaluation of judicial salaries complex, and the prospects for innovation remote. The Commission believes it is important, therefore, to recognize that both practical constraints and legal requirements define the boundaries for setting judicial compensation policies.

We have also taken into account three other material considerations.

First, as subsequently discussed in this report, the annuity arrangements in place at present for the Judiciary are unique in Canada in many respects. This is so for many important policy and constitutional reasons. As observed by several Triennial Commissions, the value of a judicial annuity constitutes a significant portion of the total compensation available to judges. In our view, the assessment of the adequacy of judicial salaries cannot be undertaken prudently, or fairly, without examination of the total compensation of judges, including pension benefits. Consideration of the value of the annuity benefit available to judges upon retirement is an important, although not determinative, factor in setting salary levels.

Second, in several submissions received by the Commission, it was emphasized for varying purposes that the demographics of the Judiciary have changed significantly such that they have

come to include, over time, the appointment of a greater number of young and female judges. The achievement of greater diversity in the demographic profile of the Bench, a laudable policy objective identified and supported by the Government, Bench and bar over the years, also carries with it compensation consequences. One of these consequences is increased life expectancies of some appointees in comparison to others, as well as greater anticipated tenure of younger appointees on the Bench until eligibility for retirement is achieved, in contrast to the anticipated tenure of colleagues appointed at comparatively older ages. These factors have implications both for the evaluation of judicial salaries and to issues concerning the current pension arrangements for the Judiciary.

Finally, in contrast to both the private and public sectors, retention factors traditionally have not played a material part in the setting of judicial salaries. Historically, few judges resigned their positions prior to eligibility for retirement, save for health or personal reasons. In these times, it would be unwise to assume that retention is not a relevant factor in judicial compensation.

2.2 The Positions of the Parties

At present, puisne judges (excluding puisne judges of the Supreme Court of Canada) are paid a salary of $179,200 per annum, inclusive of indexation as of April 1, 2000, in accordance with section 25 of the *Judges Act*. Also effective April 1, 2000, Chief Justices and Associate Chief Justices of the Superior, Federal and Tax Courts receive a base salary of $196,500, and Justices of the Supreme Court of Canada receive a base salary of $213,300. The April 2000 adjusted salary for the Chief Justice of Canada is $230,200.

On the issue of the current adequacy of these judicial salaries, the principal parties were starkly divided.

The Conference and Council urged that judicial salaries be increased to at least $225,000 per year effective April 1, 2000 and, further, that provision be made to supplement that base salary with further staged increments, in addition to the mandatory annual statutory indexing, for the duration of the work of this Commission as currently constituted and as may be necessary to

reflect any parallel movement in the remuneration of senior Deputy Ministers within the Government.

The request for a $225,000 salary level was premised in part on the proposition that such an increase was warranted to establish a necessary and reasonable relationship between judicial remuneration and that of senior lawyers at the bar from whose ranks judges are traditionally appointed. In addition, it was argued that recent increases in the salaries of senior Deputy Ministers in the Government supported such a salary level. The Conference and Council also pointed out that review of judicial compensation is now undertaken at four-year intervals rather than three year intervals as was the case prior to 1998. Thus, judicial salaries will not be reviewed again until at least the fall of 2003. In contrast, the compensation of senior Deputy Ministers and others within Government will next be reviewed in 2001. Moreover, based on past history, some delay may be anticipated in implementing those salary recommendations of this Commission that are accepted by Parliament. For all of these reasons, the Judiciary argued that it was now time for a "*real and substantive increase*" in the salaries of the Judiciary.

In contrast, the Government submitted that the current level of judicial salaries, coupled with automatic annual adjustments mandated by the statutory indexation provision, reflects an adequate and acceptable level of judicial remuneration. In the alternative, if the Commission concluded that an increase in judicial salaries was necessary based on compensation trends in the federal public service, the maximum increase that could be justified would be 5.7% as of April 1, 2000, inclusive of statutory indexing effective the same date.[10]

The Government submitted that the effect of section 25 of the *Judges Act* has been *"not merely to protect judicial salaries against inflation, but to deliver an increase in salary in real terms"*.[11] In addition, it was submitted that the level of existing judicial salaries fully reflects the recommendations of the Scott Commission (1996), which expressed concern about the erosion of judicial salaries resulting from the freeze on the salaries of judges and other publicly - remunerated officials during the five-year period commencing December 1992 and ending

[10] Submission of the Government dated December 20, 1999, at paras. 25 and 40.
[11] *Ibid.*, at para. 18.

March 31, 1997 pursuant to the *Public Sector Compensation Restraint Act* (Canada).[12] As a result of that statute, annual statutory indexing of judicial salaries was suspended for a five-year period and no other alterations in the level of judicial salaries were made.

The Scott Commission recommended that commencing April 1, 1997, the Government introduce an "*appropriately phased upward adjustment in judicial salaries such as to ensure that the erosion of the salary base caused by the elimination of statutory indexing is effectively corrected*".[13] This recommendation was implemented over two years, with the result that judicial salaries were increased by 4.1% on April 1, 1997 and by an additional 4.1% on April 1, 1998. The Government asserted that these increases were in addition to the restoration of annual indexing adjustments and that they had the effect of restoring judicial salaries to the levels that would have been attained if indexing had not been suspended during the five years of the freeze.[14]

2.3 The Suggested Comparators

The Conference and Council suggested to the Commission that the adequacy of current judicial salaries should be examined with reference to various comparators, namely:

i) the salaries at present of the most senior level of deputy ministers within the Government ("DM-3s");

ii) the incomes of the top one-third of lawyers in the private practice of law in Canada, to the extent measurable by available income tax data; and

iii) the salaries available to judges, including senior judges, in other jurisdictions including England, Australia and New Zealand.

As later discussed, the Government expressed concerns regarding the applicability, and reliability, of such comparators.

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[12] *Ibid.*, at para. 11.
[13] Scott (1996), at 16.
[14] *Supra*, fn. 10, at para. 12.

Because of the special legal and other considerations that establish the framework within which judicial salaries are to be assessed and determined, no suggested comparator to the Judiciary is truly apt. Nonetheless, each suggested comparator informs the overall assessment of the adequacy of judicial salaries. In this context, some comparators are more useful than others.

We concluded that all of the suggested comparators should be included in our considerations but, as earlier noted, a strictly formulaic approach to the determination of an adequate salary level for judges was not desirable or appropriate. Our conclusion in this regard was reinforced by our review of the reports of various Triennial Commissions, each of which considered one or all of the comparators suggested to us by the Conference and Council, and each of which placed greater or lesser weight on them depending upon their view of prevailing circumstances at the time of their respective inquiries. Thus, while one comparator might be apposite during the planning horizon of one compensation commission, another suggested comparator might be more relevant during the inquiry of another, depending upon all of the considerations then relevant. In our view, at this time, no one comparator can or should dominate.

Various Triennial Commissions discussed in their reports the concept of "relationships" between judicial salaries and the salaries of DM-3s or the compensation of senior members of the bar. In some instances, recommendations concerning judicial salaries were based on a suggested "gap" between the salary level of judges and the salary of one or more comparator groups. Thus, all of the Lang (1983), Guthrie (1987), Courtois (1990) and Crawford (1993) Commissions specifically considered the historic relationship between judicial salaries and the salaries of DM-3s, and the status of that relationship at the time of their respective inquiries. Similarly, those Commissions and the Scott Commission (1996) considered the incomes of legal practitioners to be a relevant and useful comparator and the relationship between judicial salaries and the incomes of private practitioners an important factor in formulating recommendations on judicial salaries. In the case of the Scott Commission (1996), as discussed further below, this comparator was regarded as the most significant one for the purposes of that Commission's salary recommendations.

In our view, the criteria now enumerated in subsection 26(1.1) of the *Judges Act* expressly permit consideration of such relationships. The criterion identified in subsection 26(1.1)(c), for example, is directed expressly to the issue of recruitment of suitable candidates for the Bench. Traditionally, most judges in Canada are appointed from the ranks of private legal practitioners. Accordingly, those factors constituting incentives or disincentives to the seeking of judicial office by private legal practitioners are relevant to recruitment of judicial candidates. Compensation differentials are clearly one of the factors influencing the decision by practitioners to seek appointment to the Bench. Similarly, none of the parties before this Commission took issue with the proposition that the compensation of DM-3s could be considered by this Commission, if thought by us to be relevant, under subsection 26(1.1)(d).

Part of our principal mandate under the *Judges Act* is to inquire into the adequacy of the salaries of the Judiciary. "Adequacy" is a relational term. In seeking to determine its meaning in the context of judicial salaries, several questions arise: Adequate for what purpose? Adequate in relation to who, or what? Adequate over what time frame? Against the background of the constitutional principles articulated in the *PEI Reference Case*, we have concluded that the operative meaning of "adequacy", to guide our work, requires us to determine what constitutes a fair and sufficient salary level for the Judiciary taking into account the criteria set out under subsection 26(1.1). What is required in this context is a proper judicial salary level, not a perfect one.

The DM-3 Comparator

The number of DM-3s fluctuates by reason of resignations and promotions.[15] There were 10 Deputy Ministers within Government at the DM-3 level as of late November 1999. As of April 1, 2000 there were 13 incumbent DM-3s.

[15] Responses to Requests Provided by the Government of Canada to the Judicial Compensation and Benefits Commission dated April 19, 2000, at para. 5.

As a result of a report in 1998 by the Strong Committee[16] on Senior Level Retention and Compensation, significant enhancements to the salary levels of DM-3s, among others, were recommended and ultimately accepted by the Government. In summary, the Strong Committee recommended a base salary increase for DM-3s of 19.4% effective April 1, 1998, plus variable at-risk pay. As implemented to date, effective April 1, 1999, the mid-point base salary level for DM-3s was set at $188,250, within an overall salary range of $173,000 to $203,500. Table 2.1 below, reproduced from materials provided to the Commission by the Government,[17] illustrates the increases in the mid-point of the base salary of DM-3s since 1992.

Table 2.1
Mid-Point and Base Salary Ranges: DM-3s

Date	Mid-Point Salary	Base Salary Range
April 1, 1992	$150,750	$136,000 - $165,500
June 1, 1992	$155,300	$140,100 - $170,500 (3% legislated increase effective June 1, 1992)
April 1, 1993	$155,300	$140,100 - $170,500
April 1, 1994	$155,300	$140,100 - $170,500
April 1, 1995	$155,300	$140,100 - $170,500
April 1, 1996	$155,300	$l40,100 - $170,500
April 1, 1997	$155,300	$140,100 - $170,500
April 1, 1998	$188,250	$173,000 - $203,500 (19% increase as a result of Advisory Committee recommendations)
April 1, 1999	$188,250	$173,000 - $203,500

[16] First Report of the Advisory Committee on Senior Level Retention and Compensation, dated January 1998 (the "Strong Committee").
[17] Letter from the Department of Justice, Canada, dated December 9, 1999.

In addition to their base salary level, DM-3s have been entitled since July 1, 1996 to some form of performance, variable or at-risk pay. The Strong Committee recommended a new scheme of variable, at-risk compensation for DM-3s, to replace the previously existing performance pay scheme and to be paid on the basis of performance measured against agreed targets and the achievement of business plans. This variable pay component was regarded by the Strong Committee as an integral part of the total compensation for DM-3s. It is a pensionable component of compensation for these public servants in that it forms part of the compensation against which annual pension accrual entitlements are calculated. Fourteen persons received at-risk pay as DM-3s as of April 1, 1999.

The Strong Committee recommended that at-risk or variable pay for DM-3s up to a maximum of 10% of salary be introduced by April 1, 1999, and that a maximum of 20% of salary be introduced by April 1, 2001 (for performance in fiscal year 2000-2001). Table 2.2 below, illustrates the range of at-risk awards that were made as of April 1, 1999.[18]

Table 2.2
Distribution of 'at-risk' pay for DM-3s (14 eligible)
As of April 1, 1999

Percentage of 'at-risk' pay	Number of DM-3s
Between 0% and 5%	2 (average $4,400)
Between 5.5% and 7%	4 (average $13,200)
Between 7.5% and 10%	8 (average $17,735)

Overall average 'at-risk' pay: $15,800
Overall average 'at-risk' pay as % of average salary: 8.19%

[18] Submission of the Government dated March 31, 2000, at Tab 48.

As appears from Table 2.2, the average at-risk pay effective April 1, 1999 ranged from $4,400 (2 DM-3s) to $17,735 (8 DM-3s). The overall average at-risk pay, as of the same date, was $15,800 or 8.19% of average salary.

The Government argued that the DM-3 comparator was a weak one for the purposes of assessing the adequacy of current judicial salaries and, in any event, that it should not be determinative of our recommendations concerning judges' salaries. It was suggested that the overall increase in the compensation of DM-3s, as recommended by the Strong Committee and accepted by the Government, came about because DM-3s did not have the advantage of automatic annual indexing of their salaries, in contrast to the benefit afforded judges under section 25 of the *Judges Act*. Accordingly, if the DM-3 comparator was to be used by the Commission, it was the Government's position that regard should be had only to the mid-point of the base salary level of DM-3s, namely, to the sum of $188,250, without any regard to at-risk awards. This would result in a 5.7% salary increase for puisne judges[19], inclusive of annual statutory indexing as of April 1, 2000.

Several observations should be made:

i) the Commission does not accept the Government's submission that no regard should be had to the at-risk component of the DM-3 compensation package in comparing judicial salaries with those of DM-3s. Similarly, the Commission does not agree with the implied submission of the Conference and Council, that the proper comparison point is the maximum at-risk award. It is not clear what proportion of at-risk pay is relevant in making the compensation comparison between judges and DM-3s but, in our view, it is not zero, and it is not 100%. We concluded that neither of these approaches is appropriate;

ii) while the relevant proportion, for comparison purposes, of DM-3 at-risk pay cannot be precisely ascertained, one can consider the average of actual at-risk awards, as a percentage of the maximum. Based on the most current information available (that is, the at-risk awards made as of April 1, 1999), this average was 82%. If the 82% average payout effective as of April 1, 1999 is added to the mid-point of the DM-3 base salary range ($188,250), it results in total compensation of $203,686 ($188,250 plus $15,436);

[19] That is, an increase of $10,250 from a 1999 base of $178,000.

iii) based on the information provided to the Commission, it is not possible to ascertain the number of DM-3s who were at the high end of the total salary range as of April 1, 1999. In the interests of maintaining the privacy of the affected individuals, the Commission is unaware of what any individual DM-3 earns, either as base salary or for at-risk pay as of April 1, 1999. What is clear from the available information, however, is that the overall total range for DM-3 compensation as of April 1, 1999 was $173,000 (the lowest end of the base salary range without any at-risk award) to a maximum of $223,850 (the highest end of the base salary range, plus the maximum at-risk award of $20,350);

iv) at the time of finalizing our report, the at-risk awards for DM-3s effective as of April 1, 2000 had not yet been determined. The Strong Committee recommended variable pay for DM-3s up to a maximum potential of 10% of salary for fiscal years 1998-99 and 1999-2000, to reach 20% for fiscal year 2000-2001. The Government informed us that, "*consistent with the recommendations, the maximum available in respect of 1998-99 was 10% and is likely to be 10% for 1999-2000*".[20]

Assuming, therefore, a 10% maximum for at-risk awards in 1999-2000, the total range for DM-3 compensation as of April 1, 2000 would be identical to the range as of April 1, 1999, that is, $173,000 to $223,850; should the at-risk awards again average 82% of maximum, applying the average at-risk award to the mid-point of the base salary range would result in an overall compensation level of $203,686 as of April 1, 2000;

v) should the Government accept the Strong Committee recommendation to increase at-risk awards as of April 1, 2001 (for performance in fiscal year 2000-2001) to a maximum of 20% of salary, the total range for DM-3 compensation as of that date will be increased to $173,000 (the lowest end of the base salary range without any at-risk award) to $244,200 (the highest end of the base salary range, plus the maximum at-risk award of $40,700). If actual at-risk awards are again in the range of 82% of maximum, application of this average to the mid-point of the base salary range would result in an overall compensation level of $219,123 as of April 1, 2001 ($188,250 plus 82% of 20% of salary);

vi) if one were to assume that all DM-3s will receive the maximum 20% at-risk award as of April 1, 2001, the mid-point of the compensation range would be adjusted by 20% to yield a total salary of $225,900 ($188,250 plus $37,650). The request of the Conference and Council before this Commission for a salary level of $225,000 emanates from this calculation; and

[20] Submission of the Government dated January 21, 2000, at para. 16.

vii) the Strong Committee is scheduled to again review compensation for senior executives within the Government, including DM-3s, in 2001. The Commission has taken into consideration the timing of that scheduled compensation review in comparison to the timing of the next required review of judicial compensation and benefits, in the fall of 2003.

Before the Triennial Commissions, much was said about the concept of "1975 equivalence", referring to the historic relationship of rough equivalence between the salaries of judges and those of senior deputy ministers in the federal public service. This concept of the relational aspects of judicial salaries to those of DM-3s, was a significant issue for each Triennial Commission, including the Scott Commission. Both the Guthrie and Scott Commissions (1986 and 1996, respectively) observed that as a result of amendments to the *Judges Act* in 1975, the salary level of Superior Court puisne judges was *"brought to within 2% of the mid-point of the salary range"* of DM-3s. They suggested, however, that thereafter the relationship again deteriorated. By 1989 the level of judges' salaries was said to be $8,200 below 1975 equivalence.[21]

In submissions in 1993 by the Department of Justice to the Crawford Commission, the Department, argued that:

> *Despite the historically lower salaries of judges as compared with senior deputy ministers, the government has indicated to the judges that a rough equivalence between judicial salaries and the midpoint of the DM-3 salary scale would be considered appropriate. Support for this sort of rough parity between judges and top-level public servants is found in comparative figures from other common-law countries that are most like Canada. …*
>
> *1975 was a long time ago, and much has changed in the meantime, not the least of which has been our economy. There seems to be little point in trying to tie judicial salaries to some arbitrary level set so long ago and in very different circumstances. Therefore, the government thinks it would be better to do away with both the concept and the terminology of 1975 equivalence, and instead deal with judicial salary levels on the basis that there should be a rough equivalence to the DM-3 midpoint.*[22]

[21] Lang (1983), at 6; Guthrie (1987), at 8; Courtois (1990), at 10 and see *Supra*, fn. 5, at 3.
[22] *Ibid.*, fn. 5 at 6.

This concept of rough equivalence expressly recognizes that while DM-3s and judges do not perform the same work, there is a basis for approximate remuneration parity.[23]

In this context, the Commission noted the suggestion by the Scott Commission (1996) that there were two contributing factors to erosion in judicial salaries, the first only of which was attributable to the withdrawal of statutory indexing and the second of which was occasioned by the suggested failure of governments to introduce 1975 equivalency.[24] We agree with the suggestion made by the Department of Justice in 1992 that the concept of 1975 equivalence may be less useful today than it once was to earlier compensation commissions. We were concerned, nonetheless, to track the historical relationship between the mid-point salary levels of DM-3s and judges. Table 2.3 below, reproduced from information provided by the Government, tracks the historical salary data of Superior Court Judges and DM-3s at mid-point of salary range, from 1980 to 2000.[25]

Based on Table 2.3, it appears that by 1989 the salaries of Superior Court Judges were $10,850 below the mid-point salary level of DM-3s. A disparity between the salary levels of such judges and DM-3s persisted until 1991 (in reducing amounts). In 1992 the situation was reversed and the judicial salary level became slightly more per annum than the base mid-point salary level of DM-3s. This remained the case for the next four years, while wage restraint measures were in effect. In 1997, as a result of partial implementation in that year of the salary recommendations of the Scott Commission (1996), the judicial salary level became $10,200 higher than the mid-point base salary level of DM-3s. By 1998, when salary levels for DM-3s were adjusted as a result of the Strong Committee recommendations, the base salary level for DM-3s was increased to a mid-point amount of $188,250, the level at which it remains today. After implementation in 1998 of the remaining aspects of the Scott Commission's salary recommendations for judges, a salary gap or differential was again created between the salary level of judges and that of DM-3s, in amounts ranging from $12,450 (1998) to $9,050 (2000).

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[23] *Ibid.*, at 5.
[24] Scott (1996), at 15 to 16.
[25] *Supra*, fn.15, at Appendix 57.

Table 2.3
Historical Salary Data – 1980 to Present

Year	Superior Court Judges	DM-3 – Mid-Point
1980	$70,000	$77,300
1981 (Apr)	$74,900	$86,750
1981 (Nov)	$74,900	$91,750
1982	$80,100	$97,250
1983	$84,900	$102,105
1984	$89,100	$105,675
1985	$105,000	$110,950
1986	$115,000	$110,950
1987	$121,300	$126,500
1988	$127,700	$134,550
1989	$133,800	$144,650
1990	$140,400	$150,750
1991	$147,800	$150,750
1992	$155,800	$155,300
1993	$155,800	$155,300
1994	$155,800	$155,300
1995	$155,800	$155,300
1996	$155,800	$155,300
1997	$165,500	$155,300
1998	$175,800	$188,250
1999	$178,100	$188,250
2000	$179,200	$188,250

Note: The salaries in Table 2.3 are as of April 1 of the year in question. The only exception is for 1981; the first entry is for April 1; the second is for November 1, the date on which executive classifications and salaries were restructured.

To the extent then, that rough equivalency between judicial salaries and the remuneration of DM-3s was the desired outcome, the basic salary levels of these groups have been "out-of-sync" for the last four years. When it is recognized that variable, at-risk pay for DM-3s became substantial in 1998 as a result of the adoption of the recommendations of the Strong Committee, the pay gap between the two groups becomes more pronounced.

We have considered this matter in detail and have examined the various approaches taken by Triennial Commissions, the Judiciary and Government depending upon the timing and circumstances applicable to previous judicial compensation reviews. While we agree that the

DM-3 comparator should not be determinative of our recommendations concerning judicial salaries, in our view, it is an appropriate and useful comparator at this time. More particularly, we have concluded that the important aspect of the DM-3 comparator, for the purposes of our inquiry, is the maintenance of a relationship between judges' salaries and the remuneration of those senior federal public servants whose skills, experience and levels of responsibilities most closely parallel those of the Judiciary. We agree with the substance of the observation by both the Courtois and Scott Commissions (1990 and 1996) that the relationship between the remuneration of DM-3s and judges should be maintained, not as a precise measure of "value" but as a reflection of "*what the marketplace expects to pay individuals of outstanding character and ability, which are attributes shared by deputy ministers and judges*".[26]

This approach is consistent, in our view, with the conclusions reached by successive Triennial Commissions that judicial salaries are not to be addressed *"as though judges were subject to the conditions of service of federal government employees"*[27] because they are *"a distinct group with compensation requirements that set them apart from the public service"*.[28] This proposition is not simply a matter of policy perspective. It has long been recognized in the relevant jurisprudence. As articulated by the House of Lords in 1933:

> *It is we think beyond question that the Judges are not in the position occupied by civil servants. They are appointed to hold particular offices of dignity and exceptional importance. They occupy a vital place in the constitution of this country. They stand equally between the Crown and the Executive, and between the Executive and the subject. They have to discharge the gravest and most responsible duties. It has for two centuries been considered essential that their security and independence should be maintained inviolate.*[29]

More recently, the Supreme Court of Canada in the *PEI Reference Case* unequivocally confirmed that judges are not to be regarded as civil servants for the purposes of compensation policy. As stated by Chief Justice Lamer:

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[26] Scott (1996), at 13; Courtois (1990), at 10.
[27] Lang (1983), at 3.
[28] Guthrie (1987), at 7.
[29] *Ibid.*, at 7.

> *…the fact remains that judges, although they must ultimately be paid from public monies, are not civil servants. Civil servants are part of the executive; judges, by definition, are independent of the executive. The three core characteristics of judicial independence – security of tenure, financial security, and administrative independence – are a reflection of that fundamental distinction, because they provide a range of protections to members of the judiciary to which civil servants are not constitutionally entitled.*[30]

In this context, it is clear that the salaries of judges are not to be set automatically based on the remuneration of public servants. To do so would be to treat judges, indirectly, as part of the executive branch of government. That does not mean, however, that the salaries of judges must be set without any regard to remuneration levels within the senior ranks of the Government, or that they should be permitted to lag materially behind the remuneration available to senior individuals within the Government. To allow this to occur, would be to legitimize a financial gap between the overall remuneration of judges and the remuneration of those within the Government who, historically, have been regarded as possessing the same characteristics of skill, integrity, talent and leadership required of judges.

We have concluded, therefore, as did successive compensation commissions before us, that the remuneration of DM-3s at the time of our inquiry and for the term of our mandate is relevant to our assessment of the adequacy of judicial salaries and, further, that rough equivalency between the overall remuneration of DM-3s and the salary level of judges is both proper and desirable in the public interest.

Incomes of Private Practitioners

The appropriateness and utility of examining the relationship between judicial salaries and the incomes of lawyers in private practice, as earlier noted, was affirmed by various Triennial Commissions. Just as the concept of a relationship between remuneration levels of DM-3s and judges has been found worthy of support, so too has the concept of a relationship between the incomes of above-average lawyers and salaries of judges.

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[30] *Supra*, fn. 2, at 640, para. 143.

The Lang Commission (1983) supported maintenance of a proportionate relationship between the salaries of Superior Court Judges and the professional incomes of senior members of the bar because it is the latter class of persons who, in the public interest, should be attracted to the Bench. It was the conclusion of that Commission that such a proportionate relationship should be maintained *"… while at the same time recognizing that the satisfaction to be derived from public service is both an incentive to judicial office and an incalculable part of judicial compensation"*.[31]

Thirteen years later, the Scott Commission was more strongly of this view. It concluded that the relationship between judicial salaries and the incomes of lawyers in private practice was a "far more significant aspect" of judicial compensation than was the relationship between DM-3s and judges' compensation.[32] The Scott Commission felt that the entitlement of judges to automatic statutory indexing of their salaries was reflective of much more than a statutory device designed merely to prevent erosion of salaries from inflation. Rather, it suggested, the provisions of section 25 of the *Judges Act,* are:

> *… more specifically, a statutory mechanism for ensuring that there will be, to the extent possible, a constant relationship, in terms of degree, between judges' salaries and the incomes of those members of the Bar most suited in experience and ability for appointment to the Bench. The importance of the maintenance of this constant cannot be overstated. It represents, in effect, a social contract between the state and the judiciary. By its statutory terms, the judges, who by acceptance of judicial office close the door, on a permanent basis, to any real prospect of a return to their previous lives at the Bar, can at least be certain that their commitment in accepting a judicial appointment will not result over the years in a less favourable financial situation as between judicial service and practice at the Bar than that which prevailed at the moment of their appointment.*[33]

The Conference and Council strongly urged the Commission, when assessing judicial salaries, to have regard to the available data concerning incomes of lawyers in private practice including those, in particular, within the top third of income earners based on reported income tax data.

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[31] Lang (1983), at 3.
[32] Scott (1996), at 14.
[33] *Ibid*., at 14 to 15.

The Government argued that various difficulties arise when such a comparison is undertaken. These difficulties concern both the availability of income data and issues relating to the appropriate comparator segment of the legal profession. In raising these concerns, however, the Government did not argue that any comparison with the incomes of members of the legal profession was inappropriate or irrelevant.[34]

Other groups also supported consideration by us of the incomes of private practitioners. The Canadian Bar Association ("CBA"), through its Standing Committee on Pensions for Judges' Spouses and Salaries, provided the Commission with both written and oral submissions on the matter of judicial salaries. The CBA expressed concerns that:

> *…judicial salaries are falling farther and farther behind those of senior practitioners, who form the pool from which judges are selected. Except for indexation to reflect inflation, federally appointed judges have not received a salary increase for over a decade. Indexation does not take into account that salaries for senior practitioners, as determined by the market, probably increased more than the cost of living.*
>
> *As a result, the CBA recommends that judges receive a salary increase over and above indexation. To determine the appropriate level of salary, reference should be made to salaries of senior practitioners as well as senior employees in the public service.*[35]

The CBA did not make any submission as to a specific salary level considered by its members to be appropriate or adequate.

While the information available to the Commission did not support, for reasons earlier outlined in this Chapter, the suggestion that the Judiciary has not received "*a salary increase for over a decade*", the available data did indicate that the incomes of senior practitioners in the legal profession are in some instances higher, sometimes materially higher, than the salary level of judges. However, as appears from the discussion below, much depends on regional location and urban versus non-urban factors.

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[34] Submission of the Government dated December 20, 1999, at paras. 27 and 28.
[35] Submission of the Canadian Bar Association dated January 14, 2000, at 4 to 5.

The Commission also had regard to a submission received from John Honsberger, Q.C., an experienced practitioner from Toronto. Mr. Honsberger urged that:

> *The salaries of judges should be increased by at least the increased cost of living and any additional amount as may be necessary to catch up to an appropriate salary level so that judges may maintain a standard of living comparable to what most members of the profession enjoy but with some reduction to represent the value of the pension a judge will receive on retirement.*[36]

It is the view of this Commission that the need to consider the relationship between the incomes of private practitioners and judicial salaries arises in consequence of the mandatory statutory requirement that we consider, as a criterion relevant to the assessment of the adequacy of judicial salaries, "*the need to attract outstanding candidates to the judiciary*". This statutory criterion expressly engages recruitment issues that, in turn, give rise to consideration of those factors that encourage or discourage applications for appointment from outstanding candidates. Income differentials are clearly such a factor.

a) The Importance of Recruitment Issues

The *PEI Reference Case* confirmed that the objective is to recruit to the Bench lawyers of great ability and first class reputation.[37] This principle was subsequently confirmed by statute upon introduction of subsection 26(1.1)(c) of the *Judges Act*, which identifies the type of candidates to be attracted as those who, by ability and experience, may be regarded as "outstanding". This is significant because many lawyers in Canada apply for appointment, but few are chosen. Between 1990 and 1999, for example, 4,209 applications for appointment to the Judiciary were received.[38] This statistic is of limited use, however, because the number of overall applications across Canada does not reflect the number of applications from outstanding candidates. Expressed differently, it is not difficult to encourage 1,000 applications. It is much more difficult to ensure that 1,000 applications from the best applicants are received.

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[36] Letter from John Honsberger, Q.C., dated January 11, 2000, at 2.
[37] *Supra,* fn. 2, at para. 55.
[38] Data provided by the Commissioner for Federal Judicial Affairs to the Commission.

Therefore, the Commission specifically considered the category of applicants comprising those who, following assessment by the involved advisory committees, were ranked as "recommended" or "highly recommended" for consideration for judicial office. This analysis revealed that in the same 10-year period (1990 to 1999), 40% (1,682) of the total number of overall candidates were recommended or highly recommended for consideration for appointment. Based on information provided by the Government, we estimate that approximately 25% were ranked as "highly recommended" for appointment[39]. Overall, 556 candidates were appointed to the Bench.[40]. Even if only the 25% of candidates who were "highly recommended" are considered to be "outstanding", it cannot be said that serious recruitment problems currently exist. Indeed, no party to our inquiry provided evidence of, or suggested, a current recruitment problem.

It is also important to consider the distribution of judicial appointments, in geographic terms, of the 556 persons appointed to the Bench. Information provided to the Commission revealed that in the years 1990 to 1999, of the 556 appointees in Canada, 36.5% were from Ontario, 20.5% were from Quebec, 11.5% were from British Columbia, and 10.4% were from Alberta.[41]

At present, there are 1,014 members of the Judiciary, including 192 judges who have elected to serve as supernumerary judges. As pointed out by Counsel for the Government, no segment of the legal profession has a monopoly on outstanding candidates.[42] Rather, they are drawn from the private bar, provincial and territorial Benches, the academic community and government service. Nonetheless, while it is inappropriate to regard the private bar as the only relevant source of candidates for appointment to the Bench, the data indicate that the overwhelming majority of candidates continues to be drawn from private practice. In the years 1990 to 1999:

i) 73% of appointed judges were drawn from private practice;

ii) 11% of appointed judges were elevated to the Judiciary from a provincial or territorial Bench; and

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[39] Submission of the Government dated March 14, 2000, at Appendix 35.
[40] Data provided by the Commissioner for Federal Judicial Affairs to the Commission.
[41] *Ibid.*
[42] Submission of the Government dated December 20, 1999, at para. 28.

iii) 16% of appointed judges were drawn from government (9%), from the academic community (4%) and from other legal fields (3%).[43]

If those judges elevated from the provincial or territorial Bench are excluded from the assessment, approximately 82% of those appointed to the Bench in this 10-year period were appointed from the private bar. Thus, it clearly represents the primary source of potential candidates for appointment to the Bench. This underscores the importance and relevance of a comparison between the incomes of lawyers in the private bar and judicial salaries.

b) Available Data Concerning Incomes in the Private Bar

A direct comparison between judicial salaries and the incomes of lawyers is difficult given:

i) the unavailability of current reliable income data relating to legal practitioners including, in particular, those in the private bar;

ii) the unavailability of income data of practitioners at the time of their appointment to the Bench;

iii) the difficulty in isolating appropriate comparison points. As queried by Counsel for the Government, are the average or median earnings of lawyers to be considered, or those of only higher income earners, or of the profession as a whole?[44]

iv) that available income data does not distinguish between areas of practice. Thus, to the extent relevant, it is not possible on the information available to us to distinguish the reported incomes of litigation versus non-litigation lawyers at the bar.

Because the comparison is difficult, however, it does not follow that it is irrelevant or impossible.

We had available to us a report prepared by Sack Goldblatt Mitchell on behalf of the Conference and Council concerning the "*Incomes of Canadian Lawyers Based on Revenue Canada Income Tax Data*", dated January 31, 2000 and based on 1997 income tax data (the most current

[43] *Ibid*., at Appendix 10.
[44] *Ibid.*, at para. 27.

available income tax data); a letter dated February 10, 2000 from Hay Management Consultants Limited commenting on the Sack Goldblatt Mitchell report; and detailed submissions by the Conference and Council, and the Government, on the issue. In addition, as described below, the Commission consulted its own experts, Morneau Sobeco, on standard compensation principles and the data provided by the parties. In combination, this formed a sufficient data base to assist us in understanding the current relationship between judicial salaries and the incomes of lawyers in private practice.

The available data make clear that the incomes of private practitioners vary materially by the age and experience of the practitioner, the province or territory in which the lawyer practises, and the geographic location of the practice within each province (that is, whether the lawyer practises in an urban or non-urban setting). The Sack Goldblatt Mitchell report indicates that the average income of the top third by income of those lawyers aged 44 to 56 years who earn more than $50,000 per year, is $342,280.[45] Not unexpectedly, the figures are higher in large metropolitan centres such as Toronto, Calgary and Vancouver. The comparable figure for the top third of lawyers practising in the seven largest census metropolitan areas, as defined by Statistics Canada (the "Largest Metropolitan Areas"), according to the Sack Goldblatt Mitchell report, was $393,881[46], in 1997. The Largest Metropolitan Areas examined were: Toronto, Montreal, Vancouver, Ottawa-Hull, Edmonton, Calgary and Quebec City. The Largest Metropolitan Areas account for 52% of the appointments to the Judiciary made since 1989.[47]

The following is noteworthy concerning this information:

i) the overall data applied to 31,270 self-employed lawyers of all ages in Canada. The data was refined to focus on self-employed lawyers between the ages of 44 to 56 years. We were informed that this age grouping was selected by the Conference and Council because since 1989 approximately 69% of persons appointed to the Judiciary have been in this age grouping;[48]

[45] Report by Sack Goldblatt Mitchell dated January 31, 2000 and entitled "*Incomes of Canadian Lawyers Based on Revenue Canada Income Tax Data*", at 1.
[46] Morneau Sobeco calculate this number to be $399,720.
[47] *Supra,* fn. 45.
[48] The data available to the Commission from the Commissioner for Federal Judicial Affairs indicates that in the last 10 years, the overall average age of appointees to the Bench was 50.

ii) an income exclusion, set at $50,000, was used by the Conference and Council and their experts to exclude potential distortions in the data that might be occasioned by inclusion of lawyers practising law on a part-time basis. They suggested that this was a conservative approach because lawyers practising full-time, among other matters, likely earn far more than $50,000, even if they utilize low billing rates.

Issue was taken in several respects with the appropriateness of a $50,000 income exclusion based on the assumption of part-time employment. It was pointed out to the Commission, for example, that the effect of such an income exclusion was to reduce the number of lawyers covered in the data by almost 48% and, if examined strictly in the 44 to 56 years age grouping, by approximately 39%.

In the Commission's view there may be many explanations, in addition to part-time employment, for income of less than $50,000 by members of the private bar. These include life-style decisions to moderate work commitments, new practices that are not yet fully established, and less successful or profitable practices. In this connection, it is important to recall that lawyers are not eligible for appointment to the Bench for ten years following their call to the bar. It can be expected that income levels for new lawyers, generally, will be lower than for more experienced lawyers and that, absent income-limiting choices by practitioners, income will increase with seniority, experience and increased profile at the bar; and

iii) as a result of application of an income exclusion of $50,000, and the decision to focus on self-employed lawyers between the ages of 44 to 56 years, the number of lawyers to whom the income data applied was reduced from 31,270 to 7,830 (the "Comparator Population");

The Conference and Council suggested, in connection with this income data, that the comparable group of practitioners for the purposes of comparison to judges was the group of lawyers comprising the top third income earners within the Comparator Population, and that the average income of this group was the appropriate comparison point. While this approach recognizes that the majority of judges (as noted, approximately 69%) appointed since 1989 were between the ages of 44 to 56 at the time of their appointment, it also has the effect of targeting an income range with a mid-point at approximately the 83rd percentile within the Comparator Population. In addition, the average income in that range ($342,280) is above the 87th percentile for lawyers in the Comparator Population.

Hay Management Consultants Limited, on behalf of the Government, expressed reservations about targeting an income range with a mid-point at the 83rd percentile, among other matters, indicating that in the private sector "*an aggressive tie in to comparable market data for executives would be the 75th percentile*".[49] The experts engaged by the Commission agreed with this observation.

In light of these issues, the Commission sought additional data regarding the net professional income of lawyers in 1997, broken down in multiples of 5 percentiles, between the 50th and 95th percentiles in the Comparator Population. The purpose was to examine the comparable income figures for practitioners within the group of lawyers thought to be the group at the bar most likely to represent the primary source of outstanding candidates for the Judiciary, while at the same time targeting an income range at the 75th percentile of the Comparator Population. The detailed calculations in this regard are attached at Appendix 4 to this report. They revealed the following incomes for lawyers at the 75th percentile:

Alberta	$283,000
British Columbia	$236,000
Manitoba	$176,000
New Brunswick	$177,000
Newfoundland	$222,000
Nova Scotia	$191,000
Ontario	$260,000
Prince Edward Island	$179,000
Quebec	$209,000
Saskatchewan	$163,000
CANADA	$230,000

In 1997, the year to which this income data pertains, the salary of a federally-appointed puisne judge of the trial and appellate superior courts was $172,000. The comparative data suggested

[49] Letter from Hay Management Consultants Limited to D. Sgayias of the Department of Justice, dated February 10, 2000, at 5.

that a significant gap existed in 1997 between the salary of such judges and the reported incomes of private practitioners at the 75th percentile in the Comparator Population. The gap is higher, lower or eliminated depending upon the geographic location of the practitioner within Canada. The gap is more pronounced in urban areas from which the largest number of appointees to the Bench are drawn. In those centres, the range of incomes for young lawyers is often significantly higher than the salary level of judges. The impact of urbanization on the potential for income in the private bar is clearly demonstrated by the 1997 professional income data available to the Commission. It revealed incomes, at the 75th percentile, of lawyers in the Comparator Population practising in the Largest Metropolitan Areas, as follows:

Toronto	$343,000
Montreal	$248,000
Vancouver	$266,000
Ottawa-Hull	$198,000
Edmonton	$163,000
Calgary	$375,000
Quebec City	$204,000

As appears from these figures, the gap can vary among urban areas even within the same province (as, for example, between Edmonton and Calgary, Alberta). Overall, there is a significant disparity between incomes within the Largest Metropolitan Areas and other areas. The data available to the Commission indicate that the incomes of practitioners in the Comparator Population at the 75th percentile is $284,000 in the Largest Metropolitan Areas. Outside these areas, the figure drops to $158,000. When it is recalled that the current, and historical, approach in Canada to judicial salaries for puisne judges has been the adoption of a flat national salary level, the potential implications of urbanization become more serious.

The Significance of the Judicial Annuity to the Assessment of Salary Levels

For the reasons earlier described in this Report, we also had regard to the value of the judicial annuity in assessing the adequacy of current judicial salaries. We recognized, in both economic and human terms, that the value of future pension entitlements does not assist in the payment of bills due in the present. The pension value, however, is a significant factor to be taken into account in comparing the income position of judges and lawyers in private practice. This is so because lawyers in private practice form the group from whose ranks the majority of judicial candidates are selected. Further, such lawyers generally do not have the benefit of pension arrangements or pension schemes and are obliged to save for their retirement through Registered Retirement Savings Plans ("RRSPs") and from after tax savings on an on-going basis. For some, therefore, it may safely be assumed that the judicial annuity is an important engine driving recruitment. Moreover, the availability of the judicial annuity frees judges from any form of savings plan for retirement, aggressive or otherwise, which lawyers in private practice ignore at their peril.

Therefore, we asked our experts to examine the benefit of the pension with regard to lawyers in private practice, by addressing the following question: what additional salary would a judge require, to purchase the annuity that the judge in fact would receive under current pension arrangements? Expressed differently, were a lawyer in private practice to attempt to save from income an amount sufficient to yield an equivalent pension benefit per annum upon retirement as the current annuity benefit available to judges upon retirement, what amount would the lawyer be required to save per annum?

There is no single answer to these questions, because the calculation depends upon assumptions about the age of retirement of the judge, the gender of the judge, and the economic value of the ability to elect supernumerary status. Our experts made assumptions about these variables that

we believe to be reasonable. Their assumptions and calculations are set out in detail at Appendices 5 and 6 to this report.[50]

Hay Management Consultants Limited, on behalf of the Government, suggested that a 50-year old individual commencing to fund a retirement income of $120,000 per year and planning to retire at age 65, expecting to live to the age of 80, would need to invest approximately $57,500 in after tax income per year (assuming a 5% real rate of return on investment), to generate such a retirement income. Assuming maximum annual RRSP contributions, this would require over $90,000 per year in pre-tax income.

The Commission's experts suggested that the pre-tax estimate of $90,000, in fact, was somewhat conservative. As a general proposition, they estimated that a judge, appointed at age 50 and retiring at age 65, would require a salary approximately 70% higher in order to fund the annuity available to him or her under the current annuity arrangements. A judge retiring at age 70, in contrast, would require a salary approximately 55% higher to fund the annuity to which the judge would be entitled under the current annuity arrangements. In terms of 1997 dollars, an additional salary of $95,000 to $120,000 pre-tax income would be required to fund the judicial annuity if a judge were required to do so, or if a lawyer in private practice sought to fund a similar annuity benefit.

The calculations in Appendix 6 reveal that the base salary of judges in 1997 dollars ($172,000) was slightly in excess of the average income of two-thirds (62%) of the lawyers in the Comparator Population. When the total compensation of judges in 1997 was taken into account, including an attributed value for the judicial annuity, it exceeded the average income of approximately 79% of lawyers in the Comparator Population, regardless of whether retirement for judges was assumed to be at age 65 or age 70.

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[50] Appendix 5 sets out the assumptions used to calculate the values of the annuity. Appendix 6 provides calculations that illustrate the total 1997 earnings of the Judiciary, including an attributed value for the judicial annuity, in comparison to the net reported income of self-employed lawyers in Canada based on 1997 income tax data in each of the 10 provinces in Canada (except Prince Edward Island) and in each of the Largest Metropolitan Areas, as well as on a national basis. To ensure comparability insofar as possible with the methodology reflected in the Sacks Goldblatt Mitchell report, the comparisons in Appendix 6 were restricted to lawyers in the Comparator Population.

As shown in Table 2.4 below, if the comparison is made at the 75th percentile of the Comparator Population, the base salary of judges in 1997 was less than the average income of lawyers at the 75th percentile in all provinces in Canada except Saskatchewan. However, when the total compensation of judges in 1997 is taken into account, including an attributed value for the judicial annuity, it exceeded the average income of private practitioners at the 75th percentile on a Canada-wide basis in all areas, except in Toronto and Calgary[51].

Table 2.4
Estimated Percentage Gaps between the Compensation of Judges and the Incomes of Private Practitioners at the 75th percentile in the Comparator Population, 1997 data

Geographic Area	Income of Private Practitioners at the 75th percentile in the Comparator Population	Percentage Gap Between the Compensation of Judges and Incomes of Lawyers (positive indicates that judges compensation exceeds lawyers income), based upon		
		Judges Salary ($172,000)	Judges Salary adjusted for benefit of judicial annuity, estimated at:	
	$		$267,000	$292,000
CANADA	230,000	-25.2	16.1	27.0
Alberta	283,000	-39.2	- 5.7	3.2
British Columbia	236,000	-27.1	13.1	23.7
Manitoba	176,000	- 2.2	51.7	65.9
New Brunswick	177,000	- 2.8	50.8	65.0
Newfoundland	222,000	-22.5	20.2	31.5
Nova Scotia	191,000	- 9.9	39.8	52.9
Ontario	260,000	-33.8	2.7	12.3
Prince Edward Island	179,000	- 3.9	49.2	63.1
Quebec	209,000	-17.7	27.8	39.7
Saskatchewan	163,000	5.5	63.8	79.1
LARGEST METROPOLITAN AREAS	$			
Toronto	343,000	- 49.8	-22.2	-14.9
Montreal	248,000	-30.6	8.7	17.7
Vancouver	266,000	-35.3	0.4	9.8
Ottawa-Hull	198,000	-13.1	34.8	47.4
Edmonton	163,000	5.5	63.8	79.1
Calgary	375,000	-54.1	-28.8	-22.1
Quebec City	204,000	-15.7	30.9	43.1

[51] As indicated in Table 2.4, at the level of $267,000 for total judicial compensation, judges' compensation is also less than the overall average income of practitioners in the Province of Alberta.

When this data is reviewed in the context of urban versus non-urban settings, it becomes clear that profound disparities exist between the total compensation of judges (including an attributed value for the judicial annuity) and the incomes of lawyers in the Comparator Population, depending upon geographic location. What is critical to this analysis is the impact of regionalization and urbanization within various regions.

It is apparent, therefore, that use of a uniform national salary scale for the Judiciary fails to take into account pronounced regional disparities in the income of those practitioners considered, at least by the Judiciary, to form the group of lawyers most likely to generate outstanding candidates for judicial appointment.

The Commission therefore considered whether some compensation arrangement should be recommended which specifically took into account and responded to the financial disparities created by regionalization and urbanization. One of the most obvious ways to address this issue would be to recommend a salary differential between members of the Judiciary serving in urban, versus non-urban settings. Other creative ways may also be available to compensate judges serving in urban centres without introducing a base salary differential.

In considering this matter, we noted the observation of the Lang Commission (1983) which concluded that the implications of regionalization should be considered by successor commissions.[52] We were conscious, however, of the fact that no party to our inquiry recommended the creation of a salary differential between members of the Judiciary based on the geographic location of residence of the judge. Indeed, both the Government, and the Conference and Council indicated during the Commission's public hearings that they did not support such a differential[53]. We were also concerned that creation of such a differential, or the adoption of other differentiating income mechanisms, could have the practical effect of creating many different classes of judges at the same level within the Judiciary, in fact or in perception. In our view, this would not be in the public interest or in the interests of the administration of justice cherished in this country.

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[52] Lang (1983), at 7.
[53] Transcript of the February 14, 2000 Public Hearing, Vol. II, at 232 to 237.

While it may be that introduction of some differentiating income mechanism will be warranted in the future, so as to take into account directly the negative financial impact of regionalization and, in particular, urbanization, for the reasons indicated, we have decided not to recommend such an approach at this time. While we are mindful of the income disparities created by regionalization, demonstrated by the Sack Goldblatt Mitchell report and the additional income data provided to the Commission and presented at Appendix 6, we do not think it responsible to suggest that the salary level of the Judiciary should be set so as to match the income of the highest income earning lawyers in the largest urban centres in Canada. What is required, in our view, is the striking of an appropriate balance in order to ensure that the judicial salary level is sufficient to continue to attract outstanding candidates to the Bench, including outstanding candidates from the most lucrative of legal services markets in Canada, and that current and future judges serving in urban areas receive a fair and sufficient salary.

We therefore concluded that the assessment of the adequacy of judicial salaries in relation to the incomes of private practitioners must take into account the following:

i) the total compensation of judges includes a significant pension annuity that has substantial value when a comparison of judicial compensation to the income of private practitioners is undertaken;

ii) continued use of a uniform national salary scale for puisne judges will have an adverse differential impact in different regions of the country and, therefore, potentially on the ability to attract outstanding candidates to the Judiciary in some areas of the country; and

iii) while judicial salaries should not be set according to the most lucrative legal services market, they must be set at a level which will not have a chilling effect on recruitment by serving as a disincentive to outstanding candidates in the Largest Metropolitan Areas, including those urban centres in which lawyers in private practice realize the highest incomes. They must also be set at a level that does not result in unfairness to those current and future judges residing in larger urban areas.

Pension Benefits of DM-3s

As noted, we believe that the value of the judicial annuity is a significant and relevant factor to be considered in assessing the adequacy of judicial compensation in comparison to the incomes of lawyers in private practice. It is clear to us that this comparison is both necessary and useful because the incomes of lawyers in private practice affect recruitment among the class of persons from whom most judges are drawn.

It is less clear that it is appropriate to have regard to the comparative positions of DM-3s and judges in relation to annuity benefits. We recognize that there will be differing views on this issue. We thought it important to at least be aware of the facts concerning the value of the pension benefit available to DM-3s.

We therefore requested the experts engaged by the Commission to determine the additional salary that would be required, as a percentage of pay, to accumulate in after-tax savings funds necessary to provide a retirement income equivalent to the difference between the judicial annuity and the DM-3 pension (and special retiring allowance, where applicable). The additional value of a judicial annuity, compared with a DM-3 pension, increases with the age of appointment of the judge and the DM-3. Later ages of appointment, and shorter terms of service, provide substantial pension benefits to judges compared to pension benefits available to DM-3s. For example, if a judge appointed at age 50 were required to purchase the pension benefits to which he or she is entitled under the current pension regime, over and above those currently available to a DM-3 appointed at the same age, the judge would require a salary approximately 25% higher than that paid to the DM-3 (assuming a salary of $200,000 in the year 2000). If one assumes that the judge was appointed at age 40, however, and retires at age 65 after 25 years service, only about 2% additional salary would be required for the judge to purchase the additional pension benefits received, over and above those currently available to a DM-3 who serves for a similar period. On the same assumptions, if the judge retires at 70 years of age, no additional salary would be required. Particulars of the calculations carried out by the Commission's experts in this regard, and the assumptions underlying them, are set out at Appendix 5 to this report.

Judges' Salaries in Other Jurisdictions

The Commission was also requested by the Conference and Council to take into account the current salary levels applicable to judges in other jurisdictions. We were informed that effective April 1, 1999, the salary of an English High Court Judge is approximately $309,500 (Cdn) and that Circuit Judges in England now receive the equivalent of approximately $232,000 (Cdn). Moreover, District Judges in England, who have a more limited jurisdiction than do members of the Canadian Judiciary, currently receive a salary of approximately $186,000 (Cdn). The Commission was also provided with some data concerning judicial salary levels in Australia, New Zealand and at the Federal Circuit Court level in the United States.

In every instance made known to us, the salary level of judges in other jurisdictions exceeds the current salary, sometimes significantly, of the Canadian Judiciary. Care must be taken, however, not to assess these figures out of context. The utility and reliability of comparisons between judicial salaries in other jurisdictions and those in this country are questionable on the basis of the information now available to us. This is so, in our view, because of variations between economic and social conditions in Canada and the other identified jurisdictions, fluctuating exchange rates, significantly different income tax structures, differing costs of living and the absence of information concerning the retirement benefits of judges in the other identified jurisdictions. Without further, and more detailed, information regarding the process for setting judicial salaries in other jurisdictions, the nature and extent of the responsibilities of the judges in those jurisdictions suggested to be comparable to Canada, and the overall total compensation scheme applicable to judges in the other identified jurisdictions, we are unable to place significant reliance on data concerning judges' salaries in other jurisdictions.

2.4 Recommendations Concerning Salaries for Puisne Judges

We have attempted in our recommendations to be fair both to the Judiciary and taxpayers. We believe that our recommendations for judicial salaries are in the public interest and strike the appropriate balance.

Recommendation 1

The Commission recommends that the salary of puisne judges be established as follows:

Effective April 1, 2000: $198,000, inclusive of statutory indexing effective that date;

Effective April 1, 2001: $200,000, plus statutory indexing effective that date;

Effective April 1, 2002 and 2003, respectively: the salary of puisne judges should be increased by an additional $2,000 in each year, plus statutory indexing effective on each of those dates.

2.5 Salary Differentials for Trial and Appellate Judges

The appellate judges of six Courts of Appeal in Canada (Alberta, Saskatchewan, Manitoba, Ontario, Quebec and New Brunswick) urged the Commission to recommend a salary differential between appellate and trial court judges. They requested a recommendation that the salaries for federally-appointed appellate court judges be fixed at that amount which is the mid-point between the salaries of puisne judges of the trial court and the salaries of puisne judges of the Supreme Court of Canada. They also requested that we recommend that the salaries of the Chief Justices of the appellate courts continue to be set at an amount that represents the same approximate percentage by which the salaries of those Chief Justices now exceed the salaries of judges of their respective courts, that is, approximately 10%.

The Commission received both a written submission on behalf of the appellate judges and an oral presentation by Mr. Justice J. Michel Robert of the Quebec Court of Appeal supporting salary differential recommendations. The Commission also received a written submission from Mr. Justice Ronald L. Berger of the Court of Appeal for Alberta, submitted in his individual capacity as a puisne judge of that Court, opposing any such salary differential. The Conference and Council took no position on the request for a salary differential between appellate and trial court judges.

In the written submissions delivered on behalf of the various appellate courts and in the oral presentation of Mr. Justice Robert, a number of significant factors were outlined in support of the proposal for differential salaries between trial and appellate court judges. Any summary of those factors in this report would not do justice to the full reasoning identified by the requesting appellate courts. Briefly, however, the main arguments advanced in support of differential salaries were as follows:

i) when regard is had to the hierarchical organization of the Canadian judicial system, it is clear that salary differentials already exist for all levels of courts, save that no increased salary is paid to judges in the appellate courts. For example, salary differentials now exist between judges on the Supreme Court of Canada and other courts; between judges on the trial courts in each province and provincial court judges and masters in each province and territory; and between justices of the peace and commissioners, or their equivalents, and judges at various levels in all provinces and territories. Thus, it might be said that salary differentials are currently the norm in Canada, with one prominent exception, namely, the absence of a differential between the salaries of trial and appellate court judges;

ii) other common law countries, including the United Kingdom, Australia, New Zealand, and the United States provide for salary differentials between their trial and appellate courts;

iii) the responsibilities and obligations imposed on appellate courts in Canada are extensive. The appellate courts in the provinces and territories, in practical terms, are courts of last resort for the overwhelming majority of cases. This is reflected in the fact that more than 98% of the cases in some provinces never reach the Supreme Court of Canada. These facts underscore the importance of the jurisprudential development role of the appellate courts in the provinces and the territories. In this context, it may be argued that a salary differential between trial and appellate courts is as justified as the current salary differential between appellate courts and the Supreme Court of Canada;

iv) the costs of implementing a salary differential for trial and appellate judges would not be excessive having regard to the relatively limited number of appellate judges (138); and

v) finally, the absence of a salary differential in Canada between trial and appellate court judges may be characterized as an historical anachronism arising from an era in history pre-dating the creation of separate courts of appeal. The reality of the current court structure in Canada, it was argued,

> necessitates bringing compensation policy for trial and appellate court judges in this country into line with those of other common law countries and, as well, with the contemporary reality of our court system.

The Commissioners regarded many of these arguments as compelling. We were concerned, however, with the opposition to such a salary differential advanced both by the Government and by Mr. Justice Berger of the Court of Appeal for Alberta. We also noted that some appellate courts did not join in the request for a salary differential. Mr. Justice Berger made it clear in his written submission that his remarks to the Commission were made on his own behalf only. He argued that:

i) the absence of hierarchical distinctions among federally-appointed judges strengthens collegiality and fosters mutual respect. This traditional legal culture, he suggested, promotes constructive and useful interaction among members of both levels of court. In his view, the adoption of a salary differential between trial and appellate court judges would give rise to a "*very real risk of destroying the goodwill, collegiality and interaction that we have worked so hard to achieve*"; (at 2)

ii) some trial judges sit from time to time with courts of appeal. A pay differential among judges performing the same judicial function, Mr. Justice Berger suggested, would be both undesirable and potentially vulnerable to constitutional challenge. The alternative solution, of paying those trial judges who sit with appellate courts a special *per diem* or *ad hoc* pay amount, would have the effect of creating two classes of judges performing the same functions; and

iii) members of appellate courts sit as a group thereby sharing collective responsibility for the outcome of cases argued before them and diffusing the workload and responsibilities within the group. This contrasts to the daily tasks of individual trial judges who bear their decision-making responsibilities alone.

The Government argued that the Commission should not recommend a salary differential for trial and appellate judges absent evidence that the work of appellate judges is more onerous or of greater value than that of trial judges. This, it was submitted, would require an objective and principled assessment of the responsibilities of both appellate and trial judges. Moreover, the Government suggested that recommendations for such a salary differential should not be made without consultation with affected provinces. The Government maintained that a salary

differential could have implications for the structure of the system of courts within the provinces, giving rise to constitutional issues under the *Constitution Act, 1867*. This is so, it was suggested, because legislative responsibility for the structure of the system of courts within Canada rests with the provinces.

We recognized the merits of the arguments made by various parties on this issue. The proposal for a salary differential between trial and appellate court judges is of significant importance and far-reaching implication having regard to the traditions of the Canadian judicial system and the historical construct of our court system. We concluded that any decision on the matter necessitates an in-depth review and evaluation of more extensive information than is currently available to us. Such additional information, we suggest, might usefully include data concerning the current workloads and responsibilities of trial and appellate courts across the country, the history of salary differentials in other comparable jurisdictions, and consideration of potential constitutional issues identified by various of the parties. We would be prepared to consider this matter in further detail, should it be made the subject of a referral to us pursuant to the *Judges Act* (Canada) within the term of our mandate.

2.6 Salary Levels for Other Judges

For many years a relatively constant differential has been maintained between the salaries of puisne judges and Chief Justices/Associate Chief Justices. No party before the Commission suggested that this differential should be altered. Chief Justice Lamer, on behalf of the Canadian Judicial Council, requested that the Commission recommend continuation of approximately a 10% differential between the salaries of puisne judges and the salaries of their Chief Justices and Associate Chief Justices. The Commission sees no reason to alter this well-established relationship.

Recommendation 2

The Commission recommends that the salaries of the Justices of the Supreme Court of Canada, and the Chief Justices and Associate Chief Justices should be set, as of April 1, 2000 and inclusive of statutory indexing effective that date, at the following levels:

Supreme Court of Canada:	
Chief Justice of Canada	**$254,500**
Justices	**$235,700**
Federal Court and Tax Court:	
Chief Justices	**$217,100**
Associate Chief Justices	**$217,100**
Superior and Supreme Courts and Courts of Queen's Bench:	
Chief Justices	**$217,100**
Associate Chief Justices	**$217,100**

As of April 1 in each of 2001, 2002 and 2003, these salaries should be adjusted to maintain the same proportionate relationship with the salary of puisne judges established as of April 1, 2000.

CHAPTER 3

OTHER ALLOWANCES

Under section 27 of the *Judges Act* provision is made for various annual allowances to judges. These allowances are referred to as "Incidental Allowances", "Northern Allowances" and "Representational Allowances".

Incidental Allowances cover such things as the cost of repair and replacement of court attire, the purchase of law books and periodicals, memberships in legal and judicial organizations, the purchase of computers and other assorted expenses associated with the position. The purchase of art, furniture and rugs, hospitality costs, and expenses relating to spouses and to office personnel are not covered.

Northern Allowances are paid to judges working in the northern communities. They are intended to provide compensation for the higher cost of living in those locations.

Representational Allowances cover travel and other expenses actually incurred by a judge or the spouse of a judge in discharging the special extra-judicial obligations and responsibilities that are required of their position. Representational Allowances, like Incidental Allowances, cover only those expenses not covered elsewhere under the *Act.*

3.1 Incidental Allowances

Subsection 27(1) of the *Judges Act* provides that the Judiciary are entitled to be reimbursed up to $2,500 each year for "*reasonable incidental expenditures that the fit and proper execution of the office of judge may require, to the extent that the judge has actually incurred the expenditures*

and is not entitled to be reimbursed therefor under any other provision of [the Judges Act]". They have been set at the same level since 1989.

Several parties in their submissions to the Commission indicated that the level of Incidental Allowances was no longer adequate and requested that it be adjusted to reflect the true cost of expenditures. The Conference and Council cited, as examples, the increased cost of law books and the growing need for computers and information on CD-ROM. Increases to levels between $3,200 and $5,000 were suggested. It was also initially requested that Incidental Allowances should be indexed, a request that was opposed by the Government. The issue became moot, however, because at the public hearing on February 14, 2000 the Conference and Council withdrew the request for indexing of Incidental Allowances.

The Commission agrees that Incidental Allowances should be adjusted upward to better reflect the cost of goods in today's marketplace.

Recommendation 3

> **The Commission recommends that Incidental Allowances be adjusted to a level of $5,000 per year effective as of April 1, 2000.**

3.2 Northern Allowances

Under subsection 27(2) of the *Judges Act*, judges in the northern territories are entitled, in addition to Incidental Allowances, to a yearly allowance of $6,000 as compensation for the higher cost of living in the northern communities.

Seven judges currently receive Northern Allowances. The amount of the Northern Allowances was last adjusted in 1989.

The Conference and Council, in their submissions, requested an increase to between $16,000 and $20,000 citing the allowances paid to public servants under the Treasury Board's Isolated Posts Directive (the "IPD") as a comparator. The IPD provides for an environmental allowance

and adjustments for cost of living and fuel and utility differentials at site specific locations in the territories and in the provinces.

The Government submitted that the IPD was not a good comparator, and argued that the environmental allowance provided for under the IPD is used for recruitment and retention purposes and should not apply to judges. The Government did note that the cost of living is higher in the territories, particularly in Nunavut, and that the Northern Allowances should be reviewed. It asked for the Commission's advice on the scope, structure and amount of these Northern Allowances.

Northern Allowances under the IPD vary between locations. Judges qualifying for Northern Allowances reside in Whitehorse, Yellowknife and Iqaluit. Using the IPD, allowances of $5,123, $9,161 and $15,356, including the environmental allowance, respectively, would apply. If the environmental allowance component is excluded, as urged by the Government, and only the cost of living adjustment is considered, the Northern Allowances would be $3,088, $5,338 and $10,108, respectively.

In our view there are sound reasons to maintain the traditional approach of having a uniform level of Northern Allowances. We looked at the numbers provided for under the IPD, in particular those for Iqaluit, which range from $10,108 to $15,356. We decided that $12,000 was an appropriate Northern Allowance for all three locations.

Recommendation 4

> **The Commission recommends that Northern Allowances be adjusted to a level of $12,000 per year effective as of April 1, 2000.**

3.3 Representational Allowances

Under subsection 27(6) of the *Judges Act*, the Chief Justice of Canada, puisne judges of the Supreme Court of Canada, Chief Justices of the Federal Court and the Chief Justices of each of

the provinces, other specified Chief Justices and Judges, and the Chief Judge and Senior Judges of the northern territories are entitled to be paid Representational Allowances.

The maximum yearly amounts currently allowed for Representational Allowances are listed below.

Chief Justice of Canada	$10,000
Chief Justices of the Federal Court of Canada and the Chief Justice of each province	$ 7,000
Supreme Court of Canada Puisne Judges, Trial Chief Justices, Other Designated Chief Justices and Senior Judges	$ 5,000

The amount of these Representational Allowances has not been changed since 1985. The Supreme Court of Canada and the Canadian Judicial Council (the "Council") made submissions to the Commission requesting increases in the maximum yearly limits. The Courtois Commission (1990) recommended that the levels be increased to $15,000, $10,000 and $8,000, respectively. Bill C-50, which was introduced in December 1991, contained the increases recommended by the Courtois Commission. However, Bill C-50 died on the Order Paper. Two years later, the Crawford Commission (1993) concluded that the recommendations of the Courtois Commission were still adequate and endorsed the same levels. No Bill was introduced to implement these recommendations.

Both the Supreme Court of Canada and Council suggested that, after 15 years, the maximum level for these Representational Allowances is no longer adequate and that an increase is necessary to cover the increasing demands on judges to participate in activities both inside and outside of Canada. Both of these parties requested that the Representational Allowances be indexed annually and suggested that they be increased to $22,500 for the Chief Justice of Canada, $15,000 for Chief Justices of the Federal Court and provinces, and $12,000 for other eligible judges. Submissions were based on increasing either the current levels, or the levels

recommended by the Courtois Commission, according to various indexation measures.

The Government's submission noted that automatic indexation of allowances, generally, was not necessary, stating that "*while judicial independence may require indexing protection to prevent erosion of judicial salaries by inflation, the same cannot be said for allowances*"[1]. The Government maintained that this was particularly true for Representational Allowances and that a review of them on a quadrennial basis was sufficient.

We agree that the maximum level for Representational Allowances should be increased to reflect the increase in the cost of living over the past 15 years. We also agree with the Government that the Commission should review the amount of the Representational Allowances every four years.

We indexed the Courtois Commission's recommendations, as if implemented in 1990, to 1999 using both the IAI index and the CPI index to determine the range in which those recommendations would be today. We believe that the resulting levels are a valid basis for establishing current Representational Allowances.

Recommendation 5

The Commission recommends that, effective as of April 1, 2000, Representational Allowances be set as follows:

Chief Justice of Canada	**$18,750**
Chief Justices of the Federal Court of Canada and the Chief Justice of each province	**$ 12,500**
Supreme Court of Canada Puisne Judges, Trial Chief Justices, Other Designated Chief Justices and Senior Judges	**$ 10,000**

[1] Submission of the Government of Canada dated January 21, 2000, at 9, para. 39.

CHAPTER 4

JUDICIAL ANNUITIES

As we noted earlier in this report, the pension arrangements to which members of the Judiciary are entitled are an integral part of their total compensation and a critically important element in attracting outstanding candidates to serve as judges. They are also extraordinary, if not unique, in the sense that no other pension arrangements in Canadian society are structured in the way that judicial annuities are structured.

In this Chapter, we make substantial recommendations that will change the nature of the judicial annuity arrangements. It is important to understand the context in which we are putting these recommendations forward. Therefore, we begin with a brief historical review of how the judges' annuity scheme has evolved to its present state, and a summary of the current regime, noting the major points that differentiate it from other, more broadly representative, retirement income schemes.

4.1 Evolution of Annuity Arrangements[1]

Members of the Judiciary are entitled to a pension by virtue of Section 100 of the *Constitution Act, 1867*. They are the only group in society that is constitutionally entitled to such a benefit.

From the time of Confederation until 1919, federally appointed judges were entitled to retire voluntarily after 15 years of service with an annuity equal to 2/3 of their salary ("a 2/3 annuity"). There were no mandatory retirement provisions and judges could choose to work, at full salary, for as long as they lived. From 1903-1919, provision existed for judges to retire voluntarily at

[1] This section draws largely on the historical review contained in the Submission of the Conference and Council dated December 20, 1999, at 3-7 to 3-14.

full salary upon reaching age 75 with 20 years of service, or age 70 with 25 years of service, or any age with 30 years of service.[2] Judges made no contributions toward the cost of these retirement income arrangements.

In 1919, Parliament converted the right to retire voluntarily after 15 years of service with a 2/3 annuity to a benefit, available only when the Governor-in-Council decided that a given retirement would be "in the public interest". Parliament also eliminated the right to retire on full salary for future appointees. As a result, judges had no automatic retirement income rights, although they continued to have the right to lifetime tenure with full salary. These arrangements continued until 1927.

Over the period from 1927 to 1960, a number of changes were made that, in concert, removed the right of lifetime tenure by introducing mandatory retirement concepts. Mandatory retirement at age 75 for justices of the Supreme Court and the Exchequer Court was introduced in 1927 and compulsory retirement was accompanied by an annuity of 2/3 of salary. In 1960, a constitutional amendment imposed mandatory retirement provisions for all Superior Court judges at age 75 and related amendments to the *Judges Act* provided a 2/3 annuity for all judges on retirement. From 1960 forward, a judge was required to retire on a 2/3 annuity at 75 years of age, and was entitled to retire voluntarily with a 2/3 annuity if he or she had attained the age of 70 and had served at least 15 years on the Bench. The annuities were still non-contributory.

The next change came when Parliament introduced the concept of supernumerary judges. Supernumerary judges are judges that have reached eligibility for retirement, but elect to continue to work on a half-time basis for full salary. In 1971, judges could elect supernumerary status at age 70 with 10 years of service. In 1973, election of supernumerary status was extended to judges of 65 years of age with a minimum of 15 years of service. Judges eligible for retirement could elect supernumerary status for up to 10 years. The introduction of supernumerary judges helped deal with a serious backlog of cases at the time by opening up

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[2] Friedland, Martin L., *A Place Apart: Judicial Independence and Accountability in Canada,* Canadian Judicial Council, Ottawa: 1995, p. 67.

additional positions for the appointment of new judges, while retaining the expertise of highly experienced judges on a part-time basis.

In 1975, judges' annuities were made contributory. Judges appointed before February 17, 1975 were required to contribute 1.5% of salary annually, which at the time was said to be on account of improvements to survivors' benefits that were then introduced. Judges appointed after February 17, 1975 were required to contribute 7% of salary, which included 1% for the indexation of retirement income to inflation. This decision of Parliament was very controversial, both because it broke the tradition of non-contributory pensions and because, by grandfathering certain judges, it created a situation where judges who were doing exactly the same work were compensated differentially (after contributions) depending upon the date of their appointment. The decision was the subject of consideration by the Dorfman Commission (1978) and by a special Advisory Committee set up to consider judicial annuities that was chaired by Jean deGrandpre and reported in 1981. The decision was also appealed to and upheld by the Supreme Court of Canada.[3]

Two further changes affected judicial annuities during the 1990s.

In 1992, Parliament revised the framework that governed tax assistance available for retirement savings. In essence, the changes set a maximum value of tax assistance for individuals regardless of whether they were accumulating retirement income through registered pension plans or RRSPs. As a result of these changes, judges -- who had previously been able to contribute to individual RRSPs to augment their judicial annuities -- were no longer able to do so. This decision was appealed unsuccessfully to the Federal Court of Appeal. Our understanding is that leave to appeal to the Supreme Court is currently being sought.[4]

In 1998, in response to recommendations by the Crawford (1993) and Scott (1996) Commissions, Parliament amended the *Judges Act* to allow for voluntary retirement with an annuity equal to 2/3 of salary under what is known as a "modified Rule of 80". That is, with a

[3] *The Queen v. Beauregard,* [1986] 2 S.C.R. 56
[4] *Trussler v. R.,* [1999] 3 C.T.C. 580.

minimum of 15 years of service, a judge can now retire with a 2/3 annuity when age plus years of service total 80.

4.2 Current Situation

The main characteristics of the current annuity scheme for judges are the following:

i) the maximum annuity that can be received is a 2/3 annuity calculated at the date of actual retirement;

ii) the plan is contributory. Virtually all judges now contribute 7% per annum, 1 percentage point of which is on account of post-retirement indexation. Contributions are fully deductible under the *Income Tax Act* and judges are entitled to RRSP contributions of only $1,000 per year while they are contributing to their annuity scheme. Judges make contributions until they actually retire and begin drawing an annuity, even though they may become eligible to retire at an earlier date;

iii) a judge is eligible to retire, with a 2/3 annuity, in the following circumstances:

   a) after serving 15 years in office, with a combined age and years of service that total 80;

   b) after serving at least 15 years, where in the opinion of the Governor-in-Council, the resignation of the judge is conducive to the better administration of justice or is in the national interest;

   c) where a judge has become afflicted with a permanent disability that prevents the performance of judicial duties;

   d) where a judge reaches the mandatory retirement age with at least 10 years of service; or

   e) where a judge of the Supreme Court of Canada attains the age of 65 and has served at least 10 years on that Court;

iv) a judge who is 65 years of age and has at least 15 years service may elect to become a supernumerary judge for up to 10 years, until the age of compulsory retirement. A supernumerary judge continues to work at full salary, but at a reduced workload (generally 50% of a full workload). A supernumerary judge, even though eligible for retirement, continues to make contributions of 7% per year to the annuity scheme;

v) a judge who is eligible to retire with a 2/3 annuity, but is younger than 65, may choose to continue working full time until age 65 at which point the judge becomes eligible for supernumerary status; and

vi) a judge must retire at age 75. If service at age 75 is less than 15 years but greater than 10 years, the judge will receive a 2/3 annuity. If service at age 75 is less than 10 years he or she will receive 1/10 of a 2/3 annuity for each year of service.

At the time that the judges' annuity scheme was introduced, employer-sponsored pension plans were relatively rare. Over the past decades they have grown in importance and legislative frameworks have been developed federally and provincially to ensure that they meet certain basic minimum criteria. When the judges' plan was made contributory in 1975, and when judges were denied the right to contribute to RRSPs in 1992, their overall annuity scheme began to take on some of the characteristics of employer-sponsored plans. Major differences, however, remain.

Most employer-sponsored plans are structured in a way that allows an individual to accrue a certain percentage of salary every year, with a pension benefit based upon the rate of accrual, times the number of years of eligibility, times an average of the last several years of salary (usually three years or five years). These plans typically have a maximum allowable pension of about 70% of average final salary. The judges' plan differs in several important respects:

i) basing the annuity on final salary, rather than on an average of salaries, is more generous than most employer-sponsored plans, but using a maximum of 2/3 rather than 70% tends to compensate for this;[5]

ii) the 2/3 maximum annuity is "earned" entirely at the time the judge becomes eligible for an annuity. There is no vesting and there are no accrual rights. This means that individuals appointed at different ages will have *implicit* accrual rates that vary from one individual to another. For example, a judge appointed at age 40 could retire with a full annuity at age 60, accruing that annuity over a twenty-year working span, while a judge appointed at age 50, five years after the appointment of the 40 year old, could retire at the same time as the 40 year old, aged 65, with exactly the same annuity accrued over a fifteen-year working span. This situation is characterized by the

[5] With reasonable growth in salaries, 2/3 of final salary becomes similar to 70% of the average of several past years. For example, using the average of past five years (the benchmark for the public service plan) and assuming the same salary five years before retirement and a growth rate of 3% per year for the last five years of employment, then 2/3 of the final salary would equate to 70.7% of the five-year average.

Conference and Council as "*leading to unequal treatment among judges (a characteristic which raises Charter implications)*";[6]

iii) because there is no vesting or accrual, there is no right to early retirement with a pro-rated pension. If a judge retires prior to attaining eligibility for a full annuity according to the modified Rule of 80, there is no provision for the payment of a pro-rated or partial annuity, other than for a judge aged 75 with less than 10 years of service. In all other cases, judges are entitled only to a return of contributions with interest, regardless of how long they have served; and

iv) finally, the overall structure of the judges' plan makes it more generous financially than most employer-sponsored contributory pension plans. Insofar as we are aware, only "top-hat", or supplementary executive retirement plans in the private sector, which are generally non-contributory, are sometimes more generous. As a point of comparison, for example, judges' contributions amount to between 19% and 25% of the present value of their annuities, depending upon actuarial assumptions.[7]

4.3 Major Issues

The Conference and Council, in their submissions to the Commission, devoted considerable attention to the inequities that they suggested arise as a result of the operation of the modified Rule of 80. In particular, they pointed out that younger appointees are compelled to work more years and pay longer before being entitled to retire with exactly the same benefits as colleagues who may have been judges for a considerably shorter time. They submitted that this requirement raises serious equality issues, in particular since a majority of recent younger appointees are women. The Commission has taken this concern very seriously. We have sought and obtained expert advice on whether the modified Rule of 80 might be successfully challenged under section 15 of the *Charter*. We outline that advice, and our own conclusions, below.

The Conference and Council sought a number of recommendations from the Commission that, in their view, were essential to both redress inequities in the annuity scheme and to repair inadequacies in the current retirement package. In particular, they urged that the annuity scheme be amended such that:

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[6] Submission of the Conference and Council dated December 20, 1999, at 3-2.
[7] Submission of the Government dated April 14, 2000, at Appendix 52.

i) the modified Rule of 80 be amended to delete the requirement for 15 years of service, making it an "unencumbered Rule of 80";

ii) eligibility for retirement on a full annuity of 2/3 salary to occur at the earlier of attaining 15 years of service (with the annuity payable at age 60) or when the judge would be eligible under the unencumbered Rule of 80;

iii) contributions to the annuity scheme cease after 15 years of service;

iv) the right to contribute to an RRSP be reinstated after 15 years of service;

v) the right to elect supernumerary status for up to 10 years be available after 15 years of service, provided the judge is at least 55 years of age at that time;

vi) judges have the right to elect early retirement at any age after 10 years of service, with a prorated annuity payable at age 60 (based on salary that would have obtained at age 60 and with no actuarial reduction) or payable immediately with an actuarial reduction of 3% per year;

vii) there be more generous pro-ration rules for judges who retire with less than a full pension after the age of 65;

viii) the current provision of the *Judges Act* that limits survivors to receipt of only one judicial pension be eliminated;

ix) survivors' benefit provisions be amended to bring the law into conformity with existing law and jurisprudence concerning common law and same sex relationships;

x) survivors' benefits be increased at Government expense and additional options be provided for election by judges at their expense;

xi) single judges be entitled to benefits equivalent to those that are received by judges with survivors;

xii) all pensions be adjusted annually so that they would be based on the higher of the original pension indexed for inflation, or the current judicial salary being paid; and

xiii) judges have the right to increase their annuity beyond 2/3 of final salary at a rate of an additional 2.2% of salary for every year (or partial year) of full-time work beyond 15 years and/or an additional 1.1% for every year (or partial year of supernumerary work.

The Government, in its initial submission, expressed the view that *"changes that would alter fundamental features of that scheme [i.e., the current annuity scheme], should only be*

undertaken following a comprehensive review of the structure and function of the scheme in the face of changing demographics and new demands".[8] The Government informed the Commission in that submission that:

> *The Minister of Justice intends to refer to the issue of the adequacy of the current judicial annuity scheme to the Judicial Compensation and Benefits Commission for consideration sometime following June 1, 2000. The Government invites the Commission's views about the appropriate timing of such a review, as well as any preliminary views as to the scope, design and conduct of the review.*[9]

The Government acknowledged that issues related to the provision of survivors benefits to survivors who were in a common-law or same-sex relationship with judges should be addressed outside the scope of this broader review, as should the requirement for judges to continue to make contributions to their annuity arrangements after they had completed the necessary service to be eligible for a full annuity.

In its reply submission of January 21, 2000, the Government presented cost estimates of the amendments proposed in the initial submission of the Conference and Council. The estimated costs of all the amendments to the annuity scheme on an accrued liability basis for the 1,014 members of the Judiciary who would be affected, ranged between $499 million and $594 million. The actual cost increase in fiscal year 2000-2001 ranged from $28.3 million to $35.3 million. These costs reflect changes proposed to the annuity scheme based on continuation of 1999 salary levels. They would be higher with an increase in salary.[10]

At the public hearing held by the Commission on February 14, 2000, Counsel for the Conference and Council informed the Commission that they accepted the costing numbers of the Chief Actuary that had been submitted to the Commission.[11] Counsel also indicated at this time that the last three requests enumerated in the above list, as well as the request with respect to enhanced pro-ration on early retirement for judges who had served beyond 65 years of age, were

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[8] Submission of the Government dated December 20, 1999, at 17, para. 66.
[9] *Ibid.*, at 17, para. 68.
[10] For example, these estimates calculated that increasing the salary level to $225,000 on April 1, 2000, as requested by the Conference and Council, would increase accrued liabilities by $130-170 million, and actual costs by $10.2-13.9 million. See Reply Submission of the Government, January 21, 2000, Appendix 29, at 3.
[11] Transcript of the February 14, 2000 Public Hearing, Volume II, at 273.

no longer being advanced by the Conference and Council as amendments that should be considered in this inquiry. What this meant, in terms of the cost of potential amendments to the annuity scheme, was a reduction in the cost estimates provided by the Government of between $430 and $510 million in accrued liabilities and between $17.5 and $21.9 million in annual costs.

In light of this revised position, and having considered the submissions of the principal parties on the matter, the Commissioners informed both the Conference and Council, and the Government, at the conclusion of the hearing on February 14, 2000, that:

> *…the Commission feels that following this Hearing and having taken into consideration the reasons for which there was a decision by [the Government] to favour a referral on the comprehensive review of the pension plan or the annuity scheme and taking into consideration what we heard about some of the items that have been deleted from the list of proposals or submissions made by the Judiciary, we would like to ask [Counsel for the Government] if you could go back to your clients and discuss this further with them in order that we do everything possible to meet our requirements of dealing with the whole issue in view of Article 26 (1) …. When we look at the …issues that are left on the table the Commission feels that they could deal with these issues within the mandate of 26 (1).*[12]

At the public hearing on March 20, 2000, Counsel for the Government expanded the list of items that the Government felt could be dealt with in this report. However, it continued to be the Government's position that certain proposals -- particularly those relating to early retirement and, by implication, the "appropriate length of a judicial career" -- should be the subject of a comprehensive review, to be conducted after the presentation of this report.

There was clear agreement among all principal parties, however, that the Commission has jurisdiction to deal with all the proposals that have been raised in this inquiry. As Counsel for the Government commented on March 20:

> *…the Government accepts that the Commission has the jurisdiction to deal with all the issues of salary and pensions as a matter of jurisdiction. The Government has not made a referral and will not make a referral before seeing the Commission's report…*

[12] *Ibid.*, at 301 to 302.

> *And the Government's argument is in the framework of what the Commission should do, not what it can do, but what the Commission should do in that respect.*[13]

4.4 Our Approach to the Issues

The Commission carefully considered the positions advanced by the Conference and Council and by the Government. We had long and detailed consultations with experts whom we engaged. We believe that we are in position to deal fairly and responsibly with the issues that have been raised before us within the statutorily mandated time frame of our inquiry. Therefore, we recommend in the balance of this Chapter a number of changes to the annuity scheme for judges that in our view respond constructively and responsibly to the changing characteristics and needs of the Judiciary in a rapidly evolving society. Although our recommendations carry with them some increased costs, they are not aimed at further enriching the pension plan but, rather, are directed at providing additional flexibility and choice, which we believe are important to continue to attract the outstanding judicial candidates that the country requires.

Before discussing the specific recommendations, it is important to comment on the notion of what is an "appropriate judicial life span". The Government asserted that this issue is critical to the design of the annuity scheme, and is one where there should be deeper study than the Commission is in a position to conduct in the context of the current review. The Conference and Council submitted that the appropriate judicial life span is 15 years, although no studies supporting this position were provided. Rather, the proposition was founded upon the historical role that 15 years has played in the annuity scheme, particularly in the period between 1867 and 1919.[14]

The Commission recognizes the importance of this issue. On the basis of the information before us, we are unable to conclude that any change is required in the modified Rule of 80 that currently determines when judges become eligible for a full annuity. We believe it is nevertheless possible and appropriate to make recommendations for substantive, practical

[13] Transcript of the March 20, 2000 Public Hearing, at 97.
[14] *Ibid.*, at 35 to 36 and 80 to 81.

changes that will provide greater fairness and flexibility to judges' annuities. We believe that we can move a considerable distance toward the increased flexibility that characterizes most modern pension plans while maintaining the essential distinguishing characteristic of the judges' annuity: that is, the entitlement to a pension equal to 2/3 of final salary upon eligibility for retirement.

The balance of this Chapter outlines our reasoning and our recommendations.

4.5 Eligibility for Full Pension

The Conference and Council have proposed two modifications to the current rules. First, they propose that a judge be eligible for full pension after 15 years of service, although the pension would not be payable until the judge reaches age 60. This change, compared with the current regime, would benefit judges who are appointed at ages younger than 50. Second, they propose that the requirement that a judge serve at least 15 years, the requirement now attached to the current modified Rule of 80, be removed. This change would benefit judges who are appointed at ages older than 50. Table 4.1 compares the eligibility age for full pension, and the working years necessary to earn it, for judges appointed at different ages, under the current regime and that proposed by the Conference and Council.

We note that the Government took no substantive position on these proposals of the Conference and Council, since it argued that the requirements for eligibility for full pension should be subject to a subsequent, more detailed review.

Although the judges' annuity plan does not have an annual accrual rate, it is possible to calculate an implicit accrual rate. With 15 years of service required to earn an annuity equal to 2/3 of final salary, the implicit accrual rate is 4.4% of salary per year. An accrual rate that exceeds 4% is very unusual among pension plans in either the public or private sectors.[15] The proposal of the Conference and Council for an unencumbered Rule of 80 would further benefit judges who are appointed in their 50s and 60s, making it possible to accrue a full annuity with as few as 6

[15] For example, accrual rates for members of the House of Commons are 4% per annum. Some senior Deputy Ministers are entitled to accrue retirement income at a rate of 4% per annum for a maximum of ten years.

working years. We are not convinced that it is necessary or desirable to move to an unencumbered Rule of 80.

Table 4.1
Age of Eligibility For Full Pension
And Working Years Required To Earn It

Age at Appointment	Current Regime		Proposal by Conference and Council	
	Age at eligibility	Working years required	Age at eligibility	Working years required
38	59	21	53	15
40	60	20	55	15
42	61	19	57	15
44	62	18	59	15
46	63	17	61	15
48	64	16	63	15
50	65	15	65	15
52	67	15	66	14
54	69	15	67	13
56	71	15	68	12
58	73	15	69	11
60	75	15	70	10
62	75	13	71	9
64	75	11	72	8
66	75	9*	73	7
68	75	7**	74	6

*The retiring judge would receive 90% of a full annuity.
**The retiring judge would receive 70% of a full annuity.

As we indicated earlier, the Conference and Council, in arguing for a right to full annuity eligibility at 15 years, argued that the current system disadvantages younger judges appointed in their late 30s or 40s, many of whom are female. As can be seen from Table 4.1, a judge appointed at age 40 must work (and contribute) five years longer than a judge appointed at age 50 in order to receive an identical annuity. This is not a feature of most pension plans, where the amount of the annuity is related to years of service. The Commissioners engaged Professor Patrick Monahan, of Osgoode Hall Law School at York University, to examine whether this situation raised concerns under the *Charter*. Professor Monahan, in an opinion that is attached at

Appendix 7, concluded that there are three significant reasons why an equality rights challenge brought on this basis would be unlikely to succeed.

First, an incomplete picture is obtained if one looks only at the contributions and does not consider the benefit received for those contributions. It is true that a younger appointee contributes for a longer time, but it is also true that a younger appointee will retire at a younger age than an older appointee and can therefore be expected to receive the annuity for a longer period. Indeed, as set out in Professor Monahan's opinion, calculations provided by the Office of the Chief Actuary show that:

> *…the annuity available to an appointee at age 40 will have a present value of approximately $5 million in the year 2020, which is significantly higher than the present value of the annuity available to the 50 year old appointee ($3.64 million in the year 2015) or the 60 year old appointee ($2.64 million in the year 2015). Even discounting for inflation between the years 2015 and 2020, the present value of the 40 year old's annuity is approximately 19 per cent higher than that of the 50 year old appointee, and 63 per cent higher than that of the 60 year old appointee. Female appointees are assumed to live longer than male appointees and thus the present value of their individual annuities (considered without regard to the value of a survivor's annuity) is uniformly higher for all age groups. However the life expectancies of survivors of male appointees are assumed to be longer, which has the effect of increasing in relative terms the present value of the total annuity attributable to male judges to a level which is broadly comparable to the value of the total annuity attributable to female judges.* (at 2)

On this point, Professor Monahan concludes that *"since younger appointees are entitled to receive an annuity with a present value that is far greater than older appointees, they cannot be said to be subject to unequal treatment."* (at 3)

The second reason why Professor Monahan concludes that a challenge would be unlikely to succeed is that the age of judicial appointment is within the significant control of the appointee.

> *…if a potential candidate came to the view that the judicial annuity scheme is discriminatory towards younger appointees, he or she could avoid this discrimination by waiting to apply until a later date. On this basis, even if it were to be found that there was some form of inequality inherent in the judicial annuity scheme, it is arguable that the inequality*

> *can be avoided by the conscious choice of candidates and thus cannot give rise to a successful equality rights claim.* (at 3)

Third, Professor Monahan concludes that even if the scheme were found to impose some sort of unequal treatment, it *"nevertheless confers a significant economic benefit on judicial appointees of all ages. Therefore it is very unlikely that the judicial annuity scheme could be held to be discriminatory, within the definition elaborated by the Supreme Court of Canada"*. (at 3)

Professor Monahan's conclusions with regard to the *Charter* suggest to us that it is not legally necessary to change the current eligibility for retirement as reflected in the modified Rule of 80. The question remains, however, whether it is desirable to do so even though it may not be legally required.

We have considered carefully the proposal to allow eligibility for a full pension after 15 years. On the one hand, we recognize the role that 15 years of service has played historically. We also recognize that providing a full entitlement to 2/3 of salary after 15 years of service would be extraordinarily generous in comparison to other broadly based pension plans. On balance, we conclude that we do not have an adequate basis at this time to accept the proposal of the Conference and Council that judges be entitled to a full pension after 15 years of service.

There is an additional factor that we believe important in this connection. Although younger appointees do receive a greater annuity (in present value terms) than older appointees, they must serve a longer time to "earn" this pension. Because there are no early retirement provisions in the annuity scheme, they are effectively locked in to what can be a very long period of service to receive any benefit other than a return of their own contributions with interest. Shortening the eligibility requirement to 15 years is one way of addressing this concern. But another way is to provide more flexibility in the form of early retirement options. We recommend such options below. We believe that this additional flexibility will be helpful in encouraging younger candidates to apply, as well as providing additional retirement planning opportunities for those now serving as judges.

4.6 Cessation of Contributions

The Conference and Council proposed that contributions to the annuity scheme cease after 15 years of service, whether or not a judge is then eligible to retire. The Government submitted that contributions should be reduced from 7% to 1% of salary at the time that a judge becomes eligible for a full annuity.

The Commission also received submissions on this point from Mr. Justice Douglas Lambert, of the Court of Appeal for British Columbia and Court of Appeal for Yukon, who took the position that requiring contributions after a judge has effectively earned the right to retire with a full annuity is not only unfair, but is unlawful and unconstitutional.[16]

This issue was also considered by the Scott Commission (1996), which noted that *"the sum of the annual pension contributions of 7% made by judges to retirement are modest relative to the final costs borne by the Crown".*[17] On this basis, it agreed with the earlier conclusions of the Crawford Commission (1993), which supported the continuation of judges' contributions towards the cost of their pensions until those who are entitled to retire do so. The Scott Commission commented that any *"perception of inequitable treatment is surely tempered by the benefits afforded the annuitant under the present arrangement."*[18]

After hearing and considering the submissions of Justice Lambert and those of the Conference and Council and of the Government, we concluded that contributions toward the judges' annuity should not continue past the point where the judge is eligible to receive that annuity. Even though there is no concept of annual accrual, it would nevertheless be the case that additional contributions were being required in circumstances where no additional benefit was forthcoming. We have noted that this is not the case in employer-sponsored pension plans. We do recognize that the 7% contribution is made up of two components -- 6% on account of the pension and 1% as a contribution to the indexation of the pension in retirement. The pension plan for the federal public service requires that the 1% contribution continue even after the maximum pension has

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[16] Submission of Mr. Justice Lambert to the Commission dated December 6, 1999 and the Transcript of the March 20, 2000 Public Hearing, at 47 to 66.
[17] Scott (1996), at 22.
[18] *Ibid*.

been earned, so long as the individual continues in employment. We believe that this is also a reasonable situation for the Judiciary.

Recommendation 6

> **The Commission recommends that, effective as of April 1, 2000, contributions toward a judicial annuity be reduced from 7% of salary to 1% of salary for the period during which a judge is entitled to receive a full annuity but continues to work in either a full-time or supernumerary capacity.**

4.7 Contributions to RRSPs

The Conference and Council requested the right to fully contribute to RRSPs after 15 years of service. There is no explicit link in the submission of the Conference and Council to the eligibility for retirement after 15 years and the cessation of contributions after 15 years, but there is a certain logic in linking the two proposals. Counsel for the Government pointed out that, for public service pensions, the RRSP limit is restored once contributions cease.[19]

The Commission sees no reason, either in policy or precedent, why contribution room to RRSPs should not be restored when judges cease making contributions to their annuity. We understand that this will not happen automatically, but will require amendment to Regulation 8309(2) of the *Income Tax Act.*

Recommendation 7

> **The Commission recommends that, effective as of April 1, 2000, the relevant regulations under the *Income Tax Act* be amended to afford judges the opportunity to contribute to RRSPs at the time they cease making contributions to the judicial annuity scheme, on the same basis as public servants are now allowed to do.**

[19] Transcript of the March 20, 2000 Public Hearing, at 15.

4.8 Supernumerary Status

The ability for judges to elect supernumerary status, under certain conditions, was introduced in 1971. The election to supernumerary status allows a judge who would otherwise be eligible for retirement, and an annuity equal to 2/3 of salary, to continue to work on a half-time basis for full salary. When the measure was introduced in 1971 the then Minister of Justice, testifying before the Standing Committee on Justice and Legal Affairs, explained the proposal in the following terms:

> *The advantages of the proposition before you, Mr. Chairman, are that the judges will be induced to vacate their ordinary judicial office, will be able, thereby, to create a vacancy for younger appointments, and yet the supernumerary judges will be available at all times; it will provide a larger proportion of younger judges and yet at the same time retain a pool of capable experienced judges at the disposal of the chief justice.*[20]

As a result of the 1971 changes, judges were afforded the opportunity to elect supernumerary status at age 70, with a minimum of 10 years on the Bench. Judges could serve in a supernumerary capacity for five years, until mandatory retirement at age 75.

In 1973, amendments were passed that permitted judges to elect supernumerary status at age 65, rather than 70, for a maximum period of 10 years, so long as the judge had served at least 15 years. This change linked the ability of judges to elect supernumerary status with the conditions at which they became eligible for a full annuity of 2/3 of salary. In 1998, conditions for eligibility for a full annuity were revised to incorporate the modified Rule of 80, which provided additional flexibility to younger judges in terms of their retirement options. But no corresponding changes were made to eligibility for supernumerary status. As a result, judges who are now eligible for a full annuity at ages younger than 65 years cannot opt for supernumerary status without continuing to serve for a further period as a full-time judge.

The submissions of the Conference and Council suggest that supernumerary status is not only cost neutral to the Government, but that it is a net benefit since a supernumerary judge effectively works half-time for 1/3 of his or her salary (that is, the difference between full salary

[20] Submission of the Government dated April 19, 2000, at 3 and at Appendix 53.

and what the judge would be entitled to as an annuity if he or she retired). The Crawford Commission (1993) accepted this analysis but went on to state that:

> *We would encourage chief justices to continue to carefully monitor the implementation of the supernumerary programme in their respective courts. We would invite the Canadian Judicial Council to consider documenting court management of the supernumerary programme so that it might confirm for future Triennial Commissions whether the basic assumptions surrounding supernumerary service, such as the 50% workload factor, remain valid in the years ahead as the number of supernumerary judges increases.*[21]

To the best of our knowledge, such follow-up activities have not been undertaken. We reiterate the encouragement given by the Crawford Commission (1993) to the Council to actively collect relevant information in this area with a view to making it available for future quadrennial reviews.

We have considered the reasons why supernumerary status was introduced and our conclusions are that it was a useful response to both the backlog in judicial cases and the desire to renew the judiciary and make it more reflective of demographics in a changing Canadian society. We believe that both of these objectives suggest that there be no substantive change at this time in the basic concept of supernumerary status. We do find, however, that there is no logical basis for the gap between eligibility for a full annuity and the ability to elect supernumerary status that has opened up since the introduction of the modified Rule of 80. Therefore, we conclude that this gap should be closed.

Recommendation 8

> **The Commission recommends that, effective as of April 1, 2000, judges have the right to elect supernumerary status for a period not exceeding 10 years upon attaining eligibility for a full pension.**

[21] Crawford (1993), at 25.

4.9 Early Retirement

At the present time judges are not allowed any early retirement benefits. A judge appointed at 40 years of age must serve 20 years to qualify for a full annuity. If he or she serves any time less than 20 years, the only compensation is return of the judges' contributions with interest. As we have seen, judges' contributions account for only a small portion of the value of the annuity and judges have been denied RRSP room for all of the time during which they are making contributions to the annuity program. This lack of any early retirement consideration strikes us as inflexible and unfair.

We believe that many of the alleged inequities in the annuity scheme would become substantially less difficult if judges could elect to retire with some pension benefits after a reasonable period of service. For example, a judge appointed at 40, who must now work 20 years to attain the same pension that an older judge can attain by working 15 years, might feel differently about the additional five years if he or she could also retire after 15 years, with some pension benefits, and pursue other professional or personal interests. Similarly, a judge who is appointed in his or her late 50s, and now must work until the early 70s to attain any judicial pension, could be less interested in an unencumbered Rule of 80 if it were possible to retire earlier with some pension benefits. We therefore believe that an early retirement option is of critical importance.

We also believe that an early retirement option is strongly suggested by the changing nature of the judiciary -- that is, by the demographic and gender characteristics of new appointees, and the increasingly complex and difficult nature of the judicial workload. In the modern world, pension arrangements ought not to act as "golden handcuffs" but should facilitate rational career planning on a fair and reasonable basis.

The Conference and Council have proposed that judges have the right to take early retirement at any age after 10 years of service, on a pro-rated annuity. Consistent with the view that the annuity should be fully earned after 15 years, the Conference and Council suggest that the pro-rated annuity should be payable at age 60 and should be calculated as 2/3 of the salary that pertains at that time, times a fraction that would be equal to the actual number of years of service divided by 15. It further submits that a judge should be able to take the annuity immediately

upon retirement, in which case it would be calculated as 2/3 of the final salary times the same fraction, reduced by 3% per year for every year in advance of age 60.

The Government made no submission on the issue of early retirement, arguing that this was one of the issues which turned upon the broader questions it wished to have explored in its suggested review of the entire annuity scheme. The submission of the Conference and Council suggested that one reason for proposing an early retirement scheme was to address the issue of burnout.[22] In oral submissions before the Commission, Counsel for the Government argued that there is inadequate information about the extent to which burnout is a problem, and even if it is a serious problem, there are other methods that can be introduced to deal with it short of early retirement provisions.[23]

As indicated above, the Commission does not rest its conclusions with regard to early retirement on the existence of burnout. In our view, the case for early retirement with some pension benefit is one of planning flexibility and fairness. It appears to us that the key issue is not whether to provide a benefit, but how it should be structured.

We regret that the Government did not put forward any views in this regard. We feel nonetheless that we have developed a model that is reasonable in the circumstances. There are a number of parameters that must be decided upon to develop an early retirement regime. These include:

i) the threshold at which a judge would be entitled to elect early retirement;

ii) the manner in which the pension should be calculated and pro-rated, and the date at which an unreduced pension could begin to flow to the retired judge; and

iii) the actuarial penalty that should be imposed if the judge chooses to take an immediate pension at the time of early retirement.

[22] Submission of the Conference and Council dated December 20, 1999, at 3-26.
[23] Transcript of the March 20, 2000 Public Hearing, at 33 to 35.

The Threshold for Early Retirement

We believe that those who would seek appointments to the Bench should do so with a view to serving a reasonable length of time and devoting a considerable portion of their career to this endeavour. We also note that it is the norm among most pension plans in both the private and public sectors, to set age 55 as a threshold for early retirement eligibility. We have concluded that this is an appropriate standard to apply at this time to the judges' pension plan.

Recommendation 9

> **The Commission recommends that, effective as of April 1, 2000, to be eligible for early retirement with a pro-rated pension, a judge must serve at least 10 years and must be at least 55 years of age.**

Calculation of the Pension

A judge who is eligible for a pro-rated pension would have the pension calculated as 2/3 of salary at the time the election for early retirement is made, multiplied by a fraction calculated as the number of years of service divided by the number of years of service necessary for that judge to become eligible for a full pension. The denominator will vary by age of appointment, as shown in Table 4.1. For example:

i) a judge appointed at age 38 and choosing early retirement at age 55 would receive 17/21 of his or her pension;

ii) a judge appointed at age 44 and choosing early retirement at age 55 would receive 11/18 of his or her pension; and

iii) a judge appointed at age 56 and retiring 10 years later at age 66 would receive 10/15 of his or her pension.

In each of these cases the pension would not be payable before age 60 but would be indexed by the Consumer Price Index in each of the years for which it was deferred.

Recommendation 10

The Commission recommends that, effective as of April 1, 2000, a pro-rated pension, available to any judge who has served at least 10 years and is at least 55 years of age, be calculated as 2/3 of salary in the year that early retirement is elected, multiplied by the number of years of service divided by the number of years which the electing judge would have been required to serve in order to earn a full annuity.

Recommendation 11

The Commission recommends that, effective as of April 1, 2000, the pro-rated pension not be payable without actuarial reduction prior to the judge attaining age 60 and that the amount of the pension be indexed by the Consumer Price Index in each year that it is deferred.

Actuarial Penalty for Immediate Payment

Virtually all early retirement provisions allow the annuitant a choice between deferring the pro-rated pension until some later date, with no actuarial reduction, or taking an immediate pension that is reduced by an amount that, in principle, should be cost-neutral with respect to taking the pension earlier or later.

The Conference and Council asked for a reduction of 3% per year for each year in advance of age 60 that the annuitant receives the pro-rated pension. The information we have received from our experts suggests that early retirement penalties typically vary from 3% to 6% per year. A 6% penalty was the traditional, widely used penalty in the 1960s and 1970s but has often been reduced over the years. A 5% penalty is widely used now and is the rate that is applied in the federal public service pension plan, including senior Deputy Ministers. The 3% penalty rate is the minimum penalty rate that Canadian income tax rules permit in combination with generous formulas for the entitlement to an unreduced pension. It is widely used with executive pension plans when an important objective is to maximize the tax advantage provided under the *Income Tax Act.*

The cost of various penalties to the plan sponsor will depend upon the specific characteristics of each plan. In general, a 5% penalty will always cause some additional, but not necessarily significant, cost. A 3% penalty tends to cause significant cost increases because of the larger pension being paid and the greater inducement to early retirement that derives from a lower penalty. The cost will be proportional to the usage of the option, and the lower the penalty, the greater the expected use of the option will be.

Recommendation 12

> **Should a judge who is eligible for early retirement wish to elect a pro-rated annuity that is payable immediately, the Commission recommends that the value of the annuity be reduced by 5% per year for every year that the annuity is paid in advance of age 60.**

Summary of Early Retirement Recommendations

Table 4.2 shows the increased retirement flexibility that these proposals provide to judges who are appointed at different ages. Under the current regime, a judge who retires before the earliest age of retirement (column 2) is entitled to only a return of his or her own contributions plus interest. Under the proposed recommendations, a judge appointed at 40, choosing to retire at 55 would have an annuity of 50% of salary if deferred to age 60 or 37.5% of salary if the annuity is taken at retirement.

Table 4.2
Early Retirement Options Under Recommended System

Age at appointment	Earliest age of retirement with full (2/3) annuity (identical for current and proposed systems)	Early retirement options under recommended system		
		Earliest age of retirement with pro-rated annuity	Pro-rated annuity as % of salary at time of early retirement, if deferred to age 60	Pro-rated annuity as % of salary at time of early retirement, if taken at retirement.
40	60	55	50%	37.5%
44	62	55	40.8%	30.6%
50	65	60	44.4%	44.4%
56	71	66	44.4%	44.4%
60	75	70	44.4%	44.4%
65	75	75	66.7%	66.7%

4.10 Survivor Benefits

The Conference and Council raised four concerns with regard to the structure and level of survivors' benefits. They proposed that:

i) legislation be amended to bring the *Judges Act* into conformity with existing law and jurisprudence regarding the rights of survivors of common-law or same-sex relationships;

ii) the annuity payable to a survivor should be increased from 33.3% to 40% of salary if the judge dies while in office, and from 50% to 60% of the judge's annuity if the judge dies while in receipt of an annuity;

iii) a judge, at the time of retirement, should have the right to elect a higher survivor benefit for the lifetime of the survivor, with the initial pension being actuarially reduced to make such an election cost-neutral to the government; and

iv) subsection 44(3) of the *Judges Act*, which limits to one the number of survivors' pensions that can be paid under the *Act*, should be repealed.

Bill C-23, which was introduced by the Government on February 11, 2000, responds to the first proposal of the Conference and Council with respect to common-law and same-sex relationships. The views of the Commission were sought with respect to this legislation. In a letter to the

Minister of Justice dated March 27, 2000 (at Appendix 8), the Commission endorsed the proposals to amend the *Judges Act* contained in Bill C-23.

With respect to the second proposal, the Conference and Council indicated that this was recommended by both the Guthrie Commission (1987) and the Courtois Commission (1990).[24] Both of those Commissions recommended that the benefit increase apply only to future deaths and not to existing survivors. Neither the Guthrie nor Courtois Commissions appear to have addressed the issue of who would pay for this benefit enhancement, suggesting by implication that it would be at Government expense. The Scott Commission (1996) also addressed the survivor benefit issue, noting that estimates that it received suggested that the cost of the reform would be *"in the neighbourhood of $2 million over five years escalating accordingly thereafter"*.[25] The Scott Commission chose to recommend no change in benefits because it felt that a salary increase was a higher priority.

The existing survivors' benefits in the judges' plan are identical to those available to federal public servants. Pension benefit standards legislation, which governs minimum acceptable standards for private sector pension plans, requires survivors' benefits of at least 60% of pension. In most plans that offer this benefit, the annuitant's pension is actuarially reduced to fund the higher level of benefit that is paid to survivors, with no net cost to the plan. This Commission supports increasing survivors' benefits but the question of who pays for this enhancement deserves consideration and comment.

The Government's estimated costing in accrued liabilities under the annuity scheme for the increase in survivors' benefits ranged from $39.7 to $49.6 million, depending upon which actuarial assumptions were employed in the calculation. The actual increase in annual costs was estimated at between $2.8 and $3.7 million per year.

The Commission also received information from Statistics Canada about the treatment of survivors' benefits in public and private pension plans. This information covers 6,901 registered pension plans with 4.45 million members. Of the total, 24.2% of all members belong to plans

[24] Guthrie (1987), at 19 and Courtois (1990), at 29.
[25] Scott (1996), at 24.

that provide only a survivors' benefit of 50% of the pension. An additional 53.5% of all members belong to plans that provide survivors' benefits equal to 60% of the annuity, but require a reduction of the initial benefit. Only 8.3% of all members have survivors' benefits of 60% with no reduction of the initial benefit.[26]

We reiterate an important principle that we articulated at the beginning of this Chapter, namely, our overall concern in addressing the structure of the annuity scheme, which is relatively generous, is not to enrich the program further but to provide greater planning flexibility and choice to current and future judges.

Recommendation 13

> **The Commission recommends that, effective as of April 1, 2000, the annuity provisions of the *Judges Act* be amended to provide judges with the option to elect a survivor's benefit of 60% of the judicial annuity, with a consequent reduction in the initial benefit calculated to minimize any additional cost to the annuity plan.**

The Conference and Council also requested the ability to elect survivors' benefits in excess of 60% on a cost neutral basis. In principle, we see no problem with this request as it appears to be a simple extension of the previous request. In practice, however, we have been cautioned that it is not strictly possible to make such elections on a cost-neutral basis because of the age at which judges retire. Indeed, Mr. Cornelis of the Office of the Chief Actuary has commented that *"true cost neutrality cannot be achieved"* and that the election is tantamount to giving a retired judge *"the right to buy insurance at a standard cost but without a medical examination"*.[27] We conclude that some additional flexibility should be provided, but we believe that the extent of such flexibility should be limited to contain costs.

[26]Statistics Canada, *Pension Plans in Canada*. Catalogue no. 74-401-SPB, January 1 1997, Table 18. The information was contained in the Submission of the Government dated March 31, 2000 at Appendix 43.
[27] Submission of the Government dated January 21, 2000, at Appendix 29, at 8.

Recommendation 14

The Commission recommends that, effective as of April 1, 2000, judges have the further flexibility to elect a survivor's benefit of up to 75% of the annuitant's pension, with an actuarial reduction to initial benefits that will make the election as close to cost neutral as possible.

Finally, the Conference and Council requested that the limitation in the *Judges Act*, which prevents a survivor of more than one judge from collecting more than one survivor's benefit, be removed. The Commission sees no justifiable basis for continuance of this provision.

Recommendation 15

The Commission recommends that subsection 44(3) of the *Judges Act* be repealed.

4.11 Addressing the Impact of the Salary Freeze

As previously referred to in this report, the Government imposed a freeze on judges' salaries, by suspending automatic indexation from December of 1992 until March of 1997. This was implemented as part of a broader series of restraint measures contained in the *Public Sector Compensation Restraint Act* (Canada). The Scott Commission (1996) recommended that the Government introduce an appropriately phased upward adjustment in judicial salaries, beginning April 1, 1997, so as to ensure that the erosion of the salary base caused by the elimination of statutory indexing was effectively corrected.

During the period of the freeze, 131 judges retired. The Conference and Council submitted that the pensions of these retired judges (or, where applicable, their survivors) should be increased to reflect the "catch-up" in salary that was recommended by the Scott Commission. The Commission also received a submission from the Honourable Wallis Kempo who urged that judges who were actively working during the freeze period and then retired effective 1996 and onward, have been either forgotten or ignored. Madame Justice Kempo stated that these judges

have been denied not only compensation for the freeze years but, as well, reduced annuities as a consequence.[28]

While the Government did implement the Scott Commission recommendations with regard to salary, it did not implement them retroactively. Indeed, the position of the Government is that the economic objectives that a wage freeze is intended to secure are at risk if those subject to the freeze have expectations that the impact of the wage freeze on incomes will be redressed subsequently. Counsel for the Government submitted that:

> *…it has not been demonstrated that the freeze was unfair and needs to be redressed. The Scott Commission did not recommend a salary increase because the freeze was somehow unfair but because post-freeze salaries needed to be at a certain level.*[29]

Counsel for the Government also noted that the pensions of public servants who retired during the freeze were similarly affected, with no offsetting measures.

The Commission recognizes that the freeze has had an adverse impact on some individual judges and their survivors. However, judges were not singled out as targets of wage restraint and the adverse impacts of the wage freeze were experienced by other Canadians as well. As a matter of principle, we do not accept that the adverse impact of the freeze should be redressed and we are not prepared to recommend the adjustment of pensions for those annuitants who retired during the freeze, or their survivors.

4.12 Special Retirement Provisions for Supreme Court Justices

Justices of the Supreme Court are permitted by law to participate in the deliberative process and judgment-writing on cases that they heard, for a period of up to six months after retirement. The Registrar of the Court, in a submission to the Commission, noted that:

> *It is in the best interests of the litigants and of the Court to have the complete Bench which heard an appeal make the decision. In particular,*

[28] Letter from the Honourable Wallis Kempo dated December 20, 1999.
[29] Transcript of the March 20, 2000 Public Hearing, at 30.

> *this avoids potential gridlock situations the Court could face with an even number of judges which could result in costly rehearings.*[30]

The Registrar submitted that for this six-month period after retirement, Supreme Court Justices, with the certification of the Chief Justice, should be eligible for supernumerary status, and receive full salary, and an appropriately pro-rated portion of Incidental and Representational Allowances. We do not see the need to formally grant supernumerary status to Supreme Court Justices in this situation, but we do believe that they should receive full salary and pro-rated allowances for the period of time they are called upon to complete this work.

Recommendation 16

> **The Commission recommends that, effective as of April 1, 2000, a Justice of the Supreme Court of Canada who retires and who, with the certification of the Chief Justice is required to participate in judgments for up to six-months following retirement, be compensated at full salary (calculated at the time of retirement) for the time that he or she so serves, and be entitled to an appropriate portion of the Incidental and Representational Allowances.**

4.13 Cost of Pension Proposals

We requested the Commission's experts to review our recommendations, together with the cost estimates of the requests of the Conference and Council that were prepared by the Office of the Chief Actuary and submitted to the Commission. We asked them, in light of this information, to provide their best estimates of the cost of the recommendations made in this Chapter. The detailed assumptions and results are provided at Appendix 9.

Overall, our recommendations concerning judicial annuities will decrease accrued liabilities by up to $800,000 and will increase the annual cost of judicial pensions by $2.23 to $2.49 million. Virtually all of the annual cost increase, which has no impact on the accrued liabilities, is attributable to cessation of contributions at the time of eligibility for a full pension.

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[30] Submission of the Registrar of the Supreme Court of Canada dated December 16, 1999, at 5 to 6.

CHAPTER 5

OTHER BENEFITS

The Commission also received proposals for certain changes to current insurance and related benefits available to the Judiciary. These concerned:

i) basic and supplementary life insurance benefits;

ii) health benefits;

iii) survivor benefits following death on duty; and

iv) dental benefits.

5.1 Basic and Supplementary Life Insurance Benefits

At present, the Judiciary participates in insurance benefits available under the Public Service Management Insurance Plan (the "PSMIP"). Full-time Order-In-Council appointees and other senior public service executives (including Deputy Ministers) enjoy different benefits under an executive group life insurance plan (the "Executive Plan") available under the framework of the PSMIP. The Commission was informed that the Judiciary, for some time, has sought the benefits available under the Executive Plan. This was supported by the Scott Commission, which recommended that "*the government paid life insurance coverage for judges be brought more closely into line with that provided to Deputy Ministers*".[1]

The basic life insurance benefits now available to the Judiciary provide a judge with coverage of one or two times salary, at the option and expense of the judge. Variable premiums apply, based on the age and gender of the participant in the plan.

[1] Scott (1996), at 28

In contrast, under the Executive Plan, basic insurance coverage of two times salary at no cost to the participants is provided. Similar benefits are available, without cost to the participants, to Members of Parliament and Senators under another plan. These separate plans have a single premium rate for life insurance based on the claims experience of the group as a whole. Under this structure, the actual premiums paid on behalf of an individual by the Government vary by salary level and are treated as a taxable benefit to the individual plan participant.

In submissions to this Commission, the Government recognized and supported the need to improve the life insurance available to the Judiciary, and indicated that it was prepared to fund the level of benefits equivalent to that available in the Executive Plan, so long as two concerns could be met. First, there should be no "cross-subsidization" within the PSMIP. For example, if the Judiciary were included in one of the existing plans under the PSIMP this would lead to higher premiums for each participant, thereby triggering increased taxable benefits. In effect, this would result in non-judicial plan participants subsidizing the participation of the Judiciary and, at the same time, receiving lower net insurance benefits. Second, the structure of the plan for the Judiciary should be such that the degree of cross-subsidization that would take place within the plan (between younger and older judges) would not result in a breach of section 15 of the *Charter*.

In this context, the Conference and Council suggested that a separate plan could be created for the Judiciary under the general rubric of the PSMIP, in order to avoid any cross-subsidization between members of the Judiciary and members of the Executive Plan.

Both the Conference and the Council, and the Government agreed that such a plan would provide to the judges benefits with respect to basic life insurance coverage, supplementary life insurance coverage, and post-retirement benefits that are, in all material respects, the same as those available to members of the Executive Plan

The understanding of the Commission with regard to post-retirement benefits under the Executive Plan is that coverage would be available, at no cost to the insured, equivalent to 100% of final salary during the first year of retirement; 75% of salary during the second year; 50% of salary in the third year; and 25% thereafter for life.

Our understanding with regard to available supplementary benefits is that members of the Executive Plan, at their option and cost, and with suitable evidence of insurability, can purchase supplementary insurance up to 100% of annual salary.

Despite the willingness of both the Conference and Council, and the Government, to move in this direction, the proposed structure of the plan creates two separate issues, each related to the proposal of the Conference and Council that participation in the plan be compulsory for persons appointed to the Bench after introduction of the plan. The issues are:

i) whether compulsory participation could result in a successful challenge under section 15 of the *Charter*; and

ii) whether compulsory participation can be accommodated within the umbrella of the PSMIP.

The Conference and Council are strongly of the view that the economic sustainability of the plan, given the demographic profile of the Judiciary, depends upon compulsory participation in the plan of all judges following introduction of the plan. This is so because, over a certain age range for younger judges, the tax payable on the taxable benefit resulting from participation in the plan will likely exceed the actual cost at which insurance could be purchased in the market. If such judges opt out of the plan, this would raise premiums, raise taxable benefits, increase the range over which "opting-out" becomes attractive, and potentially threaten the viability of the plan. Compulsory participation, on the other hand, clearly results in cross-subsidization of older participants by younger participants.

In hearings before the Commission, the Conference and Council suggested that, upon creation of a separate plan, a one-time "opt-out" opportunity would be provided by which those persons who were judges at the time of introduction of the separate plan could elect whether to participate in the plan. Thereafter, following introduction of the plan, new judicial appointees would be required to participate in the plan or forego Government-paid basic life insurance benefits. Counsel for the Government expressed concern that limiting the ability to opt-out of the plan to those judges who are serving at the time the plan is introduced, and denying such ability to

judges who might be appointed subsequent to the introduction of the plan, could lead to a challenge under the *Charter*.[2]

In an effort to better understand the structure of the group insurance plans, and the concerns of the Conference and Council, and Government, we asked our expert advisors to convene a meeting of experts to explore some of the issues in more depth. We also requested the views of Professor Patrick Monahan, of Osgoode Hall Law School at York University, concerning the question of whether restricting an opt-out provision to those judges serving at the time of introduction of the plan could lead to a successful challenge under section 15 of the *Charter*.

Subsequent to the meeting of experts, and in response to a request to the Conference and Council for clarification of some points in their proposal, we were informed by letter that the opt-out proposal being requested by the Judiciary was an ability for a sitting judge, on a one-time basis at the inception of the plan, to exercise an option to either:

i) opt out of the Government-paid basic life benefit; or

ii) elect a lower basic life benefit of 100% of salary, rather than 200% [3].

With respect to the potential *Charter* concerns, the Commission was informed by Professor Monahan that his preliminary examination of the issues suggested that an equality challenge to the plan proposed by the Conference and Council would not likely be successful.[4]

The second concern raised by the Government is that the current structure of the PSMIP does not provide for compulsory participation. In a letter to the Commission dated May 16, 2000, Counsel for the Government informed the Commissioners that:

> *The terms sought by the Conference and Council are incompatible with the PSMIP. Participation in the PSMIP is always optional: executives and parliamentarians have the choice of not participating. …. Compulsory*

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[2] Transcript of the February 14, 2000 Public Hearing, at 258 to 259.
[3] Letter to Commission from Leigh D. Crestohl, dated April 28, 2000, at 1 to 2.
[4] Memorandum from Patrick J. Monahan to Mr. Richard Drouin, dated April 28, 2000 and reproduced at Appendix 10 to this report. Professor Monahan's memorandum suggests that more detailed analysis of the situation would be appropriate in order to provide a more definitive opinion. The view of the Commission was that such further analysis was not necessary.

> *participation…would be inconsistent with the principles that groups may participate in the PSMIP only on the basis that they abide by the overall plan design as established for the public service population.*[5]

In response to this letter the Commissioners sought and obtained confirmation from the parties that there was no disagreement between them about the benefits being sought; rather, the issues of concern related solely to the structure of the plan. An option was explored of legislating a stand-alone plan for the Judiciary outside the PSMIP, but such a stand-alone plan was subsequently rejected by the Conference and Council on the grounds that it would be economically prohibitive. In a letter to the Commission dated May 19, 2000, Counsel for the Conference and Council categorically rejected a solution outside the PSMIP. They strongly reiterated their rationale for requiring compulsory participation, but indicated that:

> *…should the Commission be of the opinion that the Judges cannot or should not be accommodated within the PSMIP, unless membership in the plan is voluntary, the Judges would rather forego insistence on compulsory membership in the plan than to find themselves thrust outside of the PSMIP.*[6]

The Commission is satisfied that a separate plan within the PSMIP for the Judiciary is essential to obtain the economies necessary to make the group life insurance plan reasonable. We are further satisfied that there is a sound rationale for the structure of the plan proposed by the Conference and Council. On the basis of the advice received from Professor Monahan, we do not believe that this structure is likely to lead to a successful challenge under section 15 of the *Charter*. That leaves the issue of whether the framework of the PSMIP can be altered, as necessary, to accommodate the proposed structure of the judges' plan. We have heard suggestions that legislation might be required to do so, but we have not heard any evidence that the framework cannot be so modified.

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[5] Letter to Commission from David Sgayias, dated May 16, 2000.
[6] Letter to Commission from L. Yves Fortier and Leigh D. Crestohl, dated May 19, 2000.

Recommendation 17

The Commission recommends that a separate plan, under the general framework of the PSMIP, be created promptly for the Judiciary so as to provide the Judiciary with basic life insurance, post-retirement life insurance, and supplementary life insurance benefits that are, in all material respects, the same as those now enjoyed by members of the Executive Plan.

Recommendation 18

The Commission recommends that incumbent judges, at the time of introduction of the new plan, have the option, at their sole discretion, of opting out of insurance coverage or electing to accept coverage of 100% of salary, rather than 200% of salary.

5.2 Health Benefits

Under the applicable current plan, the Judiciary is provided with Government-paid health insurance coverage, which provides 80% reimbursement of all eligible medical expenses subject to an annual deductible of $25.00 for an individual and $40.00 for a family. In connection with hospital benefits, judges currently have the option of upgrading hospital coverage from $60.00 per day to $150.00 per day, at their own expense. The Conference and Council proposed that the current hospital benefit of $60.00 per day be upgraded to $150.00 per day, at the cost of the Government, to accord with hospital benefits that the Judiciary understands are currently available to Deputy Ministers and OIC Executives.

The Commission was informed that effective April 1, 2000 the Government had entered into an agreement with relevant public service unions establishing a trust to manage the Public Service Health Care Plan. As part of this agreement, the Government undertook that no changes would be made to the plan prior to April 1, 2000 and that changes thereafter would be in the discretion of the trustees of the plan. Accordingly, while the Government was not opposed in principle to the request by the Conference and Council for Government-paid hospital coverage at the rate of $150.00 per day, it cautioned that introduction of such an improved benefit ultimately was within the discretion of the trustees and not the control of the Government.

In these circumstances the Commission concludes that the Government should assume the cost of this additional benefit, and should take all available steps to urge the trustees to make the changes to the plan necessary to effect this result.

Recommendation 19

> **The Commission recommends that the Government take all available steps with the trustees of the applicable health benefits plan to effect a change under the plan to the hospital benefits available to the Judiciary, so as to increase such hospital benefits from $60.00 per day to $150.00 per day at no cost to judicial participants in the plan.**

The Commission also received a submission from Madam Justice Alice Desjardins of the Federal Court of Appeal. Madam Justice Desjardins urged that single judges be allowed to register a close family member under the Public Service Health Care Plan, even if that family member was neither in a conjugal relationship with the judge nor a dependent. While sympathetic to the general principle raised by Madam Justice Desjardins, the Commission felt that a change of this nature would have such far-ranging implications for so many social programs that we were not able to recommend it.

5.3 Survivor Benefits Following Death On Duty

The Commission learned during the course of its inquiry that, at the present time, limited survivor benefits are available to the survivors of judges who die of unnatural causes during the course of the discharge by them of their public duties. This is to be contrasted with arrangements that apply for the surviving families of those senior public servants who regrettably suffer accidental or violent death as a result or during the course of the discharge by them of their public duties.

The Conference and Council requested that survivor benefits be made available to the families of judges who die by reason of, or in the performance of, their judicial duties, at the same level and under the same conditions as such benefits are made available to the survivors of Deputy

Ministers and other senior members of Government who die in like circumstances. The Government, in turn, informed the Commission that survivor benefits of this type are available for public servants but may not be available for Order-In-Council appointees. Apart from providing this clarification, the Government took no position on this request by the Conference and Council.

The Commission recognizes that in contemporary society members of the Judiciary, by virtue of the nature of their duties and the public aspect of their responsibilities, regrettably are exposed to increasing risk of personal, including fatal, injury. The frightening possibility of grave disabling or fatal injury occasioned by virtue of their status as judges is a possibility that can no longer responsibly be considered as entirely hypothetical. The Commission, therefore, strongly supports the proposition that the survivors of members of the Judiciary who die by reason of violence or through accident as a result or during the performance of their judicial duties, should receive survivor benefits at the maximum level and on the same basis as now provided for the most senior category of public servants for whom such benefits are currently provided.

Recommendation 20

> **The Commission recommends that, effective as of April 1, 2000, survivors of members of the Judiciary who die by accident or an act of violence occurring in the course of, or arising out of, the performance of their judicial duties should receive survivor benefits at the maximum level and on the same basis as now provided for the most senior category of public servants for whom such benefits are currently provided.**

5.4 Dental Benefits

The Conference and Council requested that the Commission consider and recommend improvements to the dental plan benefits available to judges so as to provide benefits comparable to those provided under private sector dental plans. Further, the Commission was requested to recommend that coverage under the current dental plan available to judges be extended to retired judges. The dental coverage available to the Judiciary is identical to that currently provided to OIC Executives. The Government indicated that the dental plan is currently in the process of

being amended to provide coverage for retirees on an optional basis. The Government anticipated that retired judges would be eligible to participate in the dental plan, once so amended.

Although the Conference and Council provided some summary information to the Commission to compare the level of benefits under the public sector plan to those under certain private sector plans, the information, in our view, was not adequate to allow us to reach a determination with regard to the overall comparability of the public sector plan with the wide range of practices in the private sector. The Conference and Council were not specific in recommending particular changes to the current dental insurance arrangements. The Commissioners are aware that dental benefits under private sector plans are subject to considerable variation depending on the plan, the number of participants, the nature and extent of related benefits and the total compensation arrangements for plan participants. Accordingly, without specific details as to the nature of the improvements sought and identification of the type of private sector dental plan considered relevant by the Judiciary, we are not in a position to make any recommendation on this issue at this time.

With respect to the issue of inclusion of retired judges in the available dental plan, the Commission understands that the Government does not object to such inclusion so long as the necessary amendments are made to the current dental plan so as to permit the participation of such retirees, on the same terms and conditions as other retirees.

Recommendation 21

> **The Commission recommends that when the dental plan is amended to provide coverage to retirees, retired judges be eligible to participate on the same terms and conditions as other retirees.**

CHAPTER 6

FUNDING OF REPRESENTATIONAL COSTS OF JUDGES

In their initial submissions, the Conference and Council requested a decision by the Commission authorizing reimbursement by the Government of all costs incurred by the Conference and Council concerning their participation in the process of the Commission, payable in a manner analogous to a solicitor and client award of costs in a court proceeding. This scale of costs contemplates full reimbursement of all actual and proper expenditures, including fees and out-of-pocket disbursements for legal counsel and experts, inclusive of applicable taxes.

The Government argued that the Commission lacks jurisdiction both to order that the Government provide such funding to the Conference and Council and, further, to determine questions of law, including the question of whether the Government has any legal obligation to fund the participation of the Conference and Council before the Commission. It was argued, in any event, that the Government had no obligation to fund the participation of the Conference and Council, particularly where participation of the Judiciary, while desirable, was not required.

When the Commission met in public session on March 20, 2000 the respective positions of the involved parties on the funding issue were further clarified. It emerged that there was no dispute among the parties on the following:

i) while the Commission does not have jurisdiction to direct or require that representational funding be provided by the Government to the Conference and Council, the Commission could make a recommendation to the Minister of Justice in that regard; and

ii) the Government had contributed $80,000 to the costs incurred by the Conference and Council in respect of their participation before the Commission. This payment was described by the Government as an "*ex gratia*" payment.

6.1 The Jurisdictional Question

As noted, all involved parties were agreed that there was no impediment to the Commission making a recommendation to the Minister of Justice on the matter of funding the representational costs of the Conference and Council, should the Commission conclude that such a recommendation was warranted. The making of such a recommendation, of course, is quite different from directing that reimbursement of representational costs be made by the Government. In either event, the Commission recognizes that consent of the parties cannot confer jurisdiction on the Commission if such jurisdiction does not otherwise legally exist.

The ability of an advisory tribunal to make a recommendation to government that reimbursement be made by the state of the representational costs of persons appearing before the tribunal, was clearly recognized in *Jones et al. v. RCMP Public Complaints Commission*.[1] In that case, the RCMP Public Complaints Commission declined to order the payment of funds to student complainants to allow them to be represented by counsel at an inquiry to be conducted by that tribunal. In addition, however, the tribunal concluded that it lacked jurisdiction to recommend to the federal government that such funding be provided and, accordingly, it declined to do so. On judicial review before the courts, the tribunal's decision was set aside and a declaration was granted that the tribunal had the authority to make the requested recommendation concerning funding, although there was no duty on it to do so. Rather, the decision whether to make such a recommendation was a matter within the complete discretion of the tribunal, as was the manner in which any such recommendation for funding might be made.

We are satisfied that similar reasoning applies to this Commission such that we are not precluded from making a funding recommendation if we determine that such a recommendation is advisable in the circumstances.

[1] (1998), 154 F.T.R. 184 (Federal Court of Canada, Trial Division).

6.2 Whether Provision of Funding is Obligatory

As noted, the Government asserted that there is no legal obligation, constitutional or otherwise, to fund the participation of the Conference and Council before the Commission. It also argued that the Commission lacks jurisdiction to determine whether an obligation to provide funding exists and, if so, on what basis, because such a determination involves a question of law and the determination of questions of law is beyond our legal authority.

In contrast, the Conference and Council argued that an obligation to provide representational funding to the Judiciary does exist and the entire issue of representational funding should be expressly recognized and dealt with by the Commission in its report.

We agree that it is important that we deal with the matter of representational funding in our report. For the reasons set out below, however, it is unnecessary for us to express a view on whether there is an affirmative legal obligation on the Government to provide representational funding to the Judiciary for the purposes of inquiries contemplated by section 26 of the *Judges Act* and further, on whether this Commission has the legal authority to determine such a question. We have concluded that some reimbursement of representational costs is both desirable and necessary to ensure the efficacy of the Commission's proceedings. Our recommendations in this regard are not dependent on any determination of whether an obligation to provide such funding exists in law.

6.3 The Desirability of Participation: A Threshold Consideration

Much has been said in the submissions of the involved parties concerning the desirability of, or necessity for, participation by the Judiciary in the quadrennial review process. This issue goes to the heart of the Commission's process and its ability to discharge its obligations under the *Judges Act*. We agree with the following observation by Madam Justice Reed in *Jones et al. v. RCMP Public Complaints Commission*, made by her in the context of determining whether authority existed to make a recommendation that funding be provided:

> *The consideration that I would think would be crucial for the Commission is whether legal representation of the complainants would improve the quality of the proceedings before it. My observation is that when decision-makers have before them one party who is represented by conscientious, experienced and highly competent counsel, [as applied in that case], they prefer that the opposite party be on a similar footing. They prefer that one party not be unrepresented. An equality in representation usually makes for easier and better decision-making.*[2]

In the *PEI Reference Case*, Chief Justice Lamer stressed that recommendations by independent compensation commissions on judges' remuneration must be made with reference to objective criteria, not political expediencies. For this reason, he indicated that, although not required as a matter of constitutional law, such a commission's "*objectivity can be promoted by ensuring that it is fully informed before deliberating and making its recommendations. This can be best achieved by requiring that the commission receive and consider submissions from the judiciary, the executive, and the legislature…*".[3] There is no requirement under the *Judges Act*, as amended to date, that we receive and consider submissions from each of the Judiciary, the executive and the legislature. Nonetheless, there can be no doubt that the proceedings of this Commission have been materially improved by the fact of active participation by both the Conference and Council, and Government. The participation of members of the Judiciary and Government has directly contributed to our understanding of the issues and has improved the information base available to us for our deliberations. This is consistent with the spirit and direction of the Supreme Court of Canada's decision in the *PEI Reference Case*.

We also have had regard to the decision of Mr. Justice Roberts of the Newfoundland Supreme Court in *Newfoundland Association of Provincial Court Judges v. Newfoundland*.[4] In that case, in ordering funding for the judges of the Provincial Court of Newfoundland before either a compensation tribunal or the courts should that become necessary, Mr. Justice Roberts stated:

> *Constitutionally, our political system is composed of three branches of government -- executive, legislative and judicial. The importance of the independence of the judicial branch from the other two branches has already been canvassed. Despite this independence, judges are paid from public funds controlled by the executive and/or the legislature.*

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[2] *Ibid*., at 191, para. 25.
[3] *Supra*, Chapter 1, fn. 4, at para. 173.
[4] (1998) 160 D.L.R. (4th) 337 (Nfld. S.C.).

> *That is why, as Lamer, C.J.C. has stated, the process of determining compensation for judges must be depoliticized. The independent tribunal or commission envisaged by the Supreme Court of Canada in the Provincial Court Judges Case [the PEI Reference Case], a version of which has existed in Newfoundland since 1992, permits the necessary dialectic at one step removed from the judges themselves. That dialectic is critical to arriving at the synthesis which will be a fair and adequate remuneration, while at the same time preserving judicial independence, both in perception and substance. For this dialectic to function, the judges have to be represented before the independent commission and/or the courts, if necessary, in the same way as the executive and/or the legislature must be represented. Is it right and just, then, that the executive and/or legislative branches of government be represented by persons who services are paid for out of the public purse while those who represent the judicial branch are not? I think not. …*
>
> …
>
> *For the system to work as envisaged, equity dictates that both parties to the process be funded, not just one.*[5]

It seems clear to us that it is highly desirable that members of the Judiciary participate fully in the process of this Commission. For the purposes of this quadrennial review, they have done so chiefly through the involvement of the Conference and Council. Were the Judiciary not to be engaged in this Commission's process it could call into question both the efficacy of our proceedings and the objectivity of our recommendations. There is a strong argument to be made, therefore, that their participation is a necessary precondition if the process of this Commission is to be effective and objective, as required by the *PEI Reference Case*.

In any event, as a practical matter, without the participation of the Judiciary and the benefit of their submissions in addition to those of the Government and other interested persons, we are not confident that we would have gained sufficient understanding of the scope and potential impact of all of the issues raised before us.

That does not resolve the question, however, as to whether participation of the Judiciary must be funded participation. In our view, consideration of this aspect of the matter gives rise to at least the following issues:

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[5] *Ibid*., at paras. 69 and 70.

i) whether the decision-making process of the Commission would be improved by participation of the Judiciary and, if so, whether such participation could be assured in the absence of funding;

ii) whether the participation of the Judiciary is connected to the Commission's ability to carry out an independent, effective and objective process for the determination of judicial remuneration;

iii) whether, absent a recommendation from the Commission, public funding would otherwise be available to the Judiciary for participation in the Commission's process;

iv) whether both the reality and appearance of fairness in relation to the Commission's process would be affected if public funding of the Judiciary's participation is not assured;

v) whether the Government has elected to contribute to the representational costs of the Judiciary, by *ex gratia* payment or otherwise and, if so, whether the amount(s) of such contribution(s) is adequate in the circumstances;

vi) in relation to disbursements incurred by the Judiciary for the cost of experts, whether the work performed by the experts was not otherwise available and whether, once undertaken, it was made available to all interested parties; and

vii) whether the amount of representational costs was reasonable in the circumstances.

6.4 Analysis of Relevant Factors

As determined by the *PEI Reference Case*, the existence of this Commission and the special process envisaged by the *Judges Act* for its inquiries, are constitutionally mandated. The process of the Commission is specifically designed to establish an independent, effective and objective means for the determination of judicial remuneration in consequence of the constitutional prohibition precluding judges from negotiating their remuneration directly with representatives of the executive or the legislature.

Under this construct, while neither the Government nor the Judiciary is expressly deemed by statute to be a party to the Commission's proceedings, in practical terms they are the two principal actors before the Commission. In addition, although the *Judges Act* does not specifically require the participation of the Judiciary in the proceedings of the Commission, the

Act does expressly contemplate the involvement of the Judiciary at key stages of the process. Thus, for example, the involvement of the Judiciary is necessary under subsection 26.1(1) of the *Judges Act* in the nomination process which serves as the means by which the Commission is constituted. Similarly, under subsection 26(3) of the *Judges Act*, the Judiciary must be involved if the Commission seeks to postpone the date of commencement of its inquiry under subsection 26(1). These two features of the *Act* provide evidence of a legislative intention that the Judiciary be engaged in the special process required by the *PEI Reference Case* for the determination of judicial remuneration.

In *R. v. Campbell et al.*[6] the Supreme Court of Canada was asked to provide directions on whether the Province of Alberta was required to pay the reasonable expenses of the Alberta judiciary incurred in participating in Alberta's provincial remuneration commission process, or litigation relating thereto. In a unanimous decision, the Court held:

> *The composition and the procedure established for hearings before the independent, effective and objective commissions may vary widely. So will the approach to the payment of the representational costs of the judges. In some instances the resolution of the payment of representational costs will be achieved by agreement. Often the commission will have to determine the issue subject to an appeal to the court. In those circumstances the position adopted in the reasons of Roberts J. in Newfoundland Assn. of Provincial Court Judges, supra, may be appropriate, a matter upon which we need not comment in this motion. Suffice it to say, whatever may be the approach to the payment of costs it should be fair, equitable and reasonable.*[7]

As appears from this passage, the Supreme Court of Canada specifically had regard in *R. v. Campbell et al.* to the earlier decision of Mr. Justice Roberts in *Newfoundland Association of Provincial Court Judges v. Newfoundland*. In the latter case, as earlier noted, Mr. Justice Roberts concluded that judges have to be represented before independent compensation commissions if the depoliticized process intended for such commissions is to function properly. In consequence, he held on equitable principles that both parties to the process must be funded. The Supreme Court of Canada, in *R. v. Campbell et al*., expressly refrained from commenting on

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[6] (1998), 169 D.L.R. (4th) 231.
[7] *Ibid*., at 233, para. 5.

the notion that funding was obligatory. The Court did not hold, although it left open the future possibility of holding, that the payment by government of the representational costs of judges in respect of participation before remuneration commissions is required at law, either in consequence of constitutional principles or in the interests of equity and fairness. What the Court did establish, however, is that the approach to the payment of representational costs of judges must be fair, equitable and reasonable.

In this case, both the Government and the Judiciary were represented throughout the Commission's process by able and experienced counsel. In the case of the Government, all of its representational costs were paid from public funds. In addition, the Government had available to it, also at public expense, the services of a variety of government experts, as required or thought desirable by the Government. In contrast, the Commission has been informed that the representational costs of the Judiciary have been paid for in equal shares to date by the Council and Conference, save as offset by the $80,000 *ex gratia* payment made by the Government.

The Council is a statutory body under the *Judges Act* and is generally funded by Parliament through the Commissioner for Federal Judicial Affairs based on Parliamentary appropriations. The Commission is not aware of whether the budget of the Council was increased specifically to compensate the Council for its anticipated expenditures in relation to this Commission's inquiry.

In contrast, the Conference receives no public funding and is financed solely by its members. The Commission has been informed that there are 950 members of the Conference, at present, which represents approximately 94% of the Judiciary. Membership statistics vary from year to year and, in the past, have been as low as 850. The current annual membership fee is $300, increased in 1999 from the previous amount of $150 to take into account the costs of establishment of a permanent office for the Conference and the engagement of staff for that office, and in contemplation of this quadrennial review process. The Conference's objects extend beyond representation of its members before this or similar commissions. The Conference was founded before the establishment of the triennial review process. Its activities include, where appropriate, involvement in the process of compensation commissions relating to the Judiciary, as well as the determination of policy for the continuing education of judges,

among other matters. From time to time the Conference engages the services of outside counsel and other professionals to advise on issues unrelated to the quadrennial review process. [8]

The Commission was informed that the $80,000 *ex gratia* payment received from the Government was made on account of the representational costs of both the Conference and Council and, upon receipt, was applied in full against outstanding invoices rendered by legal counsel for the Conference and Council.[9]

The Judiciary has not always been represented by legal counsel before past remuneration commissions. In our view, the participation of the Judiciary in the process of this Commission is as important and as beneficial as is the participation of the Government. As noted above, the quality of the Commission's decision-making and the efficacy of its process have been enhanced by the participation of both the Judiciary and Government. We are concerned, therefore, to ensure that no avoidable financial barriers to the future participation of the Judiciary before this inquiry, however constituted, are created. We also wish to ensure that public funds are expended only as necessary to defray the representational costs of the Judiciary.

We are generally of the view that the burden of paying the representational costs of the Judiciary attributable to participation in this quadrennial review process, should not be borne by individual judges. However, one of the stated reasons for recently increasing the annual membership fee for members of the Conference was associated with the costs to be incurred by the Conference through participation in the process of this inquiry. Accordingly, those members of the Conference who paid the increased annual membership fee presumably did so on the express understanding that a portion of that fee would be utilized to pay costs associated with participation in the quadrennial review. This factor must be taken into account.

Finally, we do not believe that the participation of the Judiciary should be dependent on the goodwill of the government of the day in authorizing *ex gratia* payments. If this were the case, the independence of the Judiciary from government would be undermined and the participation of the Judiciary in commission proceedings would be rendered uncertain.

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[8] Letter from Ogilvy Renault to the Commission, dated April 14, 2000, at 4.
[9] *Ibid*., at 3.

6.5 Conclusions and Recommendations

The Conference and Council provided us with a full breakdown of their representational costs as of the end of April, 2000, inclusive of legal fees and disbursements, and costs associated with experts. These costs were approximately $270,000.00. We reviewed that breakdown and all related particulars in detail and concluded, for the purposes of our inquiry, that the costs incurred were reasonable.

We recognized that the costs of participating in the process of this inquiry were considerable. They included costs related to participation in the public hearings, the preparation of various written submissions and responding to inquiries by the Commission for additional information. The question is not whether such costs can be paid by the judges who belong to the Conference and Council but, rather, what proportion of these costs fairly and equitably should be borne by the Conference and Council or their members. We agree with the proposition recognized by Mr. Justice Roberts in *Newfoundland Association of Provincial Court Judges v. Newfoundland*, previously referenced, that it is neither right nor just that the executive and/or legislative branches of government be represented before a compensation commission by persons and experts whose services are paid for out of the public purse, while those who represent the judicial branch are not. On the other hand, we also believe that some contribution should be made by the Judiciary to their overall representational costs, through application of a portion of their membership fees in the Conference. Finally, we were conscious that any recommendation by us concerning payment of representational costs will apply only to this quadrennial review, and that future commissioners will be free to determine the issue as they think fit, having regard to the facts and circumstances applicable to their inquiries.

On the basis of all of the information available to us, the factors outlined above, and the circumstances which applied to the conduct of this quadrennial review, we concluded that the Government should be responsible for payment of 80% of the total representational costs incurred by the Conference and Council in respect of their participation in the process of this inquiry, as detailed for our consideration.

Recommendation 22

The Commission recommends that the Government pay 80% of the total representational costs of the Conference and Council incurred in connection with their participation in the process of this inquiry as of May 31, 2000, such payment by the Government not to exceed the aggregate amount of $230,000, inclusive of the amount of $80,000 already contributed by the Government as of the date of this report and any extraordinary and explicitly identifiable increase to the budget of the Council in order to fund the participation of the Judiciary in the work of this Commission, and that the remainder of such costs be paid by the Conference and Council in such proportion as they deem appropriate.

CHAPTER 7

REFLECTIONS ON PROCESS

Because this inquiry is the first to be conducted in response to the decision of the Supreme Court of Canada in the *PEI Reference Case,* we have spent considerable time in our own deliberations focusing on issues of process. There are no "hard and fast rules" for how the inquiry we have conducted should be undertaken. Successor Commissioners will develop their own procedures and any procedures we have adopted, while possibly helpful, are not binding as precedents. We believe, nonetheless, that it may assist successor Commissioners if we record the way in which we dealt with many of the process and procedural issues we considered. This Chapter does that, and also puts forward some suggestions as to how the process might be improved in future.

7.1 Relations with the Parties

Although the mandate and authority of this Commission is found in section 26 of the *Judges Act,* the Commission is also rooted in the constitutional framework that assures the independence of the Judiciary and the determination of the remuneration of the Judiciary by Parliament, and in the interpretation of that framework enunciated by Chief Justice Lamer in the *PEI Reference Case.* Among the consequences that flow from this is the recognition that the Government must respond promptly to the recommendations of the Commission, and that the Government must be prepared to justify, if necessary in a court of law, any decision not to implement the Commission's recommendations:

> *What judicial independence requires is that the executive or the legislature, whichever is vested with the authority to set judicial remuneration under provincial legislation, must formally respond to the contents of the commission's report within a specified period of time. …*

> *Furthermore, if after turning its mind to the report of the commission, the executive or the legislature, as applicable, chooses not to accept one or more of the recommendations in that report, it must be prepared to justify this decision, if necessary in a court of law. … An unjustified decision could potentially lead to a finding of unconstitutionality.*[1]

This obligation on the Government to respond and justify its decision has altered the relationship of the Government to this Commission compared to its relationship with past Triennial Commissions. For example, we understand that this is the first Commission on judges' salaries and benefits where the Government has chosen to be represented throughout by counsel. This has tended to make the process and the work of the Commission somewhat more formal compared to the way in which we understand the previous Triennial Commissions to have functioned.

In considering our process, we reached the following conclusions:

i) the Commissioners should have no direct contact with either the Judiciary or the Government on any matter before the Commission, other than through counsel to the parties. When we made requests to either the Government or the Judiciary, we ensured that the other party was made aware of the request, and, in cases where third parties had expressed a particular interest in the issue that concerned us, we endeavoured to ensure that they were also made aware of such requests;

ii) since the *Judges Act* mandates us to submit our report to the Minister of Justice, it places the Commission in the position where, by statute, we are required to submit our report to a representative of one of the parties in proceedings before us. We concluded that fairness required that we make our report available to all parties at the same time, to the extent that logistics would allow;

iii) our Commission decided that we should be as open and informal as possible. Our web site provided an opportunity to ensure that all parties, and other interested persons, could follow the submissions and arguments made to the Commission, and could contact us easily by e-mail if they wished to make comments. We provided three opportunities for written submissions: an original submission, a reply submission and a final submission. This process seems to have worked well; and

iv) we endeavored to make our public hearings as informal as possible. Counsel representing parties submitted that formal rules of evidence did not apply

[1] *Supra*, Chapter 1, fn. 4, at paras. 179 to 180.

> and we agreed. We structured our hearings in a way that would maximize information exchange, rather than the reiteration of formal positions that had already been made in written submissions. We also allowed questions of clarification of any party by all parties in attendance at the public hearing. Again, we believe that this process served the Commission and the parties well.

7.2 Organizational and Administrative Issues

In the early days of this Commission we received valuable administrative and logistical support from the Commissioner for Federal Judicial Affairs and his staff. We established our own offices that are associated with those of the Commissioner in order to achieve economies, but function independently. We suggest that the Commission, as a permanent entity separate from the Government and the Judiciary, should maintain its own offices and its own files. These should be physically separate from and independent of the Office of the Commissioner for Federal Judicial Affairs, although we believe that it is helpful and efficient to maintain close administrative ties with that office.

With regard to composition and staffing, we urge the Judiciary and the Government to nominate their representatives on the Commission in future in a time frame that will allow the Commission to be constituted and fully ready to function as of the September 1 date at which the quadrennial inquiry must be commenced. Nine months in which to conduct an inquiry of this scope and importance is not a long time.

In considering the timing of nominations, note must be taken of the manner in which the Commission is constituted. Each of the Judiciary and the Government nominates a Commissioner and the two nominees are charged with identifying and recruiting a Chair. In the case of this Commission, the nominees did not seek and were not provided with any assistance from the parties with regard to potential chairs of the Commission. We believe that the timelines around the appointments of the nominees were such that we were indeed fortunate to be able to commence our work, as required, in early September 1999. It took many additional weeks to recruit staff and put in place the necessary logistical and support measures that allowed us to function effectively. We believe that it is desirable for the next

Commissioners, whose inquiry will commence on September 1, 2003, to be appointed well in advance of that date, so that staffing and logistical arrangements can be made and a fully functioning Commission can have nine full months to complete the mandate that is set out for it in the *Judges Act*.

7.3 The Role of Experts and Research

We benefited greatly from the advice that we obtained from experts who examined difficult compensation, constitutional and other legal issues for us. We suggest that future Commissioners may wish to consider engaging such experts early in their inquiry.

One area where we felt the process might be improved concerned the matter of research. Our initial view was that the Commission might play a helpful role in working with the Judiciary and Government to identify an agreed research agenda, and that we might then contract such research on behalf of the parties and the Commission. In the event, this idea became a casualty of our not being fully staffed and ready to commence an in-depth review of the issues as of September 1. We simply had too many other administrative and logistical issues to deal with first. We continue to believe that it is a concept that makes good sense and one worthy of pursuit by future Commissioners. There are several benefits: increased understanding of the issues considered relevant by each party; economic use of research resources; and, hopefully, an accepted data base that would be common to the Commission, the Judiciary and Government.

As we indicated in Chapter 2, our deliberations on salary levels were informed by considerable information provided to us by both the Conference and Council, and Government. However, we did not have full or current information on the incomes of lawyers in private practice, the group that is likely to continue to yield most of the outstanding candidates for appointment to the Bench. Information from tax returns, provided to us by the Conference and Council, was a helpful proxy. We believe, however, that the Commission should develop, as best it can, a relevant income measure for lawyers in private practice that would allow it to track over time, in

a consistent way, the relationship between judges' compensation and a compensation measure for the private bar.

We believe that the Commission should be resourced to conduct a survey of private practioner incomes on a regular basis.

CHAPTER 8

RECOMMENDATIONS

The Commission recommends that:

Recommendation 1

The salary of puisne judges be established as follows:

Effective April 1, 2000: $198,000, inclusive of statutory indexing effective that date;

Effective April 1, 2001: $200,000, plus statutory indexing effective that date;

Effective April 1, 2002 and 2003, respectively: the salary of puisne judges should be increased by an additional $2,000 in each year, plus statutory indexing effective on each of those dates.

(Section 2.4)

Recommendation 2

The salaries of the Justices of the Supreme Court of Canada, and the Chief Justices and Associate Chief Justices should be set, as of April 1, 2000 and inclusive of statutory indexing effective that date, at the following levels:

Supreme Court of Canada:	
Chief Justice of Canada	$254,500
Justices	$235,700
Federal Court and Tax Court:	
Chief Justices	$217,100
Associate Chief Justices	$217,100
Superior and Supreme Courts and Courts of Queen's Bench:	
Chief Justices	$217,100
Associate Chief Justices	$217,100

As of April 1 in each of 2001, 2002 and 2003, these salaries should be adjusted to maintain the same proportionate relationship with the salary of puisne judges established as of April 1, 2000.

(Section 2.6)

Recommendation 3

Incidental Allowances be adjusted to a level of $5,000 per year effective as of April 1, 2000.

(Section 3.1)

Recommendation 4

Northern Allowances be adjusted to a level of $12,000 per year effective as of April 1, 2000.

(Section 3.2)

Recommendation 5

Effective as of April 1, 2000, Representational Allowances be set as follows:

Chief Justice of Canada	$18,750
Chief Justices of the Federal Court of Canada and the Chief Justice of each province	$ 12,500
Supreme Court of Canada Puisne Judges, Trial Chief Justices, Other Designated Chief Justices and Senior Judges	$ 10,000

(Section 3.3)

Recommendation 6

Effective as of April 1, 2000, contributions toward a judicial annuity be reduced from 7% of salary to 1% of salary for the period during which a judge is entitled to receive a full annuity but continues to work in either a full-time or supernumerary capacity.

(Section 4.6)

Recommendation 7

Effective as of April 1, 2000, the relevant regulations under the *Income Tax Act* be amended to afford judges the opportunity to contribute to RRSPs at the time they

cease making contributions to the judicial annuity scheme, on the same basis as public servants are now allowed to do.

(Section 4.7)

Recommendation 8

Effective as of April 1, 2000, judges have the right to elect supernumerary status for a period not exceeding 10 years upon attaining eligibility for a full pension.

(Section 4.8)

Recommendation 9

Effective as of April 1, 2000, to be eligible for early retirement with a pro-rated pension, a judge must serve at least 10 years and must be at least 55 years of age.

(Section 4.9)

Recommendation 10

Effective as of April 1, 2000, a pro-rated pension, available to any judge who has served at least 10 years and is at least 55 years of age, be calculated as 2/3 of salary in the year that early retirement is elected, multiplied by the number of years of service divided by the number of years which the electing judge would have been required to serve in order to earn a full annuity.

(Section 4.9)

Recommendation 11

Effective as of April 1, 2000, the pro-rated pension not be payable without actuarial reduction prior to the judge attaining age 60 and that the amount of the pension be indexed by the Consumer Price Index in each year that it is deferred.

(Section 4.9)

Recommendation 12

Should a judge who is eligible for early retirement wish to elect a pro-rated annuity that is payable immediately, the value of the annuity be reduced by 5% per year for every year that the annuity is paid in advance of age 60.

(Section 4.9)

Recommendation 13

Effective as of April 1, 2000, the annuity provisions of the *Judges Act* be amended to provide judges with the option to elect a survivor's benefit of 60% of the judicial annuity, with a consequent reduction in the initial benefit calculated to minimize any additional cost to the annuity plan.

(Section 4.10)

Recommendation 14

Effective as of April 1, 2000, judges have the further flexibility to elect a survivor's benefit of up to 75% of the annuitant's pension, with an actuarial reduction to initial benefits that will make the election as close to cost neutral as possible.

(Section 4.10)

Recommendation 15

Subsection 44(3) of the *Judges Act* be repealed.

(Section 4.10)

Recommendation 16

Effective as of April 1, 2000, a Justice of the Supreme Court of Canada who retires and who, with the certification of the Chief Justice is required to participate in judgments for up to six-months following retirement, be compensated at full salary (calculated at the time of retirement) for the time that he or she so serves, and be entitled to an appropriate portion of the Incidental and Representational Allowances.

(Section 4.12)

Recommendation 17

A separate plan, under the general framework of the PSMIP, be created promptly for the Judiciary so as to provide the Judiciary with basic life insurance, post-retirement life insurance, and supplementary life insurance benefits that are, in all material respects, the same as those now enjoyed by members of the Executive Plan.

(Section 5.1)

Recommendation 18

Incumbent judges, at the time of introduction of the new plan, have the option, at their sole discretion, of opting out of insurance coverage or electing to accept coverage of 100% of salary, rather than 200% of salary.

(Section 5.1)

Recommendation 19

The Government take all available steps with the trustees of the applicable health benefits plan to effect a change under the plan to the hospital benefits available to the Judiciary, so as to increase such hospital benefits from $60.00 per day to $150.00 per day at no cost to judicial participants in the plan.

(Section 5.2)

Recommendation 20

Effective as of April 1, 2000, survivors of members of the Judiciary who die by accident or an act of violence occurring in the course of, or arising out of, the performance of their judicial duties should receive survivor benefits at the maximum level and on the same basis as now provided for the most senior category of public servants for whom such benefits are currently provided.

(Section 5.3)

Recommendation 21

When the dental plan is amended to provide coverage to retirees, retired judges be eligible to participate on the same terms and conditions as other retirees.

(Section 5.4)

Recommendation 22

The Government pay 80% of the total representational costs of the Conference and Council incurred in connection with their participation in the process of this inquiry as of May 31, 2000, such payment by the Government not to exceed the aggregate amount of $230,000, inclusive of the amount of $80,000 already contributed by the Government as of the date of this report and any extraordinary and explicitly identifiable increase to the budget of the Council in order to fund the participation of the Judiciary in the work of this Commission, and that the remainder of such costs be paid by the Conference and Council in such proportion as they deem appropriate.

(Section 6.5)

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GOVERNMENT RESPONSE TO THE 1999 JUDICIAL COMPENSATION AND BENEFITS COMMISSION

Canada

This is the Response to the Report of the Judicial Compensation and Benefits Commission, dated May 31, 2000, by the Minister of Justice on behalf of the Government pursuant to s. 26(7) of the *Judges Act*.

1. Background: Supreme Court of Canada Independence Decision and a Revised Judicial Compensation and Benefits Process

On November 18, 1997, the Supreme Court of Canada rendered its decision in the *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*.[1] That decision established new constitutional requirements in support of the principle of judicial independence. Every Canadian jurisdiction is required to have "an independent, objective and effective" commission to consider and make recommendations to government regarding the compensation and benefits of judges. The purpose of the commission is to depoliticize the process of judicial remuneration, so that the "courts are both free and appear to be free from political interference through economic manipulation by the other branches of government".[2]

While a commission's recommendations are not binding, governments are required to respond publicly to a commission's report. In the event that recommendations are not accepted, or where it is proposed that a recommendation should be modified, the government concerned must provide a reasonable justification for its decision. The reasonableness of the government's response is reviewable in a court of law and must meet the legal standard of "simple rationality", measured by the reasons and the evidence offered in support by the government.

A statutorily mandated federal judicial compensation commission had been in place prior to the decision in the *P.E.I Judges Reference.* Following that decision, the *Judges Act* was amended in order to reinforce the independence, objectivity and effectiveness of the commission process. The new Judicial Compensation and Benefits Commission ("Commission") is now required to convene every four years, and to make a report with recommendations within nine months of the commencement of its work.

The statutory mandate of the Commission is to inquire into the adequacy of judicial compensation and benefits.[3] In doing so the Commission is directed by statute to consider:[4]

a) the prevailing economic conditions in Canada, including the cost of living, and the overall economic and financial position of the federal government;
b) the role of financial security of the judiciary in ensuring judicial independence;

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[1] [1998] 1 S.C.R. 3. (*P.E.I. Judges Reference*)
[2] *Ibid.* 88, para. 131.
[3] *Judges Act*, R.S. 1985, c. J-1, as amended (the *"Judges Act"),* s. 26 (1).
[4] *Ibid.*, s. 26(1.1).

c) the need to attract outstanding candidates to the judiciary; and
d) any other objective criteria that the Commission considers relevant.

The *Judges Act* requires that the Minister of Justice respond publicly on behalf of the Government of Canada within six months of receipt of the Commission Report.[5] However the ultimate response will come from Parliament. Section 100 of the *Constitution Act, 1867* requires that the salaries and allowances of the federally appointed judiciary be established by Parliament. Accordingly, the Government will introduce a Bill at the earliest reasonable opportunity, proposing amendments to the *Judges Act* to implement this Response.

2. Report of the First Quadrennial Judicial Compensation and Benefits Commission

The first new quadrennial Commission was established on September 1, 1999. To ensure the independence of the Commission, as required by the *Judges Act,* its three members were appointed by the Governor in Council to hold office for a term of four years on good behaviour.[6] The judiciary and the Government each nominated one member of the Commission. Those two members nominated a third member to serve as Chair of the Commission.

The Commission sought and received written submissions, supported by expert and other evidence, from a broad range of interested persons, including representatives of the judiciary and the Government. Two days of public hearings were held on February 14 and March 20, 2000 during which the Commission heard extensive argument from representatives of the Government, the Canadian Judicial Council and the Canadian Judges Conference, and all others who chose to make oral submissions. In addition to the expert evidence provided in the various submissions, the Commission retained its own consultants to assist its deliberations.

The Commission delivered its Report to the Government on May 31, 2000. An excerpt from the Report setting out the text of the Commission's recommendations is attached as Annex A.[7]

3. Response to the Report

Before responding to the Commission's recommendations, the Government wishes to acknowledge and thank the Chair and the Commissioners of this first quadrennial Commission: Chairman Richard Drouin, and Commissioners Eleanore Cronk and Fred Gorbet. The procedure adopted by the Commission in consultation with the Government

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[5] *Ibid.*, s. 26(7).
[6] *Ibid.*, s. 26.1. The Chair of the Commission is Richard Drouin, O.C., Q.C and the Commissioners at the time of the Report were Eleanore Cronk and Fred Gorbet. Ms. Cronk resigned her position on the Commission on October 12, 2000.
[7] The interim and final Commission Reports, written submissions and supporting materials can be found at www.quadcom.gc.ca.

and representatives of the judiciary provided the transparency and accessibility necessary to ensure public confidence in the independence of the Commission and in the objectivity of its recommendations. The care with which the Commission undertook its preparations and deliberations is evident in its Report. While the Government may not share all the Commission's conclusions, it is clear that the Commission has made a great effort to offer reasons that are carefully explained and supported by evidence, to the extent that evidence was available. The quality and thoroughness of the Report will set the hallmark for future quadrennial Commissions in dealing with the important and often complex issues of judicial compensation.

The Government is committed to the principle of judicial independence and to the effectiveness of the Judicial Compensation and Benefits Commission process in support of that principle. The Government recognizes the particular importance of this first formal Response to these recommendations of the newly constitutionalized quadrennial Commission, both in terms of ensuring public perception of the legitimacy of the process and in reinforcing judicial confidence in the new process. In light of all these factors, the Government is prepared to accept Recommendations 1-7 and 9-21 of the Judicial Compensation and Benefits Commission, and will propose the necessary amendments to the *Judges Act* at the earliest reasonable opportunity. Certain of the recommendations are accepted subject to reasonable qualifications or criteria described below.

However, as also explained below, the Government is not prepared to accept the Commission's recommendations in their entirety. Specifically, Recommendation 8 relating to supernumerary judges will be deferred until further work has been done.[8] The Government does not accept Recommendation 22 relating to judicial representational costs and will propose that an alternative formula for the provision of such costs be established in the *Judges Act.*[9]

a) Salaries and Allowances: Recommendations 1-5

The Commission recommends that the salaries of puisne judges be increased from $178,100 to $198,000 inclusive of annual statutory indexing[10] effective April 1, 2000; with an increase of $2,000 in addition to statutory indexing for each of the following years until 2003[11] Equivalent adjustments to the salaries of Chief Justices, Associate Chief Justices and judges of the Supreme Court of Canada are recommended. The

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[8] The further work that is required is described *Infra.*, Section 3(c).

[9] The alternative formula is discussed *Infra.*, Section 3(d).

[10] Section 25(2) of the *Judges Act* provides for an annual adjustment to salaries based on the Industrial Aggregate to protect against inflation. The Industrial Aggregate ("IA") is a measure of average weekly wages and salaries across Canada produced by Statistics Canada. On April 1st of each year, judges receive an increase based on the increase in the IA over the previous twelve months, to a maximum of 7%.

[11] The last salary increase was effective April 1, 1998. The IA on April 1, 2000 was 0.67%, resulting in an all inclusive percentage increase (salary increase plus statutory indexing) of 11.2% as of April 1, 2000. The $2000 per year incremental salary increases represents a percentage increase of approximately 1% in each year.

Commission further recommended that incidental, Northern and representational allowances be increased.[12]

While the Commission recommends a higher salary increase (11.2%)[13] than the Government had proposed in its written submission (5.7%), the recommended increase is significantly less than that sought by the representatives of the judiciary (26.3%). From this perspective, the recommended increases are within the range of what would be considered reasonable, given the difficulties inherent in assessing the adequacy of judicial salaries. Like Commissions before it, the Commission faced the perennial challenge in establishing a true salary comparator for the judiciary. Below the Government proposes that steps should be taken to address this information deficit in time for the next quadrennial review. However, on the basis of the evidence and the analysis currently available, it would be difficult to clearly demonstrate a substantive basis to challenge the recommendations. The Government will therefore propose to Parliament that the Commission's recommendations relating to salaries and allowances be implemented.

The Government does not accept all the assumptions made or comparators used by the Commission. In particular it appears that the Commission's recommendation for an annual increment above statutory indexing is based on an assumption about how compensation trends will develop over the next three years. This assumption may or may not be borne out by experience. It will be necessary to revisit this approach at the next quadrennial Commission, in light not only of actual trends but also through consideration of an improved information base upon which future assumptions and comparisons can be made. It is to this latter critical challenge that we now turn.

The first quadrennial Commission, like commissions before it, relied on a combination of comparative factors in arriving at its salary recommendations, including the earnings of private sector lawyers, the salaries and performance bonuses of the most senior federal Deputy Ministers, and the significance of judicial annuities in recruiting outstanding candidates to the bench. However, the Commission was required to make the best of a largely unsatisfactory information base, a fact which is to some degree acknowledged in the Report itself. The Commission recognized the insufficiency of the evidence that is currently available as it relates to the compensation of lawyers in private practice.[14] The Commission proposed that the Commission should develop a relevant income measure that would allow the tracking over time and in a consistent way of the relationship between judges' compensation and a compensation measure for the private bar. The Commission further suggested that it should be provided with the necessary resources to conduct a survey of private practitioner incomes on a regular basis.

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[12] The incidental allowance (s. 27(1), *Judges Act*) permits the judiciary to purchase items and equipment, such as robes, law books and computers, which assist in the execution of judicial functions. This allowance has not been increased since 1989. The Northern allowance (s. 27(2), *Judges Act*) is intended to contribute to the higher cost of living in the territories; it has not been increased since 1989 either. Finally, representational allowances (s. 27(6), s. 27(7), *Judges Act*) reimburse Chief Justices and other like senior judges for travel and other expenses actually incurred as they discharge their special extra-judicial obligations such as representing their courts at conferences and public events. Representational allowances have not been increased since 1985.

[13] The 11.2% is inclusive of statutory indexing as set out in Fn. 11.

[14] *Report of the Judicial Compensation and Benefits Commission* ("*Report*"), May 31, 2000, at 116-117.

The Government wholeheartedly agrees that better information is required in order to understand fully the role that compensation plays in the decision to seek judicial office. In the Government's view, relevant factors include not only financial remuneration such as the specific value of salaries, pensions and allowances, but as importantly, the other "quality of life" issues that are indisputably influential in a decision to seek judicial office. For example, what consideration is given by potential candidates to such issues as relative workload including hours of work, vacation and leave benefits? How do candidates take into account tenure considerations including security and risk? What weight is given to the availability of "end of career" options such as early retirement and supernumerary status? And how is a potential reduction of financial remuneration by some candidates weighed against a less tangible but very significant factor: the deep personal satisfaction that comes from the opportunity to make a public contribution in one of the most highly respected offices in Canadian life? How important is the quality of judicial work in a collegial context that allows for intellectual reflection on important or novel issues of legal principle, often a luxury for a practicing lawyer?

Given the unique nature of the federally appointed judiciary, such an analysis will admittedly not be easy. For example, obtaining the information necessary to assess the relative earnings and quality of life expectations of candidates for judicial office will be a new and difficult exercise. Developing an objective measure against which private sector and judicial workloads can be compared will also present a significant methodological challenge. In terms of judicial workload, such an undertaking will require the close co-operation of the federal Government and the provincial and territorial governments who are responsible for administration of justice in their respective jurisdictions. It will also require the active and co-operative participation of the federally appointed judiciary, and in particular Chief Justices, who are for the most part the holders of the information that would be required to develop a workable system capable of producing meaningful results.

It should be noted that another area of necessary information gathering and analysis is identified below in relation to the discussion of the Commission's recommendation relating to supernumerary judges. The Commission reiterated the suggestion of the 1993 Crawford Commission that the Canadian Judicial Council "actively collect relevant information in this area with a view to making it available for future quadrennial commissions".[15] It seems inevitable that any analysis of the impact of the contribution of supernumerary judges to the overall workload of a court will raise similar questions. An assessment that a supernumerary judge "normally works 50% of the time" arguably begs the question unless the workload expectations for a full-time judge are well understood.

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[15] *Ibid.*, at 78.

b) Judicial Annuities and Other Benefits: Recommendations 6,7, 9-21

Generally, federally appointed judges who have served fifteen years on the bench can retire with an annuity of two-thirds of their salary. However, a judge who leaves the bench at any time before fulfilling the fifteen year requirement is not entitled to any annuity at all.[16] The Government is prepared to accept the Commission's recommendations for certain modest improvements to the current judicial annuity scheme, including that a judge be entitled to take early retirement with a pro-rated pension after 10 years on the bench. However, in so doing it is important to note that the Commission's recommendations be considered in the context of the pension proposals made on behalf of the judiciary and the Government's position in response before the Commission.

In their Joint Submission to the Commission dated December 20, 1999, representatives of the Canadian Judicial Council and the Canadian Judges' Conference proposed extensive and costly changes to the current judicial annuities scheme. The Government's position was that no additional *ad hoc* changes should be made to fundamental aspects of the scheme. The Government proposed instead to formally refer the issue of judicial annuity reform to the Commission after June 1, 2000 for a comprehensive review in light of the modern pension policy.

The judiciary withdrew, for purposes of this quadrennial review, many of their more extensive and expensive proposals for enhanced annuity options. In the end, the Commission was not persuaded to defer entirely its consideration of annuity improvements until the proposed comprehensive review. However, in the result, the Commission made only limited recommendations in this area. It recommended the provision of an early retirement option based on a pro-rated benefit.[17] The Commission also recommended the pension contribution rate be reduced from 7% to 1% when a judge becomes eligible to retire, which the Government had proposed.[18] In addition, it recommended the reinstatement of entitlement to contribute to RRSPs at the time the judge becomes eligible to retire.[19]

While the Government is prepared to implement these annuity-related recommendations, it remains of the opinion that a comprehensive review of the current judicial annuity

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[16] Section 42(1) of the *Judges Act* sets out the eligibility requirements for retirement with a full annuity. Section 42(1)(c) may be seen as an exception to the general rule of holding judicial office for a minimum period of years in that a judge who resigns as a result of a permanent disability may still receive a full annuity.

[17] In Recommendations 9 to 12, the Commission has recommended that the pro-rated, early retirement option be available as of April 1, 2000, effectively making its application retroactive. However, it is not feasible to make the early retirement option retroactive; for example, a judge can not elect a retroactive retirement date of April 2, 2000 when in reality the judge held judicial office from April 2, 2000 to the date of election. Accordingly, the *Judges Act* will be amended to implement Recommendations 9 to 12, but provide that the amendments be effective upon the coming into force of the legislation.

[18] Recommendation 6.

[19] Recommendation 7. This is consistent with the treatment afforded to members of regular employer-sponsored pension plans (including federal public servants) who cease to accrue benefits while still employed.

regime is needed. The Government continues to believe that there is a need for a thorough re-examination of the basic policy objectives and assumptions that underlie the annuity scheme. Such a study would lay the groundwork for a longer term reform of the judicial annuity scheme, consistent with the *Judges Act* requirement of "adequacy" in support of judicial independence, the current or changing demographics of the judiciary, and the evolution of contemporary pension policy in response to societal changes.

Properly framed, this comprehensive review would include all aspects of pension policy. In addition to the range of annuity proposals made by the judiciary in the Joint Submission, the review would revisit earlier amendments to the *Judges Act* scheme. This would include issues such as the appropriateness and level of annuity contributions, and early retirement options such as the Rule of 80, as well as the current Commission recommendations. Such a study would also provide the opportunity to consider other important pension-related issues, such as pension-splitting within current family law regimes, the continued merits of the current rules relating to retirement on grounds of "permanent disability" in light of advances in modern medicine, and plan restructuring to achieve consistency with contemporary income tax and pension policy.

A comprehensive review of this kind would likely require a staged approach and should ideally be designed with input from all interested persons and groups. The Government will be seeking the views of the Commission and the judiciary as to the most effective way to begin this important undertaking in order to be prepared to address these issues before the next quadrennial Commission.

Before leaving the area of annuities, it should be noted that the Government also accepts the Commission's Recommendations 13-15 relating to enhanced survivor benefits, subject to certain requirements. The Commission's intention is to provide greater flexibility without increasing cost. The Government will propose terms designed to minimize the cost and ensure that the election will be as close to cost neutral as possible.[20]

The Government is also prepared to accept Recommendations 17-21.[21] In terms of Recommendation 17 with respect to insurance, the Commission has called for prompt

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[20] The option would be exercisable at the time of retirement. (A limited time period will also be extended to retired judges to elect an enhanced survivor benefit.) Exercise of the option would be void if the judge dies within the first year, with original entitlements reinstated. The formula for actuarial reduction would be established by regulation based on mortality tables adjusted over time based on actual experience with the judicial constituency. Finally, although the Commission has recommended that Recommendations 13 and 14 be implemented as of April 1, 2000, it is not feasible to provide for retroactive application. Therefore, the *Judges Act* will be amended to provide an effective date upon the coming into force of the legislation.

[21] Recommendation 20 addresses benefits for accidental death and death caused by act of violence (also known as "slain on duty"). Dependents of judges would be provided an accidental death benefit and a slain on duty benefit equivalent to the level of benefit that is available to the dependents of the most senior category of public servants, being Executive 5. The entitlements would be implemented by statute, with the specifics of the formula provided by regulation. The accidental death benefit would be consistent with the benefit derived using formula provided in the *Government Employee Compensation Act*. The slain on duty benefit would be consistent with the benefit derived using a formula similar to the "Public Service Income

creation of a separate life insurance plan. However, in Recommendation 18, the Commission recommends that the plan be compulsory for new judges. The requirement for compulsory participation means that this recommendation must be implemented by legislation. The Government will seek the necessary amendments to the *Judges Act*. In terms of the recommendation that the plan be created under the general framework of the Public Service Management Insurance Plan ("PSMIP"), the Government will take all steps that are within its power to implement the recommendation in this manner.[22] If for legal reasons the Government is unable to do so, it will take all necessary steps to provide an alternative plan at as reasonable a cost and taxable benefit to the judiciary as possible.

c) Supernumerary Status: Recommendation 8

The Commission recommends that a judge be entitled to elect supernumerary status upon satisfying the Rule of 80, that is when the judge's combined age and years of service add up to 80.[23]

The Government is not prepared to accept Recommendation 8 at this time, for a number of reasons. Implementation of this recommendation would have implications not only for the federal Government but also for the provinces and territories. As part of their constitutional responsibility for administration of justice, the provinces and territories determine the structure of the superior courts in each jurisdiction.[24] In so doing they decide the number and nature of judicial positions on those courts. It is for the provinces and territories to determine whether, as a policy matter, it is appropriate to create the office of supernumerary judge in the first instance. It is only where a province has enacted such legislation that the authority to pay supernumerary judges pursuant to the *Judges Act* is engaged.[25]

Benefit Plan for Survivors of Employees Slain on Duty". Although the Commission recommended that Recommendation 20 be implemented as of April 1, 2000, as it is not feasible to make Recommendation 20 retroactive, the *Judges Act* will be amended to provide an effective date upon the coming into force of the legislation.

[22] PSMIP is a plan which is established and insured contractually with a private insurer. It is administered by a Board of Trustees. Both the consent of the insurer and the concurrence of the Board is required to establish a new plan under PSMIP. Recommendation 19, on the other hand, engages the Public Service Health Care Plan (PSHCP); Treasury Board Secretariat will extend 100% employer-paid coverage under the PSHCP for family hospital provisions Level III ($150/day) to all active judges.

[23] Currently, a judge must be a minimum of age 65 to elect supernumerary status (s. 28(2), *Judges Act*).

[24] The Parliament of Canada establishes the structure of the Federal Court of Canada and the Tax Court of Canada, including the creation of supernumerary offices (s. 28(1), *Judges Act*).

[25] S. 29 (1) of the *Judges Act* provides:

> Where the legislature of a province has enacted legislation establishing for each office of judge of a superior court or courts of the province the additional office of supernumerary judge of the court or courts and a judge of such a court has notified the Minister of Justice of Canada and the attorney general of the province of his election to give up regular judicial duties and hold office only as a supernumerary judge, the judge shall thereupon hold only the office of supernumerary judge of that court and shall be paid the salary annexed to that office until he reaches the age of retirement, resigns or is removed from or otherwise ceases to hold office.

Recommendation 8 has the potential of increasing significantly the number of federally appointed supernumerary judges.[26] A number of jurisdictions have for some years expressed concerns about the growing numbers of supernumerary judges and their implications for the costs associated with provision of facilities and support services to those judges. In discussions with representatives of provincial and territorial governments, it has been proposed that the role of supernumerary judges and their contribution to the workload of the Canadian courts merit a more systematic review.

At the same time, important constitutional issues relating to the status of supernumerary judges will soon be considered by the Supreme Court of Canada.[27] The Court's decision may provide important guidance with respect to the capacity of governments to legislate in this area in the future.

As discussed, the Commission itself has identified the need for better information gathering with respect to the contribution of supernumerary judges to the workload of the courts. In the Government's view, this should be one element of the broader study that we have proposed be undertaken in preparation for the next quadrennial Commission. This would also provide an opportunity for appropriate consultation with provincial and territorial governments in shaping federal government proposals as they relate to supernumerary judges. Those governments would also have the opportunity to make their views known before the next Commission.

d) Representational Costs: Recommendation 22

The Commission recommends that the Government pay 80% of the total representational costs incurred by the judiciary in connection with their participation in the Commission process, subject to a certain maximum.[28]

The Government does not accept Recommendation 22. There is no constitutional obligation on the Government to pay legal or other representational costs of the judiciary incurred as a result of participation in the Commission process.[29] As a policy matter, the Government recognized the public benefit of judicial participation in the Commission process and made an $80,000 *ex gratia* payment to representatives of the judiciary as a fair contribution to the participation of the judiciary before the Commission.

It is the Government's view that, as a matter of policy, the payment formula recommended by the Commission is not reasonable. That formula would afford the representatives of the judiciary a largely unchecked discretion in deciding what costs

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[26] Eighty-three (83) additional judges would be eligible to elect supernumerary status. (*Report*, Appendix 9, at 2).

[27] *Rice v. New Brunswick* (1999), 181 D.L.R. (4th) 643 (N.B.C.A.); *Mackin v. New Brunswick (Minister of Finance)* (1999), 40 C.P.C. (4th) 107 (N.B.C.A.); leave to appeal granted [2000] S.C.C.R. No. 21 (QL).

[28] Representational costs include the costs of legal services and disbursements such as expert consultant fees, travel expenses, photocopying and related administrative costs. The Commission recommended that the payment not exceed the aggregate amount of $230,000, inclusive of the amount of $80,000 already contributed by the Government.

[29] The Government's position is explained in its submission to the Commission dated February 3, 2000.

would be incurred for legal counsel, expert witnesses and the like in preparation for a Commission, with the public being held responsible for the payment of the significant and unpredictable expenditures incurred by the judiciary.

Instead the Government proposes an alternative formula which would provide for a reasonable contribution to the costs of the participation of the judiciary, while at the same time establishing reasonable limits on such expenditures. The costs would be shared equally by the public and the judiciary, the immediate beneficiaries of the Commission's recommendations as to compensation and benefits. The formula would be established by the *Judges Act*, so that the judges would have the benefit of knowing in advance the level of their responsibility, without having to await the recommendation of each quadrennial Commission. The representatives of the judiciary will take that responsibility into account in incurring costs reasonably and prudently.

Accordingly, the Government will propose that 50% of judicial representational costs be paid on a solicitor/client basis, subject to taxation in the Federal Court of Canada.[30] Under the proposed *Judges Act* amendment, this formula would apply to costs incurred before this Commission, as well as future commissions.

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[30] In essence, the judiciary's legal representational costs would be reviewed by an assessment officer of the Federal Court of Canada for reasonableness, and the Government would then pay 50% of the resulting total.

ANNEX "A"

The Commission recommends that:

Recommendation 1

The salary of puisne judges be established as follows:

Effective April 1, 2000: $198,000, inclusive of statutory indexing effective that date;

Effective April 1, 2001: $200,000, plus statutory indexing effective that date;

Effective April 1, 2002 and 2003, respectively: the salary of puisne judges should be increased by an additional $2,000 in each year, plus statutory indexing effective on each of those dates.

(Section 2.4)

Recommendation 2

The salaries of the Justices of the Supreme Court of Canada, and the Chief Justices and Associate Chief Justices should be set, as of April 1, 2000 and inclusive of statutory indexing effective that date, at the following levels:

Supreme Court of Canada:	
Chief Justice of Canada	$254,500
Justices	$235,700
Federal Court and Tax Court:	
Chief Justices	$217,100
Associate Chief Justices	$217,100
Superior and Supreme Courtsand Courts of Queen's Bench:	
Chief Justices	$217,100
Associate Chief Justices	$217,100

As of April 1 in each of 2001, 2002 and 2003, these salaries should be adjusted to maintain the same proportionate relationship with the salary of puisne judges established as of April 1, 2000.

(Section 2.6)

Recommendation 3

Incidental Allowances be adjusted to a level of $5,000 per year effective as of April 1, 2000.

(Section 3.1)

Recommendation 4

Northern Allowances be adjusted to a level of $12,000 per year effective as of April 1, 2000.

(Section 3.2)

Recommendation 5

Effective as of April 1, 2000, Representational Allowances be set as follows:

Chief Justice of Canada	$ 18,750
Chief Justices of the Federal Court of Canada and the Chief Justice of each province	$ 12,500
Supreme Court of Canada Puisne Judges, Trial Chief Justices, Other Designated Chief Justices and Senior Judges	$ 10,000

(Section 3.3)

Recommendation 6

Effective as of April 1, 2000, contributions toward a judicial annuity be reduced from 7% of salary to 1% of salary for the period during which a judge is entitled to receive a full annuity but continues to work in either a full-time or supernumerary capacity.

(Section 4.6)

Recommendation 7

Effective as of April 1, 2000, the relevant regulations under the *Income Tax Act* be amended to afford judges the opportunity to contribute to RRSPs at the time they cease making contributions to the judicial annuity scheme, on the same basis as public servants are now allowed to do.

(Section 4.7)

Recommendation 8

Effective as of April 1, 2000, judges have the right to elect supernumerary status for a period not exceeding 10 years upon attaining eligibility for a full pension.

(Section 4.8)

Recommendation 9

Effective as of April 1, 2000, to be eligible for early retirement with a pro-rated pension, a judge must serve at least 10 years and must be at least 55 years of age.

(Section 4.9)

Recommendation 10

Effective as of April 1, 2000, a pro-rated pension, available to any judge who has served at least 10 years and is at least 55 years of age, be calculated as 2/3 of salary in the year that early retirement is elected, multiplied by the number of years of service divided by the number of years which the electing judge would have been required to serve in order to earn a full annuity.

(Section 4.9)

Recommendation 11

Effective as of April 1, 2000, the pro-rated pension not be payable without actuarial reduction prior to the judge attaining age 60 and that the amount of the pension be indexed by the Consumer Price Index in each year that it is deferred.

(Section 4.9)

Recommendation 12

Should a judge who is eligible for early retirement wish to elect a pro-rated annuity that is payable immediately, the value of the annuity be reduced by 5% per year for every year that the annuity is paid in advance of age 60.

(Section 4.9)

Recommendation 13

Effective as of April 1, 2000, the annuity provisions of the *Judges Act* be amended to provide judges with the option to elect a survivor's benefit of 60% of the judicial annuity, with a consequent reduction in the initial benefit calculated to minimize any additional cost to the annuity plan.

(Section 4.10)

Recommendation 14

Effective as of April 1, 2000, judges have the further flexibility to elect a survivor's benefit of up to 75% of the annuitant's pension, with an actuarial reduction to initial benefits that will make the election as close to cost neutral as possible.

(Section 4.10)

Recommendation 15

Subsection 44(3) of the *Judges Act* be repealed.

(Section 4.10)

Recommendation 16

Effective as of April 1, 2000, a Justice of the Supreme Court of Canada who retires and who, with the certification of the Chief Justice is required to participate in judgments for up to six-months following retirement, be compensated at full salary (calculated at the time of retirement) for the time that he or she so serves, and be entitled to an appropriate portion of the Incidental and Representational Allowances.

(Section 4.12)

Recommendation 17

A separate plan, under the general framework of the PSMIP, be created promptly for the Judiciary so as to provide the Judiciary with basic life insurance, post-retirement life insurance, and supplementary life insurance benefits that are, in all material respects, the same as those now enjoyed by members of the Executive Plan.

(Section 5.1)

Recommendation 18

Incumbent judges, at the time of introduction of the new plan, have the option, at their sole discretion, of opting out of insurance coverage or electing to accept coverage of 100% of salary, rather than 200% of salary.

(Section 5.1)

Recommendation 19

The Government take all available steps with the trustees of the applicable health benefits plan to effect a change under the plan to the hospital benefits available to the Judiciary, so as to increase such hospital benefits from $60.00 per day to $150.00 per day at no cost to judicial participants in the plan.

(Section 5.2)

Recommendation 20

Effective as of April 1, 2000, survivors of members of the Judiciary who die by accident or an act of violence occurring in the course of, or arising out of, the performance of their judicial duties should receive survivor benefits at the maximum level and on the same basis as now provided for the most senior category of public servants for whom such benefits are currently provided.

(Section 5.3)

Recommendation 21

When the dental plan is amended to provide coverage to retirees, retired judges be eligible to participate on the same terms and conditions as other retirees.

(Section 5.4)

Recommendation 22

The Government pay 80% of the total representational costs of the Conference and Council incurred in connection with their participation in the process of this inquiry as of May 31, 2000, such payment by the Government not to exceed the aggregate amount of $230,000, inclusive of the amount of $80,000 already contributed by the Government as of the date of this report and any extraordinary and explicitly identifiable increase to the budget of the Council in order to fund the participation of the Judiciary in the work of this Commission, and that the remainder of such costs be paid by the Conference and Council in such proportion as they deem appropriate.

(Section 6.5)

Judicial Compensation and Benefits Commission

CANADA

Commission d'examen de la rémunération des juges

Chairperson/
Président
Roderick A. McLennan, Q.C.

Commissioners/
Commissaires
Gretta Chambers, CC, OQ, LLD
Earl A. Cherniak, Q.C.

Executive Director/
Directrice générale
Jeanne N. Ruest

99 Metcalfe Street
Ottawa, Ontario K1A 1E3

Tel./Tél. : (613) 992-4304
Fax/Téléc. : (613) 947-4442
e-mail/courriel : info@quadcom.gc.ca

May 31, 2004

The Honourable Irwin Cotler
Minister of Justice and Attorney General of Canada
Department of Justice
East Memorial Building
284 Wellington Street
Ottawa, Ontario K1A 0H8

Dear Minister:

Pursuant to the provisions of Section 26(2) of the *Judges Act*, I am pleased to submit the report of the second Judicial Compensation and Benefits Commission.

Yours truly,

Roderick A. McLennan, Q.C.
Chair

Encl.

ACKNOWLEDGEMENTS

In the work we undertook, we were ably assisted by the following:

- Ms. Deborah LaPierre, the Executive Director of the Drouin Commission, who on completing her duties had the foresight to prepare a record of the activities carried out and the methodology used by her and her staff in the work of the first Quadrennial Commission and made herself available to guide us from the outset of this Commission.

- Mr. David Gourdeau, the Commissioner of the Federal Judicial Affairs, and his assistant, Ms. Marie Burgher, and their staff who helped us get organized and recruit an Executive Director for our work and who subsequently provided continuous administrative services, support and counsel.

- Ms. Jeanne Ruest, who joined us as our Executive Director and who has diligently and faithfully organized the information flow and communications with persons making submissions and with other government departments from which we needed information. Her experience with government, organizational skills and pleasant personality were of invaluable assistance to the work of the Commission.

- Ms. Elizabeth Morin, our Research Assistant, who provided us with the necessary research and technical expertise to gather and organize the information we required and greatly assisted us in putting this report together.

- Mr. André Sauvé, an associate with the actuarial firm of Morneau Sobeco, whose past experience and insights into compensation matters generally and judicial compensation matters specifically, were invaluable to us.

- Ms. Chantal Lefebvre from the LexUM Centre at the University of Montreal who efficiently organized and updated our website.

- Mr. Phil Epstein, Q.C., who helped us to understand the complexities of the issues surrounding conjugal breakdown.

We are indebted to all these individuals for their unstinting commitment to the work of the Commission.

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CHAPTER 1

INTRODUCTION

This is the report of the second Quadrennial Judicial Compensation and Benefits Commission, which was established pursuant to the provisions of the *Judges Act* by amendments to that statute contained in Bill C-37 in 1999. The first such report, hereafter identified as the "Drouin Commission", outlined carefully and fully the history of earlier Commission activity, which had been designed to maintain proper compensation levels for federally-appointed judges (hereafter referred to as "puisne judges") over the years. It is, accordingly, unnecessary for us to reiterate that history here.

The recommendations presented in compensation reports that preceded the Drouin Commission were generally not acted upon by the federal government. The consequences of successive governments' failure to act, as well as the attempted reduction in the compensation paid to provincial court judges by some provinces, culminated in a decision by the Supreme Court of Canada known as the *PEI Reference Case*.[1] In that decision, Chief Justice Antonio Lamer concluded, for the majority of the court, that there was a constitutional obligation on government to establish a judicial compensation commission. He stated that the object of a commission ought to be to present "an objective and fair set of recommendations dictated by the public interest", and went on to say that "financial security is a means to the end of judicial independence, and is therefore of benefit to the public".[2]

The relevant consequence of the Supreme Court of Canada judgment in the *PEI Reference Case* was the amendment to the *Judges Act* (Bill C-37), which provided for

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1 *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1998] 1 S.C.R. 3 (*PEI Reference Case*).

2 *PEI Reference Case*, at paragraphs 173 and 193.

the creation of this Commission, set out its powers and duties, and defined the framework within which we are obliged to act.

The significant portions of the *Judges Act* provide as follows:

> ***Commission***
>
> s. 26 (1) The Judicial Compensation and Benefits Commission is hereby established to inquire into the adequacy of the salaries and other amounts payable under this Act and into the adequacy of judges' benefits generally.
>
> ***Factors to be Considered***
>
> (1.1) In conducting its inquiry, the Commission shall consider
> *(a)* the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government;
>
> *(b)* the role of financial security of the judiciary in ensuring judicial independence;
>
> *(c)* the need to attract outstanding candidates to the judiciary; and
>
> *(d)* any other objective criteria that the Commission considers relevant.
>
> ***Quadrennial Inquiry***
>
> *(2)* The Commission shall commence an inquiry on September 1, 1999, and on September 1 of every fourth year after 1999, and shall submit a report containing its recommendations to the Minister of Justice of Canada within nine months after the date of commencement.
>
> ***Response to Report***
>
> *(7)* The Minister of Justice shall respond to a report of the Commission within six months after receiving it. R.S. 1985, c. J-1, s. 26; 1996, c. 2, s. 1; 1998, c. 30, s. 5; 2001, c. 7, s. 17 (F).

The Act also provides for the membership of the Commission.[3] Pursuant to those provisions, the judiciary nominated Earl A. Cherniak, Q.C. as Commissioner of the 2003 Quadrennial Commission and the Minister of Justice of Canada nominated Gretta Chambers, C.C., O.Q. Those nominees together selected Roderick A. McLennan, Q.C. as the Chair of the Commission. All nominations were confirmed by Order in Council (see Appendix 1).

1.1 Overall Considerations

The members of the Commission owe no allegiance to those who appointed them and the Commission has acted completely independently throughout the process. In all our deliberations, we have been able to arrive at our recommendations amicably and unanimously.

We did not consider ourselves in any sense an arbitration panel deciding and resolving differences between the two principal protagonists – the federal government and the judiciary – rather, we approached our duties on the basis that we were to be guided by our perception of the public interest. For example, as will be seen, there is one feature of the proposed compensation package that we do not recommend, notwithstanding the fact that the federal government and the judiciary are in accord on that issue.

The legal principles and constitutional imperatives underlying a judge's compensation was described in detail in the Drouin Report[4] and have not changed in the intervening four years. They are set out in that report and can be conveniently summarized as follows:

- The *sui generis* nature of the role and responsibilities of judges in Canada requires that they be provided with salary and benefits, before and after

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3 *Judges Act* (Canada), s. 26.1 (1).

4 Drouin (2000), at pages 13–16.

retirement, to ensure a reasonable standard of living, in order that they may function fearlessly and impartially in the advancement of the administration of justice and that they be independent of both government and all litigants appearing before them.

- There is a constitutional prohibition against judges negotiating any part of their compensation arrangement with the executive or representatives of the legislature, a prohibition that applies to no other class of persons in Canada, within or outside of the public service.[5]

- Federally appointed judges are the only persons in Canadian society whose compensation is set by Parliament, pursuant to s. 100 of *The Constitution Act, 1867*.[6] (Recent legislation, however, has tied the compensation of others to that which is authorized by the federal government for puisne judges.[7])

- There is, as a result, a constitutional guarantee of an independent commission process, which serves as a substitute for negotiations because it "provides a forum in which members of the judiciary can raise concerns about the level of their remuneration that might otherwise have been advanced at the bargaining table."[8]

- Judges' salaries are subject to mandatory indexing according to the Industrial Aggregate Index (IAI), pursuant to s. 25 of the *Judges Act*.[9]

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5 *PEI Reference Case*, at paragraph 134.

6 Sections 54.1, 60–62, and subsection 4(1) of Bill C-28 amended portions of the *Parliament of Canada Act* in June 2001, tying the salaries of the Prime Minister, Ministers, Senators, specific members of the House of Commons (such as the Speaker, chairs of committees, Parliamentary Secretary and Leader of the Opposition) to the salary of the Chief Justice of Canada. As well, the salaries of other individuals, such as the Auditor General, the Information Commissioner, the Privacy Commissioner, the Official Languages Commissioner and the Chief Electoral Officer, are tied to judicial salaries.

7 See Appendix 2 for details.

8 *PEI Reference Case*, at paragraph 189.

9 *Judges Act* (Canada), s. 9

- Judges are precluded from engaging in any form of occupation or business other than their judicial duties, and must be lawyers of at least 10 years' standing at the bar.[10]

A variety of additional considerations are relevant to the setting of judicial compensation. They include the ever-shifting demands on the judiciary, the increasing complexity of litigation, the growth in importance of *Charter* litigation and the intensified scrutiny of judicial decisions.[11] If anything, those factors are even more relevant in 2004, given the involvement of the courts in such diverse and controversial matters as same-sex marriage, First Nation land claims and constitutional challenges to legislation. One vivid example serves to signify the issue – the child pornography decision in *R. v. Sharp,* where the trial judge was widely (but totally improperly) vilified in some quarters for concluding that the relevant sections of the *Criminal Code* violated the provisions of the *Canadian Charter of Rights and Freedoms*.[12]

The considerations that go into the setting of judicial compensation and benefits are unique, in that so much of the usual process of determining compensation does not apply. Judges cannot speak out and bargain in the usual way. Compensation incentives usual in the private sector, such as bonuses, profit sharing, stock options, at-risk pay, recruitment and performance bonuses, together with the prospect of promotion, do not apply in the judicial context, although many of these financial incentives are increasingly common in the public sector.

On the other side of the ledger, judges have an annuity that, as will be seen, has a substantial value and is unique in many respects. Its existence is essential to the concept of judicial independence, ensuring, as it does, a reasonable and commensurate standard of living in retirement after judicial service is done. Judges also have the opportunity of achieving supernumerary status for a maximum of 10 years, during which

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10 *Judges Act* (Canada), s. 55.
11 Drouin (2000), at page 17.
12 *R. v. Sharp* [2001], 1 S.C.R. 45.

time a judge continues to receive full pay and benefits for a partial workload. Retention factors play little part in the consideration of appropriate compensation for judges; historically few judges resign their position before they were eligible to retire, save for health or unusual personal reasons.

1.2 Process

As stated, we were the beneficiaries of the Drouin Commission report, which comprehensively identified a number of significant issues and an appropriate method of dealing with them. However, to obtain an appreciation of what other precedents might guide and inform us, we gathered for our review all of the previous triennial commission reports (five such commissions preceded the Drouin report) as well as the reports of the provincial commissions that were created in each province to address the compensation payable to provincial court judges following the *PEI Reference Case*. In addition, we reviewed the decisions issued by a number of courts when some provinces failed to implement certain recommendations made by provincial commissions.[13]

We published our mandate in newspapers across the country and solicited submissions from the public as well as the more acutely interested parties. A copy of that advertisement and a list of the newspapers in which it was published are attached in Appendix 4.

We also solicited by letter, submissions from either the Attorneys General or Ministers of Justice of each province, from the bar associations or law societies of each province, and the Canadian Bar Association. Notwithstanding these steps, it is fair to say that only very modest public interest was shown in the work of the Commission. We updated the Commission's website, www.quadcom.gc.ca, where we published all of the submissions and communications received by the Commission. Those who made submissions to the Commission are identified in Appendix 5.

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[13] Related case law listed in Appendix 3.

We retained our own compensation consultants/actuaries from the firm of Morneau Sobeco to advise the Commission on matters that arose as a result of the information submitted to us and/or obtained at the public hearings we conducted, and to opine on such other matters as the Commission referred to them.

We met with counsel for the federal government (hereafter, the "Government") and for the judiciary early in the process to determine what they respectively saw as the major issues so that we could prepare to assess the eventual submissions they and others might make. Their candour and advice was of benefit to us. The judiciary made submissions to us through the Association of Canadian Superior Court Judges and the Canadian Judicial Council (hereafter referred to as the "Association and Council"). The Association and Council, we were advised, represent over 90% of the federal judiciary.

We found when our Commission was first created that it had no staff or infrastructure. The Office of the Commissioner for Federal Judicial Affairs assisted us in getting organized and in recruiting an Executive Director. Our Executive Director, Jeanne Ruest, in turn, recruited a Research Assistant, Elizabeth Morin, and organized our website. (We will speak further to this situation in our recommendations for the future.) We believe, notwithstanding our late start, that the Commission has been able to effectively assemble the information we required to make our recommendations.

We have had the benefit of reviewing a series of reports initially entitled: *The Advisory Commission on Senior Level Retention and Compensation;* the first such report (the Strong Report) was issued in January 1998 and the latest report in the series was issued in May 2003. These reports were commissioned by the Treasury Board of Canada and represent the views and conclusions of a sophisticated and experienced group of business people and academics. The last three such reports were chaired by Professor Carol Stephenson, Dean of the Ivey School of Business, University of Western Ontario.

These reports were of assistance to us because they addressed, *inter alia,* the need for the federal government to attract and retain executive level personnel with the requisite skills for the efficient operation of the nation's civil service. They do not refer to the compensation paid to judges, but because of the importance of the comparator of the most senior civil servants to judges, the rationale for establishing those salaries was seen by us to be important, and is addressed later in this report.

The Commission held hearings in Ottawa on February 3 and 4, 2004, and the presenters are listed in Appendix 6. We granted a hearing to all those who expressed an interest in making an oral presentation. Those hearings were beneficial and resulted in frank and useful discussions and presentations by all those participating. In particular, the presentation by the Government led by Paul Vickery, along with Judith Bellis and Linda Wall, and the presentation for the Association and Council, which was led by Yves Fortier, Q.C. and Pierre Bienvenu, were very helpful to the Commission. Certain matters were identified at those hearings that needed to be further addressed, and, as a result, at the end of March further written submissions were made. In April, we received submissions from the principal parties on the subject of the consequences of conjugal breakdown on the judges' annuity.

We have adverted to the precedential value of the previous commissions. It is proper that we state that we did not consider ourselves to be "bound" by any previous decisions, including those of the Drouin Commission. We were, and are, of the view that it would be counter-productive to fix judicial salaries as having a pre-determined relationship to other salaries, whether those of senior civil servants or senior legal practitioners. Those considerations represent dynamics at work in our society and they change constantly. We believe the proper approach was to consider these and other factors in light of the most current information and to make recommendations accordingly. Were it otherwise, there would be no need to address this subject every four years, as contemplated by the *Judges Act*.

1.3 Our Jurisdiction

As stated, s. 26 of the *Judges Act* frames our role. We have interpreted this legislation as dictating that our recommendations be prospective in nature for the next four years. Our mandate is to consider the issues and make recommendations that will have the future desired effect on the financial security of judges and the availability of excellent candidates for appointment to judicial office. As will become apparent from this report and our comments below, we concluded that we are not some form of judicial ombudsman cloaked with authority to correct perceived past wrongs or anomalies, nor to re-arrange the historical structure of our courts, which have served the country so well.

Section 26 calls on us to make recommendations as to what compensation would be "adequate" to fulfill the goals established by the legislation. We interpret that mandate as meaning compensation that is appropriate or sufficient. If it is appropriate or sufficient to achieve the desired goals, it will be adequate, whereas if it were not appropriate compensation, in hindsight it might be determined not to have been adequate.

We are obliged by s. 26 to consider the prevailing economic conditions in Canada, including the cost of living and the overall economic and current financial position of the federal government.

We interpret this direction as obliging us to consider whether the state of economic affairs in Canada would or should inhibit or restrain us from making the recommendations we otherwise would consider appropriate. An economy providing large surpluses, lower taxes, etc. should not influence a commission to make recommendations that would be overly generous or spendthrift. The consideration to be applied is whether economic conditions dictate restraint from expenditures out of the public purse.

While this consideration may well impose difficulties for future commissions, we conclude that the current economic condition in Canada does not restrain this Commission from arriving at the compensation recommendations we believe are appropriate.

To wit:

- The 2004 budget handed down in March by the federal government clearly signals that the economy in Canada is very healthy indeed. It identifies low projected inflation rates and a growing economy.

- The recent report of the Conference Board of Canada similarly rates Canada's economy as healthy and growing and forecasts significant surpluses in the next two years and growing surpluses over the longer term.[14]

- A recent report from the Royal Bank of Canada states:

> "The Canadian economy bounced back in the fourth quarter of 2003 from the year's shocks with the strongest growth rate in six quarters. Growth comes in at 3.8% and was 1.7% for the year as a whole. We expect the economy to nearly double last year's performance of a target of 3.2% this year and 3.6% next year." [15]

- The recent federal budget referred to above highlights Canada's enviable economic condition relative to other G-7 countries as follows:

  - Canada was the only G-7 country to record a surplus in 2002 and 2003.

  - According to the Organization for Economic Co-operation and Development (OECD), Canada is projected to be the only G-7 country to record a surplus in both 2004 and 2005.

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[14] The Conference Board of Canada, *Canadian Outlook, Executive Summary*, Winter 2004.

[15] Econoscope, March 2004.

- Canada has made the largest improvement in its budgetary situation among the G-7 countries since 1992, including the sharpest decline in the debt burden.

- Canada's total government sector debt burden declined to an estimated 35% of Gross Domestic Product (GDP) in 2003 and, according to the OECD, it is expected to be the lowest in the G-7 in 2004.

- The Canadian federal government posted a surplus of $7 billion, or 0.6% of GDP, in 2002–03, while the U.S. federal balance fell further into deficit in 2002–03 to U.S. $375 billion, or 3.5% of its GDP.

- For 2003-04, a surplus of $1.9 billion is estimated for Canada, while a deficit of U.S. $521 billion is projected for the United States.

- As a result of continued surpluses at the federal level in Canada and the recent deterioration in U.S. federal finances, the federal market debt-to-GDP ratio in Canada is expected to fall below the U.S. figure in 2003–04 for the first time since 1977–78.

In light of all this information, we conclude there is no economic basis for us to restrain our recommendations from what we otherwise believe is appropriate.

We have been apprised of the surprising number of people who, by virtue of amendments to legislation passed since the report of the Drouin Commission, have had their compensation tied to that which is accorded by Parliament to the federal judiciary. The persons so affected and the legislation creating this effect is summarized in Appendix 7. The wisdom of directly linking those compensation arrangements to the compensation paid to puisne judges is not for us to comment on. We have concluded that our terms of reference in s. 26 of the *Judges Act* neither require nor permit our consideration of any extraneous implications that will flow from our recommendations pursuant to the legislation referred to in Appendix 2; and accordingly, we have concluded that we are obliged to ignore any ramifications for the compensation of others which will ensue as a result of that legislation. In other words, it is our duty to make recommendations with respect to the appropriate compensation for judges as contemplated in s. 26 of the *Judges Act*, and that is what we have done.

1.4 Conclusions

Our conclusions have been arrived at from a consideration of the information we received from the submissions made to us and from the efforts made and research conducted by our own staff and consultants. Our recommendations are consistent with our description of the approach we took in the interpretation of s. 26 and the philosophy that guided our approach and informed our conclusions.

Reports of the Strong Committee and its successors, mentioned above, have the advantage of being able to consider an active marketplace in arriving at recommendations as to the proposed appropriate level of compensation for the most senior of the government's executives. This Commission does not have that ability, inasmuch as judges' compensation is arrived at in a monopsony or a situation where there is no marketplace for puisne judges; all judges are paid from the public purse and appointed by the federal government. The only direct comparison would be to judges similarly remunerated by governments in other jurisdictions. We received no information to make the appropriate comparison with respect to working conditions, cost of living, judicial tradition, annuities, security of tenure, and all the other factors that might permit us to consider the role and compensation of judges in other jurisdictions, which could assist us to make meaningful comparisons. We comment further on this situation in our recommendations.

Accordingly, our role is to consider, as we have, those available comparators that are best able to provide us with an informed opinion and to reach a judgment on what compensation would be appropriate for federally appointed judges for the next four years.

The government appoints judges from pools of candidates who have applied for such an appointment. Our purpose is to recommend a level of compensation that ensures that those pools from which appointments are made are composed of persons who are highly qualified for judicial office, whereby the country ensures that its judiciary – the

third arm of our democracy – is secure in its position and can confidently, efficiently, and with the wisdom and experience of excellent judges, fulfill its important role in the maintenance of that democracy. In a prosperous and progressive country like Canada, subject as it is to the rule of law, nothing less should be tolerated.

Our recommendations are for a level of compensation that will not deter the best and the brightest from seeking judicial office and that should ensure that the level of compensation provided to puisne judges is not so great that the office will be sought after for its monetary rewards alone. Rather, it should appeal to those highly qualified persons of maturity and judgment who seek to provide a valuable public service to their country. In other words, we are of the view that "too much" would not be in the public interest just as "too little" is obviously not in the public interest.

The importance and prestige of the judiciary must continue to be gauged by the manner in which judges carry out their important duties rather than the compensation they are accorded by this or any other commission. This concept has been foremost in the posture that has been adopted by our puisne judges in the past and, as a result, we are privileged to live in a society where our judiciary is nearly universally regarded as a group of dispassionate officers of the law who manifestly serve no other interests. We must ensure that that continues to be so.

There are two parts to the quest of securing a judiciary of high quality and this Commission can influence only one part. We expect that our recommendations, if implemented, will result in a salary level that will attract the best and the brightest to make themselves available for judicial appointment, or at least not discourage them from doing so. The goal will be attained when the second part of the quest is properly fulfilled, which is the selection, from the pool of candidates available, of the most qualified of those prepared to accept judicial office. That will continue to be the challenge of the government.

CHAPTER 2

JUDICIAL SALARIES

This chapter deals with the considerations underlying our approach to the evaluation of the appropriate level of judicial salaries for the ensuing four-year period, the position of the principal parties, the comparators put forward and our view of their relevance and importance, our assessment of the issues raised before us, and those other matters that we considered relevant and useful.

2.1 Financial Security and the Need to Attract Outstanding Candidates

While financial security and the need to attract outstanding candidates are interrelated, they have different purposes. Judicial salaries and benefits must be set at a level such that those most qualified for judicial office, those who can be characterized as outstanding candidates, will be not be deterred from seeking judicial office. That level of salary and benefits must also be such that those who hold judicial office can never be tempted, or be seen to be tempted, to compromise their independence and integrity by reward or hope of reward, either during or after their judicial tenure. This latter consideration is why the judicial annuity is such an important part of the judicial compensation package. But its value, on an annual basis, must also be considered as part of the financial package for those contemplating judicial appointment, given that the large majority of those applying, especially those in private practice, are unlikely to have any such benefit available to them.

We have to take into account that there is no universally applicable definition or measure of “outstanding”, as it applies to candidates for judicial office, given the geographical and pre-appointment occupational diversity of applicants. Certainly, pre-appointment income levels can be no firm guide to quality, for a number of reasons. A large income is no sure indication, although financial success can be an indicator of

ability. Incomes of self-employed lawyers, including the most successful, vary substantially across the country. Incomes of lawyers in larger firms may be thought to be generally higher than those in smaller firms, but our common experience tells us that this is far from universally the case, since many small firm lawyers, depending upon the kind of law they practice, may earn large sums of money, while many who work in large firms, again depending on the type of law they practice, do not.

Outstanding candidates for the judiciary can be found in all types of legal practice, such as academe, government service, including the provincial or territorial courts, as counsel in corporations, as well as in private practice. In private practice, incomes vary significantly, not only by geography, but by area of practice, given that many outstanding potential candidates work in what are generally considered the less well paid segments of the profession, such as family law, criminal law, or legal aid clinics. Even in some of those areas, there are exceptions. For lawyers in private practice, many of the most successful and high-income potential candidates will have made a significant capital contribution to their firm, which would be returned to them upon appointment.

We have to take into account all of these factors, and the reality that while for some, judicial appointment involves a significant reduction from the income that they enjoyed in practice, for others the current level of salary and benefits may result in an enhanced economic package.

Tables 1 through 5 show the statistics on age at date of appointment, area of practice, and geographical distribution of federal appointees from 1997 to 2004.

Table 1
Age at Date of Appointment
January 1, 1997 to March 30, 2004

Age Groups	# of Appointees	% of Appointees
40 to 43	14	3.8%
44 to 56	310	84.2%
57 to 66	44	11.0%
Total	368*	100%

Source: Office of the Commissioner for Federal Judicial Affairs – Judicial Appointments Secretariat.

Table 2
Appointees' Predominant Occupation
January 1, 1997, to March 30, 2004

Sector	# of Appointees
Private Practice	268
Government (including federal, provincial and municipal as well as administrative tribunals and regulatory bodies, law societies and law reform bodies)	86
Academe (i.e., universities or colleges)	8
Legal Aid Clinic	2
Corporate Legal Department	4
Total	368

Source: Office of the Commissioner for Federal Judicial Affairs – Judicial Appointments Secretariat.

Table 3
Size of Firm for Private Sector Appointees
January 1, 1997 to March 30, 2004

Size of Firm	# of Appointees
More than 60 Lawyers	19
41 – 60 Lawyers	54
25 – 40 Lawyers	40
6 – 24 Lawyers	78
2 – 5 Lawyers	49
Sole Practice	27
Unknown	1
Total	268

Source: Office of the Commissioner for Federal Judicial Affairs – Judicial Appointments Secretariat.

* As of May 1, 2004, there are currently 1,008 puisne judges.

Table 4
Area of Practice at Date of Appointment
January 1, 1997 to March 30, 2004

Area of Practice	From Private Practice	From Government
Administrative Law	35	6
Bankruptcy & Insolvency Law	3	0
Civil Litigation – Plaintiff	45	4
Civil Litigation – Defendant	4	10
Construction Law	2	0
Corporate/Commercial Law	24	18
Criminal/Quasi-criminal Law	44	16
Employment/Labour Law	10	5
Environmental Law	1	0
Family/Matrimonial	55	12
Immigration Law	0	1
Public Law	1	0
Real Estate Law	8	3
Tax Law	14	6
Wills, Estates & Trusts Law	4	0
Workplace Safety & Insurance Law	12	2
Other[1]	6	3
Total[2]	268	86

Source: Office of the Commissioner for Federal Judicial Affairs – Judicial Appointments Secretariat.

1 Includes Natural Resources Law, International Law, Native Law, Telecommunications Law and Class Actions.
2 Does not include appointees from academe, legal aid clinics or corporate lawyers.

Table 5
Regional Breakdown of Practice at Date of Appointment
January 1, 1997 to March 30, 2004

Province/Territory	# of Appointees	Metropolitan Area	# of Appointees
Newfoundland and Labrador	15	Calgary	11
Prince Edward Island	5	Edmonton	15
Nova Scotia	25	Halifax	12
New Brunswick	15	Hamilton	6
Quebec	73	Kitchener	2
Ontario	129	London	4
Manitoba	17	Montréal	45
Saskatchewan	17	Oshawa	4
Alberta	32	Ottawa–Gatineau	25
British Columbia	36	Québec	10
Northwest Territories	1	Regina	6
Yukon	2	Saint John	5
Nunavut	1	Saskatoon	6
		Sherbrooke	1
		St.Catharines-Niagara	4
		St. John's	6
		Sudbury	8
		Toronto	42
		Trois-Rivières	3
		Vancouver	26
		Victoria	2
		Windsor	4
		Winnipeg	17
		Other	104
Total:	368		368

Source : Office of the Commissioner for Federal Judicial Affairs – Judicial Appointments Secretariat.

Table 5 shows that geographical diversity of appointees was, of course, very wide. The number of judges appointed from the major centres, where incomes might be considered to be highest, included 12 from Halifax, 45 from Montreal, 42 from Toronto, 17 from Winnipeg, 11 from Calgary, 15 from Edmonton, and 26 from Vancouver. We note as well that, while many judicial appointees do not come from the large cities, those who work in large urban centres are subject to a higher cost of living than those who do not. Judicial compensation and benefits, with only minor exceptions, is the same throughout Canada, though the reality is that the judicial dollar goes further in some areas of the country than it does, say, in Toronto or Vancouver.

We must also be mindful that, as shown in Table 6, the number of applicants who are recommended or highly recommended by the provincial and territorial Judicial Appointment Committees and the Federal Judicial Appointments Secretariat that inform the Minister of Justice, relative to the number of judicial vacancies, demonstrates that current levels of salary and benefits do attract qualified candidates.[16] This consideration must be tempered by the fact that, while many potential candidates may be qualified or even highly qualified, what is important for the well-being of our judicial system and democracy, and what is mandated for us, is to ensure that salary and benefit levels are adequate to attract, or at least, not discourage, *outstanding* candidates, in other words, the best and the brightest, which must be only a subset of even those who may be highly recommended.[17]

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[16] Between 1988 and March 30, 2004, the Federal Judicial Appointments Secretariat received 6,964 applications for judgeship; after assessment by various provincial/territorial judicial appointments committees, 2,084 candidates were recommended and 585 were highly recommended for a total of 2,669 recommendations. Of these, 793 were actually appointed to the bench (11.39% of total applications or 29.71% of recommended applicants). *Figures from the Federal Judicial Appointments Secretariat, March 30, 2004.*

[17] *PEI* Reference Case, at paragraph 173.

Table 6

Judicial Appointments Process

From 1988 to March 30, 2004

Province	Applications Received	Candidates Proposed (not assessed)	Recommended	Highly Recommended	Total Recommended and Highly Recommended	Provincial Judges	Unable to Recommend	Candidates Appointed
Newfoundland and Labrador	158	7	41	38	79	17	48	21
Prince Edward Island	66	2	23	14	37	0	23	9
Nova Scotia	386	7	117	29	146	23	186	43
New Brunswick	262	10	82	52	134	11	100	25
Quebec	1,651	43	488	64	552	44	947	168
Ontario	2,491	77	807	236	1,043	77	1,179	266
Manitoba	306	14	86	44	130	16	137	37
Saskatchewan	267	2	97	27	124	10	120	38
Alberta	597	16	170	56	226	20	302	77
British Columbia	677	12	161	17	178	31	428	101
Northwest Territories	24	0	4	3	7	0	6	2
Yukon	30	0	3	3	6	3	16	3
Nunavut	49	9	5	2	7	3	28	3
Total	6,964	199	2,084	585	2,669	255	3,520	793

Source: Office of Federal Judicial Affairs – Judicial Appointments Secretariat.

2.2 Positions of the Principal Parties

The current salary levels of puisne judges (2003–04), including the $2,000 annual increase recommended by the Drouin Commission and the statutory increases for inflation, is $216,600, up from the $198,000 level recommended in May 2000 by the Drouin Commission and accepted by the federal government. The chief justices and associate chief justices of the Superior, Federal and Tax Courts receive a salary of $237,400, judges of the Supreme Court of Canada, a salary of $257,800, and the Chief Justice of Canada $278,400. The increases set out above for puisne judges between the years 2000 and 2003 amount to 9.39% and the increases over that period for associate chief justices and chief justices, and the Chief Justice of Canada are of the same order of magnitude.

The Association and Council submit that the salary level of a puisne judge should be set at $253,800 for April 1, 2004, which is the equivalent of the mid-point of the current remuneration of what is now the second highest level of deputy minister (DM-3), and the salaries of chief justices, associate chief justices, Supreme Court of Canada judges, and the Chief Justice of Canada, be set at the same percentage differential as at present.

The submission of the Association and Council would result in a 17.2% increase over the current salary level for puisne judges.

As well, the Association and Council propose that, in order to maintain an appropriate level of compensation throughout the four-year period until the next Quadrennial Commission, the concept of annual increases continue, except that the annual increase should be $3,000 rather than the current $2,000. This, of course, would be in addition to the annual statutory indexation for inflation.

These increases were justified by the Association and Council, in large part, by the increasing erosion of what may be termed “rough equivalence” between judicial salaries and the salaries of DM-3s. At the time of the report of the Drouin Commission award of

$198,000, the DM-3 mid-point salary level, including at-risk pay, of which more will be said later, was approximately $203,000. However, in the period 2000–01, the actual level of DM-3 income at the mid-point, including at-risk pay, had risen to $239,081 and had risen by 2003–04 to a mid point of $253,880, while judicial salaries rose to $216,600, as shown in the following table.

Table 7
Comparison of DM–3 and Judicial Salaries
1999–2003

Year	DM–3 Mid-Point Salary	Estimated At-Risk Pay	Total Compensation	Judicial Salary
1999	$188,250	$14,684	$202,934	$178,100
2000	$203,300	$35,780	$239,080	$198,000
2001	$209,650	$29,770	$239,420	$204,600
2002	$214,600	$33,049	$247,649	$210,200
2003	$220,000	$33,900	$253,900	$216,600

Source: Privy Council Office, Association and Council Submission, Performance Pay Information, Supplementary Material.

The position of the Government was starkly different. Taking into account its view of the consideration of fiscal restraint, the availability of a surplus of qualified applicants for the available judicial posts, the demographics of these applicants, trends in the public sector, the argument that the DM-3 salary levels have become a poor comparator and that at-risk pay awarded to DM-3s should not be taken into account, the Government proposes an increase of 4.48%, including statutory indexing as of April 1, 2004, which would bring the salary level of puisne judges to $226,300, plus annual increases of $2,000 in each of the years 2005, 2006 and 2007 in addition to statutory indexing in those years. Taking into account these increases, the Government proposal amounts to an increase of 7.25% over those years, in addition to the statutory indexing in 2005, 2006 and 2007.

2.3 Comparators

For reasons that will become apparent in the analysis that follows, we were disappointed, and our task made more difficult, by both the lack of available and reliable data on comparators other than the remuneration of public servants at the deputy minister level, and the lack on consensus between the principal parties on the comparative information that was available.

Current information on the income levels of lawyers in private practice in Canada seems to be significantly less reliable than it was at the time of the Drouin Commission in 1999–2000, for reasons that appear to be related to the way in which the Canada Revenue Agency (CRA) gathers and reports the statistics relating to lawyers in private practice who are not employees. We discuss later in this chapter our view of the information that is available, but it is an understatement to say that it is less than satisfactory. We will make some observations and recommendations as to how this absence of important information on a key comparator might be addressed for the benefit of future commissions.

The problem with the use of the DM-3 comparator relates to the fact that there are presently only nine[18] persons in the federal public service who have that designation, along with two more who have the recent designation of DM-4 (the Clerk of the Privy Council and the Deputy Minister of Finance). In the years since the 1998 Strong Report and the successor reports to it, the level of compensation of the DM level has, for a variety of reasons detailed in those reports, contained a significant and increasingly large element of at-risk pay, contingent upon achievement by the DM of specific defined annual goals.[19] At-risk pay, and the achievement of defined annual goals, are concepts that have no relationship whatever to the judicial function.

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[18] There were 13 such persons at the time of the Drouin Commission, Drouin (2000) at page 23, and 20 such persons at the time of the Crawford Commission, Crawford (1993) at page 11.

[19] Advisory Committee on Senior Level Retention and Compensation: 1st Report (Strong, January 1998), 2nd Report (Strong, March 2000), 3rd Report (Strong, January 2001), 4th Report (Stephenson, March 2002), 5th Report (Stephenson, August 2002), 6th Report (Stephenson, June 2003).

The problem is compounded by the starkly different positions of the principal parties as to how the DM-3 comparator should be approached. The position of the Association and Council was that, because of the historic relationship between the DM-3 salary and those of judges, and because at-risk pay should be considered as simply a part of DM-3 compensation, the mid-point of such compensation remained the most appropriate comparator, and should form the basis of the salary recommendation. The position of the Government, as outlined earlier, was that the DM-3 comparator has outlived its usefulness, or at least its importance, and at-risk pay should not be considered at all.

Given these differences, the problems with the information available concerning the current income of practicing lawyers, the lack of reliance by either party on judicial salaries elsewhere, and the lack of reference by the principal parties to any other comparator, the difficulty faced by this Commission is apparent.

We turn to a consideration of the comparators, based on the information that we have from the principal parties and our own research.

2.3.1 DM-3 Comparator

The relationship between judicial salaries and DM-3 salaries goes back more than 20 years, and has been considered by every commission investigating federal and judicial salaries.[20] The theory upon which this relationship is said to be based is not that the jobs of a judge and a DM-3 are similar, but rather that the relationship is a reflection of "what the marketplace expects to pay individuals of outstanding character and ability, which are qualities shared by deputy ministers and judges".[21] That is a proposition that we can accept, but as will be shown later in this chapter, we do not apply it in the way proposed by the Association and Council or by the Government. The Association and Council concede that there can be no direct comparison between senior public servants

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[20] During the period 1975 to 1992, it appears that judges' salaries, with the exception of 1975 and 1986, were below the DM-3 mid-point and generally below the minimum of the DM-3 salary scale . . ." (Department of Justice, October 1992, *1975 Equivalence*, page 5). This document delineates the historical relationship between judicial salaries and those of senior deputy ministers. Also see Scott (1996), at page 14, "A strong case can be made that the comparison between DM-3's and judges' compensation is both imprecise and inappropriate."

[21] Drouin (2000), at page 31, quoting from Scott (1996) at page 13, and Courtois (1990) at page 10.

and judges because judges are *sui generis* and independent of government. Nevertheless, the Association and Council's salary proposal virtually equates the judicial salary of puisne judges with the current salary, including mid-point at-risk pay, of DM-3s.

The Government's submission is that the DM-3 range is a relatively poor comparator for two principal reasons: there is a difference in the security of tenure and the concept of at-risk pay is inapplicable to judges. Rather, the Government suggests we be guided by general compensation trends in the federal public service, especially in the executive and deputy minister ranks, and notes that annual salary increases, excluding at-risk pay, in the last three years have ranged from 2.5% to 3.1% and the negotiated annual increases in the same period were 2.5% to 2.7%. It argues that increases in judicial salaries should continue to be consistent with overall compensation trends in the federal public service, including DM-3s, but without any consideration given to at-risk pay. That relationship is shown in Table 8.

Table 8
Comparison of DM–3 and Judicial Salaries
1999–2003

Year	DM–3 Mid-Point Salary (without at-risk pay)	Judicial Salary
1999	$188,250	$178,100
2000	$203,300	$198,000
2001	$209,650	$204,600
2002	$214,600	$210,200
2003	$220,000	$216,600

Sources: Privy Council Office; Government Submission, December 15, 2003, Appendices Vol. II, Tab 9; Association and Council Submission, December 15, 2004, Appendices, Tab 1.

The Association and Council take exception to this position, which was argued before the Drouin Commission and expressly rejected.[22] The Association and Council strongly urged us not to accede to the Government submission that the DM-3 comparator and "rough equivalence" have become inappropriate, and to accept the proposition that at-risk pay is properly included in the comparison. While the Association and Council did not argue that we were bound to follow the reasoning and the result of the Drouin Commission, they urged that we should not fail to do so unless there were changes in the circumstances that led to that conclusion or good reasons demonstrated not to do so, and they argue that none have been shown. They point to the widening of the "gap" between DM-3 remuneration and judges salaries that has occurred since 2000. The Association and Council went so far as to say that, while they were not at this time arguing for rough equivalence with the newly created DM-4 level, they were reserving the right to do so in the future. The Association and Council acknowledged that no comparator, including the DM-3 comparator, should be determinative, and that comparators could only serve to inform the ultimate recommendation.

We have difficulty with the positions put forward by both parties. While we agree with the proposition that at-risk pay is simply a form of remuneration and cannot be ignored, to the extent that the DM class is considered a proper comparator, it is also true that since the publication of the Strong Report in 1998 and its successor reports, the concept of at-risk pay has proved a more important and increasing part of the remuneration of federal public servants at the DM level (see Table 9). It is apparent from a review of those reports that this is so in part because of the executive market pressures that exist to attract and retain talented people in the public service, as compared to the income levels available to such people in the private sector, and in part as an incentive to reward the attaining of preset and measurable annual goals of achievement. Those considerations are not relevant to the judicial context.

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[22] Drouin (2000), at pages 26–28.

Table 9
History of At-Risk Pay for Deputy Ministers
1999–2003

	Target At-Risk Pay as a Percentage of Salary			
Year, Starting	**DM-1**	**DM-2**	**DM-3**	**DM-4**
April 1, 1999	7.5%	10.0%	10.0%	n/a
April 1, 2000	7.5%	10.0%	10.0%	n/a
April 1, 2001	15.0%	20.0%	20.0%	25.0%
April 1, 2002	15.0%	20.0%	20.0%	25.0%
April 1, 2003	15.0%	20.0%	20.0%	25.0%
	Actual At-Risk Pay as a Percentage of Salary			
Year, Starting	**DM-1**	**DM-2**	**DM-3**	**DM-4**
April 1, 1999	5.85%	7.8%	7.8%	n/a
April 1, 2000	6.6%	8.8%	17.6%	n/a
April 1, 2001	10.65%	14.2%	14.2%	17.75%
April 1, 2002	11.55%	15.4%	15.4%	19.25%
April 1, 2003	11.55%	15.4%	15.4%	19.25%

Sources: Government Submission, December 15, 2003, Appendices Vol. II, Tab 9; Association and Council, February 3, 2004, Book of Additional Materials, Tab 4.

We also question the wisdom of confining the examination to the DM-3 level, rather than considering the entire group of deputy ministers from DM-1 to DM-4. The passage quoted earlier from the Courtois and Scott Commissions, and accepted by the Drouin Commission, referred to deputy ministers, not DM-3s.[23] It is apparent that the large majority of those who reach the DM-3 level have come up from the DM-1 and DM-2 levels, and that, on average, those who reach the DM-1 and DM-2 levels are public servants of long experience and demonstrable ability.[24]

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[23] In 1993, at the time of the Crawford Commission, there were 20 DM-3s in a smaller Public Service, as compared with 9 DM-3s in 2004 –Crawford (1993) at page 11.

[24] There are currently 59 Deputy Ministers, of whom 25 are DM-2s and 23 are DM-1s. The average level of experience of DM-2s is 23.5 years. Information on the average level of experience of DM-1s is not available, but is believed to be about 20 years. The average level of experience of the nine current DM-3s is 25 years. On the basis of available information, 86% were promoted from within the public service and 68% have more than 20 years experience.

The level of experience of DM-1s and DM-2s is not very much different from that of judges on their appointment, the significant majority of whom (84.2%) are between the ages of 44 and 56 years.

Since many, if not most, of those who reach the DM-1 and DM-2 levels have the qualities of character and ability that qualify them for promotion to DM-3, were openings available, there seems to us to be no good reason to exclude them from consideration. This is especially so given the importance that is accorded to the DM-3 comparison and the fact that, at present, there are only nine people who hold that rank, a very small sample upon which to base the remuneration of more than 1,100 federally appointed judges. Another consideration that influences our thinking was the difference in the pension available to those at the DM levels compared with the judicial annuity, which we will discuss in the next chapter. We are also cognizant of the fact that deputy ministers do not have the security of tenure accorded puisne judges.

If the salary and at-risk pay of all DM levels are taken into account, there are a variety of ways of looking at their remuneration.

Table 10
DM Salaries
2003–04

Level	#	Mid-Point Salaries	Target At-Risk Pay	Payout Ratios	Estimated At-Risk Pay	Estimated Total Cash Compensation
DM-4	2	$246,400	25%	77%	$47,400	$293,800
DM-3	9	$220,000	20%	77%	$33,900	$253,900
DM-2	25	$196,400	20%	45%	$17,500	$213,900
DM-1	23	$170,850	15%	53%	$13,500	$184,350

Sources: Government Submission, December 15, 2004, Appendices, Vol. II, Tab 9; Association and Council Submission, February 3, 2004, Supplemental Materials.

Table 11
DM Scenarios
2003–04

Scenario	Description	Mid-Point Salaries	Total Cash Compensation*
1	Simple Average of all DM Levels	$208,400	$236,500
2	Weighted Average of all DM Levels (weighted by the number of incumbents)	$191,700	$211,200
3	Simple Average of DM-2 to DM-4 Levels	$220,900	$253,900
4	Weighted Average of DM-2 to DM-4 Levels (weighted by the number of incumbents)	$205,100	$228,300

Source: Judicial Compensation and Benefits Commission.

* Includes at-risk pay and adjusted to reflect the changes in the number of DM–1s, DM–2s and DM–3s.

We do not accept the submission of the Association and Council that to look beyond the DM-3 comparator in any way politicizes the process, or makes it arbitrary. Rather, we are of the view that it is incumbent upon us to look at a broader range of the most senior public servants whose qualities, character and abilities might be said to be similar to those of judges.

We therefore looked at other classes of Governor in Council appointees. We thought that was appropriate, since the quality of a person who becomes a president or a chair of such institutions as the Canadian Institutes of Health Research (CIHR), the National Research Council (NRC), or one of the quasi-judicial commissions, which include the Canadian Radio-Television and Telecommunications Commission (CRTC), the Office of the Superintendent of Financial Institutions (OSFI), the National Energy Board (NEB), the Canadian Transportation Agency (CTA) and the Competition Bureau are likely to be as highly qualified as those who rise to the level of DM-3. Those who were appointed to these positions are recognized leaders and experts in their field. Some are lawyers. The remuneration of the chairs of the quasi-judicial commissions is more comparable in some respects to the judicial context, since there is no at-risk pay associated with these

posts (see Table 12). In addition to their quasi-judicial duties, they administer large agencies. Unlike judges, they do not have security of tenure, since the length of appointment ranges from five to ten years, with the possibility of reappointment and, while pension benefits are roughly equivalent to those at the DM-3 level, many, if not most, of such appointees come from outside the public sector, and therefore do not qualify for a full pension because of the limited number of years of service.

Table 12
Salaries for Governor in Council and Quasi-Judicial Appointees — Top Levels
To April 1, 2003

	# of positions	Salary Rate	At-Risk Pay
GC–10	2	$256,200	20%
GC–9	2	$222,800	15%
GCQ–10	0	$290,400	n/a
GCQ–9	5	$245,100	n/a

Source: Advisory Committee on Senior Level Retention and Compensation – 6th Report, May 2003.

The GCQ-9 level includes the chairperson's position in the largest administrative tribunals, the CRTC, NEB, CTA, CB and OSFI. There are only 2 GC-10s, the presidents of the NRC and the CIHR. There are no GCQ-10s at this time.

2.3.2 Incomes of Private Practitioners

Tables 2 and 3 show that it is necessary, to the extent possible, in order to address the requirement of attracting outstanding candidates to the bench, to have regard to the income of private practitioners, since that remains the pool from which most of the appointees, and presumably most of the recommended applicants, come. Unfortunately, the information available to us was problematic, to say the least, and not

as helpful and complete as the information that appears to have been available to the Drouin Commission.[25]

The triennial commissions dealt with the relationship between the incomes of lawyers in private practice and the salaries of judges. The Scott Commission, in particular, was of the view that the commission process in the *Judges Act* was "a statutory mechanism for ensuring that there will be, to the extent possible, a constant relationship, in terms of degree, between judges' salaries and the incomes of those members of the Bar most suited in experience and ability for appointment to the Bench."[26]

The rationale, of course, is that it is in the public interest that senior members of the Bar should be attracted to the bench, and senior members of the Bar are, as a general rule, among the highest earners in private practice. While not all the "outstanding" candidates contemplated by s. 26(1.1)(*c*) of the *Judges Act* will be senior lawyers in the higher earning brackets, many will, and they should not be discouraged from applying to the bench because of inadequate compensation.

2.3.3 Current Information on Lawyers' Income in Private Practice

We expected to be given information on the income of lawyers in private practice that would be sufficiently reliable for the purpose of our deliberations, and the principal parties hoped to be able to make a joint submission as to what those statistics demonstrated. They asked for, and were given, to the end of January 2004 to submit the material, so that they could use the most recent information available from CRA, which was not available in time for the initial round of submissions by the principal parties on December 15, 2003.

The information put before us for the years 2000 and 2001 was characterized by the Government as "unreliable" and "of little use" to the Commission for the purposes of establishing comparison with judicial salaries. The 2000 data suggested a significant

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[25] Drouin (2000), at pages 37–41.
[26] Scott (1996), at page 14.

decline in the number of self-employed lawyers since 1997, a suggestion that does not reflect reality. The 2001 data was said to be no better, since it showed a decline of 10% in the number of self-employed lawyers who filed income tax returns and a decline of 36% in average net income, both figures manifestly highly suspect. These problems apparently stem from the changes made by CRA in the way it now collects and analyzes lawyers' income and the difficulties that arise from the way lawyers self-identify and report income, combined with changes in the CRA's occupational coding system. Of course, CRA does not track this information for the purposes of this Commission and the principal parties were obliged to use only what CRA was able to give them.

We obtained the view of our consultant and we forwarded this to the principal parties (see the letter dated March 25, 2004, from Morneau Sobeco in Appendix 8).

The Government requested and obtained an independent analysis on the 2001 data from a compensation specialist at Western Compensation and Benefits Consultants (WCBC). The Government recommends that the Commission utilize the methodology from that firm's report in reviewing the data for the tax years provided.

The Association and Council also provided us with two reports from an independent consultant, Sack Goldblatt Mitchell (SGM). The first such report is dated January 30, 2004, and comments on the data as to the income of lawyers in private practice for the years 2000 and 2001 (the first SGM report). SGM provided a second report (the second SGM report) on February 27, 2004, responding to the Government's reply submission on the usefulness of these numbers and a reply to the WCBC report filed by the Government at the end of January.

2.3.4 SGM's Work in Comparing the Year 2000 Data

The first SGM report was based on the data supplied to it through CRA for the year 2000. SGM found that there were many differences in the way that the 2000

information was presented as compared with that from 1997, particularly in the geographical designations, especially the definitions of the major metropolitan areas. SGM continued to use in its analysis a $50,000 earnings threshold, as it did in the report that it prepared for submission to the Drouin Commission, but observed that this was very conservative, and was of the view that it was reasonable to increase that threshold to account for inflation between 1997 and 2000. Because of the way that the information came to SGM from CRA, they found it impossible to present the data from 1997 in a manner that the Drouin Commission had found appropriate.

In spite of some difficulties with the 2000 data, SGM was able to verify much of it, because of work that it had done and information that it had received in connection with a report it prepared for the Ontario Conference of Judges, in the proceedings before the Fifth Triennial Provincial Judges' Remuneration Commission in Ontario in 2003.

Although it was not possible to calculate exactly to the 75th percentile of income, SGM believed that it was possible to approximate it with a reasonable degree of accuracy. SGM prepared a number of tables that compared the 1997 and 2000 data for both the country and selected metropolitan areas, using the 75th percentile of income, the 44 to 56 age group, a $50,000 exclusion, and an inflation-adjusted exclusion of $53,122. Further adjustments took into account inflation to 2003 and the results are shown in the following table. SGM notes that the 2000 data confirmed the importance of the seven largest Census Metropolitan Areas (CMAs) where more than 60% of Canada's lawyers live.

Table 13

Income at 75th Percentile by Province and CMA[1] for Lawyers, Aged 44 to 56, after $50,000 Exclusion for 2000 Tax Year

March 2003, Adjusted for Increased Thresholds and Inflation

	CRA Tax Year[2]			
	Column A	**Column B**	**Column C**	**Column D**
	Income Calculated at the 75th Percentile	**Column A Plus 3.1% to Account for Increased Threshold**	**Column A Adjusted for Inflation to April 2004 (6.8%) without Adjustment to Threshold**	**Column B Plus 6.8%**
Canada	$238,816	$246,219	$250,055	$262,962
Newfoundland and Labrador	$229,205	$236,310	$244,791	$252,379
Prince Edward Island	n/a	n/a	n/a	n/a
Nova Scotia	$158,243	$163,149	$169,004	$174,243
New Brunswick	$178,838	$184,382	$190,999	$196,920
Quebec	$202,972	$209,264	$216,774	$223,494
Ontario	$276,152	$284,713	$294,930	$304,973
Manitoba	$188,481	$194,324	$201,298	$207,538
Saskatchewan	$159,994	$164,954	$170,874	$176,171
Alberta	$255,118	$263,027	$272,466	$280,913
British Columbia	$201,543	$207,791	$215,248	$221,921
Toronto	$369,536	$380,992	$394,664	$406,899
Montréal	$252,571	$260,401	$269,746	$278,108
Vancouver	$230,482	$237,627	$246,155	$253,786
Ottawa–Gatineau	$225,949	$232,953	$241,314	$248,794
Edmonton	$164,522	$169,622	$175,709	$181,156
Calgary	$361,284	$372,484	$385,851	$397,813
Québec	$201,658	$207,909	$215,371	$222,047

Sources: Canada Revenue Agency, March 2003; Sack Goldblatt Mitchell Report, January 30, 2004, page 27.

[1] CMAs are Census Metropolitan Areas.
[2] CRA Tax Year indicates the data produced by the Canada Revenue Agency in March 2003.

However, SGM also noted, as do we, significant issues that cast doubt on the accuracy of the 2000 data supplied by CRA. There is a large discrepancy in the number of filers of returns in many areas, notably British Columbia and Ontario. There are unexplained anomalies that call into question the validity of the material presented. Differences between the 2000 data supplied in March 2003 and that supplied in January 2004 remain unexplained, and in the opinion of SGM cast doubt upon the lower income levels for Canada, especially Ontario, in comparison to the March 2003 data they used for the Ontario Provincial Triennial Commission. As a result, SGM did not give much credence to the January 2004 data supplied by CRA.

With respect to the 2001 data, SGM rejected it because of inexplicable differences from both the 1997 data and the 2000 data, which differences could not be clarified or explained either by CRA or the Department of Justice. SGM concluded that the 2001 data was unreliable.

2.3.5 The Government's Submission

Notwithstanding its submission that the data obtained from CRA as to the income of self-employed lawyers was of limited use to the Commission, the Government provided us with the WCBC report dated January 2004 (the first WCBC report), which was an analysis of the 2001 net income of self-employed lawyers who filed income tax returns.

WCBC concluded that a valid comparison could not be made with the 1997 data without major modifications to them, which was not possible to carry into effect.[27] The WCBC analysis concluded that the average net income for the practice of law by self-employed lawyers in 2001 across Canada was $94,000.

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[27] In its first report, submitted in January 2004, WCBC conducted tests of the 2001 data for the purposes of determining their reliability and comparability with the 1997 data submitted to the previous Commission and expressed the following concerns: the fact that the 1997 data included "tax filers who were not lawyers, such as paralegals and notaries"; the fact that the 1997 data excluded only lawyers with zero net income but did not exclude lawyers with negative net incomes; the substantial reduction in the number of reported lawyers when only income from the practice of law is taken into account; and the possibility that income from other sources than the practice of law was included.

The WCBC analysis took issue with the exclusion of self-employed lawyers' earnings below $50,000, and the decision to focus on lawyers between the ages of 44 to 56 years of age. Rather, WCBC based its opinion on the entire range of available data with "more emphasis" (p. 4) on the group from which the majority of judges was appointed. Looking at the entire group, and taking the 66th and 75th percentile for net income in 2001, and applying an age weighting to the data, WCBC found a 66 percentile average income of $105,993 and a 75th percentile, age-weighted, average income of $128,016. Their report noted the average incomes for the major metropolitan areas as well as the all Canada average. The first WCBC report went on to analyze the judicial annuity scheme, about which we will say more in the next chapter. If the value of the annuity is taken to be 24% of the current salary of $216,600, the current annual value of the judicial annuity to each judge, on average, is $51,984.

Table 14
66th and 75th Percentile Age-Weighted Income for Major Metropolitan Centres
2001

Metropolitan Area	66th Percentile Income	% Difference from Canada	75th Percentile Income	% Difference from Canada
Toronto	$125,305	18%	$156,070	22%
Montréal	$91,941	–13%	$114,084	–11%
Vancouver	$103,663	–2%	$128,223	0%
Edmonton	$112,250	6%	$129,560	1%
Calgary	$115,958	9%	$146,555	15%
Québec	$85,095	–20%	$105,820	–17%
Ottawa–Gatineau	$122,008	15%	$145,926	14%
Hamilton	$136,257	29%	$155,482	22%
Canada	$105,993		$128,016	

Sources: Canada Revenue Agency; Western Compensation and Benefits Consultants Report, January 2004, page 9.

The first WCBC report went on to calculate the percentile ranking of current judicial income with and without the annuity in the major metropolitan centres with the following result.

Table 15
Percentile Rankings of Judicial Compensation by CMA*

Metropolitan Area	Percentile Ranking (excluding Judicial Annuity)	Percentile Ranking (including Judicial Annuity)
Toronto	83rd to 91st	83rd to 91st
Montréal	83rd to 91st	Over 91st
Vancouver	83rd to 91st	Over 91st
Edmonton	83rd to 91st	Over 91st
Calgary	83rd to 91st	Over 91st
Québec	Over 91st	Over 91st
Ottawa–Gatineau	83rd to 91st	Over 91st
Hamilton	83rd to 91st	83rd to 91st
Canada	83rd to 91st	Over 91st

Source: Western Compensation and Benefits Consultants Report on the Earnings of Self-Employed Lawyers for the Department of Justice Canada for the 2003 Judicial Compensation and Benefits Commission, January 2004, page 12.

* CMAs are Census Metropolitan Areas.

2.3.6 Responses by the Principal Parties

The principal parties responded to each other's initial submissions and their experts' reports with respect to the 2000 and 2001 income data on self-employed lawyers.

The Association and Council noted the inconsistency between the Government's stated position that the 2001 data was unreliable and of limited importance, and the WCBC finding that it was reliable. The Association and Council criticized the methodology used by WCBC and its report, where it failed to accept the view that the analysis should

include a $50,000 income threshold, and the failure of WCBC to accept that the 44 to 56 age bracket was the appropriate comparator group.

The second SGM report concluded that the first WCBC report was unreliable in two respects:

a) the data upon which it was based were flawed; and
b) the analysis of the data was flawed.

It is not possible to detail here the entire basis for these criticisms. The primary criticism was the exclusion by WCBC in the 2001 data of 7,198 self-employed lawyers who earned significant professional income, which was said to be from sources other than the practice of law. The second SGM report argues that this exclusion was unreasonable and against common sense, and contrary to other available statistical information. In the view of SGM, exclusion of these individuals accounts for the discrepancy in the average income of self employed lawyers between the 1997 and 2001 data.

SGM points out that, in order for the income levels reported by WCBC to be correct, massive layoffs and significant disruption in lawyers' offices across the country would have been required, but there is no evidence of this. SGM describes many other reasons why the data relied upon by WCBC are flawed and unreliable.

SGM criticizes the failure of WCBC to use the $50,000 threshold and the failure to use the 44 to 56 year comparator group. It describes those omissions as fatal flaws to the usefulness of the report.

The Government responded to the first SGM report by way of a submission, and a second WCBC report. The Government pointed out that, given the Drouin Commission's ultimate recommendation of a judicial salary of $198,000 for judges, it could not have accepted the 1997 data, which placed the income of lawyers in the

comparator age group at the 75th percentile at $230,000 on average throughout Canada, and significantly higher in the major metropolitan areas. The Government's submission refers to the weaknesses it found in the methodology of the first SGM report. Briefly summarized, these criticisms relate to the problems inherent in using an income threshold, which fails to take into account those lawyers who, for a variety of reasons, earn less, yet are fully qualified for the bench, and the failure to exclude the highest-income earners who, so the Government argues, would never consider judicial appointment. The Government points to the lack of statistical evidence to justify a $50,000 exclusion.

The Government believes that the use of the 44-to-56 age group fails to take into account a sufficient sample of the self-employed lawyers who were appointed to the bench, since the actual age range of such appointees is between 41 and 66 years of age.

The second WCBC report comments on the first SGM report and criticizes its use of the 2000 data, rather than the more recent 2001 data.[28] It found the SGM criticism and rejection of the 2001 data to be unconvincing. WCBC criticizes the SGM methodology for the reasons outlined in the Government's submission described above and for the failure to recognize the value of the judicial annuity. WCBC was critical of the attempts made to update the 2000 data to 2004 for many reasons that need not be detailed here but relate to problems with attempts to generalize to the entire country and to assume that the income of self-employed lawyers necessarily rises with inflation or increases every year.

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[28] In a letter dated February 27, 2004, WCBC reviewed the 2000 data relative to the 2001 data and made the following comments: "When analyzing salary or income information, it is best to use the most current information available."; "Although the results might be comparable, both sets of data (that is the 1997 and 2000 data) contain extraneous information which might lead to incorrect conclusions." With reference to the comparison by SGM of the 2000 data with the data prepared for the fifth Ontario Commission, "Data that can be produced does not make the data correct, just consistent. The data still contain the same problems as identified above."

2.4 The Commission's View of the Available Evidence

We have taken the reader through this lengthy survey of the principal parties' positions on the current income data available with respect to self-employed lawyers in Canada because it is important to understand both the problems that exist with respect to the available data and the diametrically opposed positions taken by the principal parties on the data available. This review is also necessary because we are of the view that, given the statutory criteria that bind us, information as to self-employed lawyers' income in Canada is important, indeed critical, to our task. This is true as a stand-alone proposition, and particularly so, given the views we have outlined earlier in this chapter with respect to the DM-3 comparator and the principal parties' position on that comparator.

While we deplore the deficiencies in the material put before us with respect to the 2000 and 2001 income data of self-employed lawyers, we remain of the view that the income of self-employed lawyers in Canada is an important, and perhaps the most important, comparator for our work, and that we must do the best we can with the data available. Accordingly, we asked our consultants, Morneau Sobeco, to assist us in this endeavour.

We were of the view that, of the current information on the income of lawyers in private practice that is available, the most reliable was the 2000 data, since it was based on a total grouping of 20,670 lawyers (of whom 7,144 were between the ages of 44 and 56 and had incomes in excess of $50,000) and constitutes a sufficient sampling to provide a credible image of the net incomes of lawyers in private practice. The problems noted with the 2001 data, because of the way they are reported by CRA, are too great for them to be relied upon to any extent. We agree with SGM and the Association and Council that the 2000 data are useful, and our consultant concurs. We note that, notwithstanding the use made of the 2001 data by its consultant WCBC, the Government itself questioned the usefulness of the 2001 data in its own submissions.

The lawyers' net professional incomes reported for 1997 and 2000, while consistent, are not directly comparable because of the significant difference in the reported number of cases. Possible explanations for the reduction include the increased use of personal corporations. However, no complete and satisfactory explanation has been found for the substantial reduction in the number of reported cases.

Unfortunately, we were not provided with any more recent and reliable data. We view the 2001 data as less reliable, since the removal of notaries and paralegals should have had the effect of increasing the average net income rather than reducing it. Also, we find it difficult to accept that 7,198 lawyers could have "professional incomes", but no professional income from the practice of law.

In the final analysis, the 2000 data are more or less consistent with the 1997 data and remains the most credible and relatively recent source of information that we have on the net income of self-employed lawyers in Canada. The number of lawyers in private practice reported in 2000 (20,670), although 33.9% fewer than in 1997, still represents a very significant proportion of all lawyers in private practice in Canada and, as such, constitutes a sufficient sample to study the net income of lawyers in private practice.

We are mindful of the fact that the 1997 and 2000 data are samples and, as such, provide only estimates of the net income of lawyers in private practice in Canada. We can take some comfort in the fact that these estimates are probably conservative because:

- They include the net income of notaries and paralegals, which will tend to reduce the averages, given the information that was provided to us by the Chambre des notaires du Québec;

- The lawyers who have established personal corporations and are no longer reporting professional incomes are probably those with the higher incomes; and

- The nature of the data provided (net income for income tax purposes associated with professional income from the practice of law) is more likely to underestimate rather than overestimate the real economic benefits of lawyers in private practice.

The 44-to-56 age group continues to be the population from which the large majority of judicial appointments are made.[29] The 75th percentile of income, calculated with an income exclusion, strikes a reasonable balance between the largest self-employed income earners and those in lower brackets, given the criteria that we must apply. To the extent that there is validity in the Government's submission that lawyers at the highest income levels do not apply for the bench, of which there is no evidence, the use of the 75th percentile level takes that into account. With respect to the appropriate level of exclusion mentioned above, our view is that it would be more appropriate to increase the level to $60,000. It is unlikely that any in the pool of qualified candidates will have an income level lower than $60,000. The salaries of articling students range from $40,000 to $66,000 in major urban centres and the salaries of first-year lawyers range from $60,000 to $90,000 in those same centres, and are often augmented by bonuses. Earnings for more senior associates are significantly higher.

Accordingly, we asked Morneau Sobeco to provide us with tables comparing the 1997 and 2000 income of self-employed lawyers between the ages of 44 and 56, at the 75th percentile, with no income exclusion and then excluding lawyers with incomes below $60,000. The results were requested for Canada, each province and each of the largest cities with adjustments for inflation to 2004.

Morneau Sobeco used 2000 income data obtained from the CRA on behalf of the Canadian Association of Provincial Court Judges (CAPCJ). The data obtained by Morneau Sobeco allowed the identification of income from the 50th to the 95th percentile, whereas the data obtained by the Ministry of Justice and SGM required an estimation of the 75th percentile. The data obtained by Morneau Sobeco and the Ministry of Justice

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[29] The 1997–2003 statistics show that during this period, 84.8% of the judges appointed were from the 44 to 56 age group.

are otherwise consistent at the national and provincial levels with only minor differences in the reported number of lawyers for a few provinces. The results are also consistent for smaller municipalities. However, important differences exist in the number of lawyers reported by CRA to the Ministry of Justice and Morneau Sobeco for larger municipalities, presumably because of the difference in the approaches used by CRA in distinguishing between cities and large metropolitan areas.

The results are presented in the following Tables 16 to 19. The net income of Canadian lawyers for that taxation year 2000 were projected to 2004, on the basis of an estimated increase in the Industrial Aggregate Index (IAI) of 7.1% from the year 2000 to April 2004.

Table 16
Net Income of Canadian Lawyers as Reported by CRA
Tax Years 2000 and 1997, No Income Exclusion

		All Ages		Ages 44 to 56			
Province		**Number**	**Average Income**	**Number**	**Average Income**	**75th Percentile 2000**	**75th Percentile Projected to 2004**
Newfoundland	*(2000)*	212	$132,400	116	$144,600	$210,200	$225,100
	(1997)	330	$106,000	140	$127,200		
	(% change)	–35.8%	24.9%	–17.1%	13.7%		
Prince Edward Island	*(2000)*	65	$76,800	34	$97,600	n/a	n/a
	(1997)	100	$79,800	40	$92,600		
	(% change)	–35.0%	–3.8%	–15.0%	5.4%		
Nova Scotia	*(2000)*	517	$100,700	285	$111,300	$136,400	$146,100
	(1997)	810	$95,000	390	$107,200		
	(% change)	–36.2%	6.0%	–26.9%	3.8%		
New Brunswick	*(2000)*	462	$86,400	242	$88,800	$114,500	$122,600
	(1997)	650	$80,500	300	$91,700		
	(% change)	–28.9%	7.3%	–19.3%	–3.2%		
Quebec	*(2000)*	5,621	$96,900	2,597	$110,600	$136,400	$146,100
	(1997)	8,850	$65,100	3,220	$85,800		
	(% change)	–36.5%	48.8%	–19.3%	28.9%		
Ontario	*(2000)*	9,258	$152,300	4,471	$176,400	$223,700	$239,600
	(1997)	12,630	$120,600	5,370	$143,600		
	(% change)	–26.7%	26.3%	–16.7%	22.8%		
Manitoba	*(2000)*	686	$95,800	330	$110,800	$157,300	$168,500
	(1997)	1,050	$78,200	420	$101,100		
	(% change)	–34.7%	22.5%	–21.4%	9.6%		
Saskatchewan	*(2000)*	487	$93,600	261	$98,000	$135,000	$144,600
	(1997)	750	$86,043	320	$95,800		
	(% change)	–35.1%	8.8%	–18.4%	2.3%		
Alberta	*(2000)*	1,361	$138,800	654	$159,300	$191,900	$205,500
	(1997)	2,210	$109,900	810	$129,400		
	(% change)	–38.4%	26.3%	–19.3%	23.1%		
British Columbia	*(2000)*	1,923	$97,800	975	$111,000	$146,300	$139,000
	(1997)	3,760	$96,100	1,720	$116,500		
	(% change)	–48.9%	1.8%	–43.3%	–4.7%		
Canada	*(2000)*	20,670	$124,600	9,992	$142,800	$176,500	$189,000
	(1997)	31,270	$97,000	12,770	$119,000		
	(% change)	–33.9%	28.5%	–21.8%	20.0%		

Sources: Canada Revenue Agency; Morneau Sobeco.

Table 17

Net Income of Canadian Lawyers as Reported by CRA

Tax Year 2000, Excluding Income Below $60,000

	All Ages		Ages 44 to 56			
Province	**Number**	**Average Income**	**Number**	**Average Income**	**75th Percentile**	**75th Percentile Projected to 2004**
Newfoundland	151	$174,500	92	$175,700	n/a	n/a
Prince Edward Island	32	$124,300	23	$128,700	n/a	n/a
Nova Scotia	339	$139,600	205	$143,300	$163,200	$174,800
New Brunswick	231	$146,300	126	$144,800	$190,000	$203,500
Quebec	2,665	$173,700	1,404	$178,800	$219,400	$235,000
Ontario	6,169	$214,900	3,225	$233,300	$291,000	$311,700
Manitoba	386	$149,000	211	$157,300	$190,500	$204,000
Saskatchewan	288	$139,200	165	$138,200	$167,200	$179,100
Alberta	870	$201,900	453	$215,700	$278,000	$297,700
British Columbia	1,014	$163,800	565	$172,100	$216,900	$232,300
Canada	12,194	$192,500	6,487	$204,100	$247,300	$264,900

Sources: Canada Revenue Agency; Morneau Sobeco.

Table 18
Net Income of Canadian Lawyers by City as Reported by CRA
Tax Years 2000 and 1997, No Income Exclusion

	All Ages		Ages 44 to 56			
City	**Number**	**Average Income**	**Number**	**Average Income**	**75th Percentile 2000**	**75th Percentile Projected to 2004**
Calgary *(2000)*	723	$176,300	333	$210,500	$316,400	$338,900
(1997)	1,200	$140,900	410	$178,400		
(% change)	–39.8%	25.1%	–18.8%	18.0%		
Edmonton *(2000)*	402	$105,700	207	$114,500	$130,400	$139,700
(1997)	640	$78,900	260	$87,300		
(% change)	–37.2%	34.0%	–20.4%	31.2%		
Montréal *(2000)*	1,676	$138,300	747	$157,500	$218,100	$233,600
(1997)	1,730	$67,800	610	$90,000		
(% change)	–3.1%	104.0%	22.5%	75.0%		
Ottawa *(2000)*	774	$139,900	370	$147,500	$193,300	$207,000
(1997)	660	$68,200	270	$131,900		
(% change)	17.3%	105.1%	37.0%	11.8%		
Québec *(2000)*	142	$98,000	65	$112,100	n/a	n/a
(1997)	260	$61,500	90	$86,200		
(% change)	–45.4%	59.3%	–27.8%	30.0%		
Toronto *(2000)*	4,770	$191,800	2,219	$232,600	$320,900	$343,700
(1997)	5,330	$161,000	2,110	$201,800		
(% change)	–10.5%	19.1%	5.2%	15.3%		
Vancouver *(2000)*	1,242	$113,300	607	$132,500	$188,600	$202,000
(1997)	1,360	$122,300	590	$160,000		
(% change)	–8.7%	–7.4%	2.9%	–17.2%		
Winnipeg* *(2000)*	549	$102,000	256	$117,500	$158,800	$170,100

Sources: Canada Revenue Agency; Morneau Sobeco.

* Data for the year 1997 was not available for the city of Winnipeg.

Table 19
Net Income of Canadian Lawyers by City as Reported by CRA
Tax Year 2000, Excluding Income Below $60,000

	All Ages		Ages 44 to 56			
City	**Number**	**Average Income**	**Number**	**Average Income**	**75th Percentile**	**75th Percentile Projected to 2004**
Calgary	512	$238,900	258	$263,000	$370,800	$397,100
Edmonton	227	$165,200	121	$172,000	$177,600	$190,200
Montréal	952	$223,800	470	$233,600	$312,700	$334,900
Ottawa	537	$190,400	266	$194,800	$244,000	$261,300
Québec	79	$151,900	40	$161,300	n/a	n/a
Toronto	3,393	$259,500	1,695	$296,200	$393,200	$421,100
Vancouver	722	$179,000	387	$193,600	$247,400	$265,000
Winnipeg	321	$154,700	168	$164,100	$205,300	$219,900

Sources: Canada Revenue Agency; Morneau Sobeco.

We believe that these tables are a reliable estimate of the incomes across the country from the comparator group, that is, lawyers aged 44 to 56, with net professional income of $60,000 or more. The analysis shows that in larger cities, the current income of this comparator group exceeds the current level of judicial compensation, even taking into account the value of the judicial annuity, a matter we discuss in detail in the following chapter.

While it is true that there are undoubtedly qualified applicants who come from what may be described as the lower-income brackets of legal practice, due to the nature of their practice or because they come academe or government, the fact remains that most appointees do come from private practice.

It is also fair to say that many appointees do come from the higher-income brackets, and come from those centres where the income for self-employed lawyers is the highest. There will always be lawyers who earn significantly more than the 75th

percentile of lawyers' professional income that we use for this comparator group and, while many in that group may choose not to seek judicial office, many highly qualified persons in that group do accept the financial sacrifice involved, because of the other attractions of judicial life. It is important, we believe, to establish a salary level that does not discourage members of that group from considering judicial office.

2.5 Annual Increases

The Drouin Commission recommended, in addition to the salary levels and annual indexing for inflation as provided by statute, that there be annual increases of $2,000 per year. No rationale for this was expressed in the report. The Drouin Commission was the first such commission to recommend annual increases over and above the salary recommendation.

In submissions to us, the Association and Council requested that there be, in addition to the salary that we recommend, an annual increase of $3,000 over and above statutory indexing. The Government accepted the principle of an annual increase over and above statutory indexing, but submitted that it remain at $2,000 per annum predicated, of course, on its submission that the base salary should increase by only 4.48% for 2004–05.

We have been unable to discern any rationale for this annual increase, and to the extent that there is one, we do not accept it. The *Judges Act* mandates the Quadrennial Commission process and each commission in its turn must recommend an adequate and appropriate level of salary and benefits. The statutory scheme is such that the level recommended, if accepted by the federal government, and subject to indexation, will be the level for the succeeding four years. We can see no mandate in the statute or in logic to maintain, during the succeeding four years, "rough equivalence" with any comparator, and we decline to do so. The salary level we have recommended is our best judgment in 2004 as to what is adequate and appropriate within the statutory

framework and, on the basis of the information currently available to us, we are satisfied that our recommendation meets that mandate both appropriately and fairly and in the public interest. Having done so and in the knowledge that the sum we have recommended, if accepted, will be increased by statutory indexing in each year, we decline to recommend that it be otherwise increased.

2.6 Recommendations Concerning Salaries for Puisne Judges

Striking the right balance, given the conflicting positions of the principal parties and the insufficiency of the available information, is not an easy task. We have considered carefully and anxiously all of the submissions and information made available in the voluminous material filed with us.

We have also taken into account the singular importance of the work done by the judiciary, its increasing complexity and the hard work involved in doing it well. We have taken into account the value of the judicial annuity, which we have more fully dealt with in the next chapter.

We combine the analysis in this chapter with the overriding considerations of the need to maintain the independence of the judiciary during the holding of office and after retirement, and to attract outstanding candidates to the judiciary. We keep in mind the current economic situation of the federal government, as we understand it. We have come to the conclusions that are embodied in the recommendations that follow, and we believe that our recommendations strike the appropriate balance and are in the public interest. We reiterate that the full public benefit of the exercise of our jurisdiction will only be achieved if the government selects the most qualified and most outstanding candidates from the pool of those available.

Recommendation 1:

The Commission recommends that the salary of puisne judges be established as follows. Effective April 1, 2004, $240,000, inclusive of statutory indexing on that date; and for each of the next three years, $ 240,000, plus cumulative statutory indexing effective April 1 in each of those years.

2.7 Salary Levels of Other Judges

For many years a relatively constant differential has been maintained between the salaries of puisne judges and chief justices, associate chief justices and judges of the Supreme Court of Canada. Both the Government and the Association and Council were satisfied that such a differential should continue to exist, and at approximately the same level as at present. That differential is approximately 10% between the salaries of puisne judges and the salaries of the chief justices and associate chief justices. There has also been a differential of approximately the same level, or perhaps slightly lower, between the salaries of the chief justices and associate chief justices, and the salary level of justices of the Supreme Court of Canada and the Chief Justice of Canada. We see no reason to alter this long-established relationship.

Recommendation 2:

The Commission recommends that the salaries of the justices of the Supreme Court of Canada and the chief justices and associate chief justices should be set as of April 1, 2004, inclusive of statutory indexing, at the following levels:

Supreme Court of Canada:	
Chief Justice of Canada	**$308,400**
Justices	**$285,600**
Federal Court and Tax Court of Canada:	
Chief Justices	**$263,000**
Associate Chief Justices	**$263,000**
Appeal Courts, Superior and Supreme Courts and Courts of Queen's Bench:	
Chief Justices	**$263,000**
Associate Chief Justices	**$263,000**

2.8 Compensation for Senior Northern Judges

The Association and Council support the position of the three Senior Northern Judges (Justice J.E. Richard of the Northwest Territories, Justice B.A. Browne of Nunavut and Justice R.S. Veale of Yukon Territory), who ask that the salary attached to the position of senior judge be the same as the salary attached to the position of the chief justice of the other superior courts in Canada, as they have the same duties, responsibilities and functions as chief justices.

The Northwest Territories and the Yukon Territory do not have chief justices for their superior courts. There are three resident superior court judges in Nunavut, three in the Northwest Territories and two in the Yukon, all of whom have extensive circuit responsibilities over large geographical areas. In each of these territories, one of these judges is designated the senior judge with administrative responsibilities for the other judges and a roster of about 40 deputy judges.

In 2000, the legislative assemblies in the three northern territories all passed legislation creating the office of a chief justice in their respective jurisdictions. Those Acts have yet to be proclaimed as the federal government has not yet agreed to create the office of chief justice, despite the fact that at the time these Acts passed the northern legislative assemblies, the then-Minister of Justice sought the concurrence of the Canadian Judicial Council to change the name and the compensation level of these northern chief justice "stand-ins". As its submission makes clear, the Canadian Judicial Council is still in agreement with the proposed change of status and remuneration.

The Commission has no mandate to recommend the creation of a judicial position to the Minister of Justice. On the other hand, each senior northern judge is responsible for the duties generally performed by a chief justice, including full representation on the Canadian Judicial Council, and the salary attached to the position ought to be the same as the salary attached to the position of chief justice of the other superior trial courts in Canada.

Recommendation 3:

The Commission recommends that the senior northern judges receive equivalent compensation to that of a chief justice, until such time as chief justices are appointed in those jurisdictions.

2.9 Differential Compensation for Court of Appeal Judges

We received a compelling submission made on behalf of 74 of the 142 appellate judges who serve on the courts of appeal of each province in Canada.

The proposal made was that, inasmuch as the courts in Canada (and virtually everywhere else) are established on a hierarchical basis, it is appropriate that those higher in the hierarchy be paid accordingly and receive greater compensation than trial court judges.

The same submission was made to the Drouin Commission, which declined to address the request because it had received inadequate study, apparently with respect to the relative workloads of each court. The submission before this Commission was not based on the suggestion that appellate judges have heavier workloads or that their work is more important than that of trial judges. It was specifically designed not to infer any negative or less important role for the duties and responsibilities performed by trial judges. The submission rested on the simple proposition that "advancement" or "elevation", which is the common description of a move from a trial court to an appellate court, ought to be attended with a raise in compensation such as normally would be accorded to promotion. Basically, the thesis is that colonels get paid more than majors.

The proposal by the appellate judges was not, as noted above, unanimous. The Association and Council submission neither endorsed the appellate judges' request nor opposed it. However, the Chief Justice of Nova Scotia, on behalf of her court, opposed it. The proposal had an irregular constituency. No member of the British

Columbia Court of Appeal was included in the group making the request and only a few members of the Ontario Court of Appeal belonged to the group on whose behalf the request was made.

All puisne judges have been treated in the same way from a compensation point of view since Confederation. The only compensation differentiation is for judges of the Supreme Court of Canada, save and except chief justices and associate chief justices, who receive additional compensation because of their administrative and other responsibilities.

There is no evidence that those considering an appointment to a court of appeal are in any way influenced by the compensation currently paid appeal court judges, nor is there any evidence that trial court judges are reluctant to accept “elevation” to a court of appeal because it does not come with a raise in compensation. Indeed, the amount of differential sought is not, in any event, such an amount as would be likely to influence such a decision.

In short, there is no support for the proposition that the current method of compensating all puisne judges equally, as they have been, has not been an entirely satisfactory arrangement to the functioning of the courts or the availability of suitable candidates to staff this country's courts of appeal. There is, on the other hand, some evidence that the creation of such a differential would be harmful.[30]

We also considered the mute position of approximately 50% of Canada’s court of appeal judges. It is significant that they would not join in the proposal of their contemporaries, given that the subject is of particular interest to them from a monetary perspective.

This Commission's jurisdiction, as noted earlier, is prospective in nature and the recommendations we make must be confined to the considerations identified in

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[30] See the letters in Appendix 9.

s. 26(1) of the *Judges Act*. We are not permitted nor authorized to re-design the court system in Canada. If we were, it is entirely probable we would design a system where appellate court members received higher compensation than trial court members. Ignoring the economic considerations mandated by the statute, we are obliged to consider what steps ought to be taken to ensure judicial independence including financial security and to promote a high quality of candidates for appointment to judicial office. There is no foundation for the thesis that altering the historical situation of the court of appeal judges, from a compensation perspective, would have any impact whatsoever on those considerations. Accordingly, we are obliged, in our view, to refuse to recommend the proposal made on behalf of the members of the court of appeal for differentiation in the compensation they currently receive from that of trial judges. We believe, however, that the government ought to give consideration as to whether or not a different level of compensation might be appropriate for puisne judges who sit on courts of appeal.

Recommendation 4:

The Commission does not recommend a salary differentiation between puisne judges who sit on courts of appeal and puisne judges who preside at trials.

CHAPTER 3

ANNUITY BENEFITS

3.1 The Judicial Annuity

We recognize that the judicial annuity is an important part of judicial compensation and must be taken into account when we come to set the appropriate salary level. This is because, given its unique characteristics and value, it is a significant incentive to those considering application for judicial appointment as there is nothing comparable available to self-employed lawyers in the private practice of law.

Lawyers in private practice are generally limited in their retirement planning to RRSPs and personal savings or investments from after-tax income. Therefore, a substantial portion of their net incomes must be set aside each year to ensure that they will maintain, in retirement, the standard of living they enjoyed prior to retirement. In contrast, the judicial annuity, which represents 66 2/3% of the judge's salary at retirement and is fully indexed to increases in the Consumer Price Index (CPI), guarantees that judges will be financially secure in their retirement years, thus fulfilling an important condition for judicial independence. Accordingly, unlike lawyers in private practice, judges do not need to set aside any significant portion of their income other than their contributions to the judicial annuity plan created under the *Judges Act* (7% of salary, reducing to 1% of salary when the judge is entitled to retire with his or her full unreduced annuity) to ensure their financial security at retirement.[31]

The Government's independent actuary estimated the value of the government-paid portion of the judicial annuity to be 24% of salary. Morneau Sobeco reviewed the methods and assumptions adopted by the Government's independent actuary and concluded that they were appropriate for compensation benchmarking purposes.

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[31] The actuarial report prepared in 2001 by the Chief Actuary of Canada, pursuant to the *Public Pension Reporting Act*, refers to the judicial annuity established under the *Judges Act* as a pension plan.

Morneau Sobeco noted that the value of the judicial annuity for any individual judge varies significantly according to the age at appointment and the assumed retirement age. On the basis of the age at appointment of judges appointed between January 1, 1997, and November 14, 2003 (age 51 on average), Morneau Sobeco determined that an appropriate value for the government-paid portion of the judicial annuity for compensation benchmarking purpose could be set at 22.5% of salary.

The Association and Council thought that the initial estimate of 24% of salary was too high in light of a report from their own consultant but did not disagree with the final figure of 22.5% of salary, which was also accepted by the Government.

Accordingly, recognizing the value of the government-paid portion of the judicial annuity, the current judicial salary of $216,600 has a real value of $265,300 for the average judge.

3.2 Comparison of the Judicial Annuity With the Deputy Minister's Pension

In comparing the salaries of judges and deputy ministers, we wanted to take into account the differences in the value of the judicial annuity and the pension benefits of a deputy minister, considering the importance of these benefits.

Comparison of the judicial annuity and deputy minister pension benefits is complicated by the fact that:

(1) the judicial annuity does not have a defined benefit accrual rate and;
(2) the service profiles of judges and DMs (age at date of appointment, prior public sector service and retirement ages) can be very different.

As mentioned before, a judge may retire with a full judicial annuity determined as 66 2/3% of his/her judge's salary, as soon as the judge has 15 years of service and the sum of age and judicial service equals 80 (the "modified Rule of 80"). In contrast, deputy ministers accumulate a pension of 2% of their best five-consecutive-year average earnings for each year of credited service up to a maximum of 35 years. A deputy minister who is responsible for a department earns an additional pension of 2% of the same best five-year average earnings for each year of service in such capacity up to a maximum of 10 years. The deputy minister's pension is payable with no reduction for early retirement at any time after:

- Age 60 with two years of contributory service; or
- Age 55 with 30 years of contributory service.

However, the deputy ministers' pensions are integrated with the Canada/Quebec Pension Plan (C/QPP). This means that their pension is reduced at age 65 by approximately 1/35 of the C/QPP pension for each year of service.

For example, a deputy minister appointed at the age of 45 who retires at the age of 65 with 20 years of service will be entitled to a pension of 40% of his or her best five-year average earnings (20 times 2%) less approximately 20/35 of the C/QPP pension. In contrast, a judge with the same service history would retire with a judicial annuity equals to 66 2/3 % of his or her final salary. In this scenario, our consultant has determined that the value of the additional annuity benefit of the judge would have been equal to 17.3% of salary each year.

If the deputy minister in the above example had been responsible for a department for 10 or more of his or her 20 years of service, the pension would be increased by 20% of the best five-year average earnings (10 times 2%), thus increasing the pension from 40% to 60% of best five-year average earnings less the same 20/35 of the C/QPP pension. The judicial annuity of 66 2/3% of the final salary would still be more generous.

It should be noted that if the deputy minister had prior years of service in the public service, the pension would be larger, thus reducing the gap between the judicial annuity and the deputy minister's pension.

Judges are generally appointed to the bench late in their career, while the typical deputy minister is usually a career public servant. Accordingly, a fair comparison of the value of their respective pension annuities is difficult.

The judicial annuity and the deputy minister pension are both fully indexed to cost of living increases.

Judges contribute 7% of their salary each year to the judicial annuity scheme, whereas deputy ministers contribute 4% of their pensionable earnings up to the Maximum Pensionable Earnings under the C/QPP and 7.5% of their pensionable earnings above that threshold. In both cases, the contribution rate is reduced to 1% once the maximum pension is reached.

The judges' survivor benefit of 50% of the judicial annuity, or 33 1/3 % of salary, exceeds that available to most deputy ministers, which is determined as 1% of the best five-year average earnings for each year of service, up to a maximum of 35 years.

This comparison shows that, in the case of both the deputy minister pension and the judicial annuity, the actual value as a percentage of annual income to individual deputy ministers or judges will vary widely, depending on age of employment or appointment and the age at retirement.

3.3 Division of Annuity After Conjugal Breakdown

As we have seen, the judicial annuity is not a pension, although it has many features common to pensions. While it is contributory (until the judge satisfies the modified Rule of 80), it does not result in any payment to the judge or his or her spouse until he or she retires, or dies. Judges, therefore, have a significant measure of control over when payment of the annuity occurs, since they can retire on a full annuity when they have attained a sufficient number of years of service and age to satisfy the modified Rule of 80, or they may choose to stay in regular service or as supernumerary judges for up to 10 years from that date, or defer retirement entirely until attaining the age of 75.

The judicial annuity is not subject to federal pension benefits legislation, particularly the *Pension Benefits Division Act* (PBDA).

The issue is how the judicial annuity should be treated when a judge's conjugal relationship breaks down and the parties, or courts, come to determine the division of the family assets.

We were advised that the Association and Council and the Government hoped to achieve a consensus on this issue, so that a recommendation from us would be unnecessary. Although substantial agreement was achieved, significant differences remains for us to consider in order to arrive at a recommendation.

Both parties agree that there ought to be a mechanism for the division of the judicial annuity after conjugal breakdown.

The Government takes the position, and the Association and Council agree, that no more than 50% of the value of the annuity accrued during a marriage should be available for distribution to the judge's spouse. This is an essential provision, in order to ensure the benefit of at least 50% of the annuity remaining with the judge, given the singular importance of the annuity to the concept of judicial independence.

It is also understood and agreed by both parties that the substantive rights to a portion of the annuity, as with all other aspects of conjugal property, will continue to be determined by provincial or territorial law.

What is needed, therefore, is in effect a procedural mechanism to value the portion of the annuity available for distribution upon conjugal breakdown.

Both parties agree that the objective is to be achieved by amendments to the *Judges Act*, rather than to other existing federal pension legislation.

What remains to be determined by us is the basis to be used for calculating the value of the annuity at the time of division, and the proportion to be applied to that value in order to determine the spouse's share upon division.

It is unnecessary to detail here the original positions of the principal parties on this issue, except to say that the Association and Council proposed a formula such that division would not actually occur until the judge retired, while the Government proposed that the division should occur at the time of conjugal breakdown or division of conjugal assets. There were also significant differences as to the method of calculating both the percentage of the judicial annuity available to the judge's spouse and the value of the annuity at the time of the division. As indicated above, many of the differences have been resolved. In particular, the Association and Council have now accepted that there should be a valuation of the annuity, based on actuarially-determined retirement patterns, as of the date of the division of assets. Further, the Association and Council have indicated their willingness to modify their position so as to accommodate the Government's commitment to the goals of a clean break and portability.

The Government makes it clear that its proposal facilitates the division of the annuity only, and does not interfere with the ability of the judge and his or her spouse, or the courts, to deal with the annuity in any fashion deemed appropriate and in accordance with provincial law. The Government's intention, in its proposal, is to achieve a process

and a division of the judicial annuity as closely aligned as possible to that for other federal employees under the PBDA.

The Government recognizes that conjugal breakdown can occur before a judge becomes entitled (a notional "vesting") to a judicial annuity of some amount upon death or retirement, as opposed to receiving a return of contributions only. This entitlement occurs at the point where a judge attains age 55 and has served at least 10 years in judicial office. A judge becomes entitled to retire on full annuity when he or she satisfies the modified Rule of 80, that is, when the judge has at least 15 years of service and his or her age plus service equals 80. At that point, judicial contributions to the annuity scheme cease, except for the 1% of salary contributions to pay for post retirement indexing.

The Government's proposal would, therefore, allow the judge's spouse to have a choice of either receiving an immediate lump sum transfer in the amount of his or her proportionate share of the judge's contributions or electing to wait until the judge's annuity notionally "vests" (or the judge dies or otherwise terminates judicial service) and at that date receives a lump sum transfer of either the proportionate share of contributions or the actuarial present value of the notionally-accrued annuity.

The proportionate share proposed by the Government is based upon the number of years of judicial service during the marriage relative to the number of years from the date of appointment to the date when the judge becomes entitled to a full annuity based on the modified Rule of 80. Thus, if a married judge is appointed at age 50, and conjugal breakdown occurs at age 60, the spouse will be entitled to 50% of the value of the judicial annuity accrued during the marriage, determined as 10/15, or 2/3 of the judicial annuity. In this example, the judge will have satisfied the modified Rule of 80 at age 65 after 15 years of service. The valuation of the amount to be divided on that rationale, in the Government's proposal, will be based on the demographic assumptions used by the Chief Actuary of Canada in the most recent *Actuarial Report on the Pension*

Plan for the Federally Appointed Judges to calculate the actuarial present value of the amount subject to division.[32]

The Association and Council submitted that both the valuation of the annuity at breakdown and the proportion to be applied to it should be determined by the actuarial data of past judicial retirement patterns.

We have devised a recommendation that incorporates aspects of both positions. We accept the rationale that there can never be a division that would lower the entitlement of the judge below 50%. We accept the Government's position that there should be a clean break, and a mechanism should be created that will allow a lump sum to be paid out at the time of the division of matrimonial property. We note that the *Judges Act* and perhaps the *Income Tax Act* may have to be amended to allow the transfer of a portion of the former spouse's lump sum settlement to an RRSP, since the judicial annuity is not a registered pension plan.

With respect to the value of the entitlement to the annuity, we agree with the Government that the demographic assumptions used by the Chief Actuary in the most recent *Actuarial Report of the Pension Plan for the Federally Appointed Judges* be used to calculate the actuarial present value of the portion of the judicial annuity subject to division. This approach should be cost-neutral, to the extent that the retirement experience of judges following their marital breakdown is consistent with the demographic assumptions developed by the Chief Actuary.

Considering the unique nature of the judicial annuity, our view is that, for purposes of determining the portion of the judicial annuity subject to division upon marital breakdown, the judicial annuity should be deemed to accrue over the entire period of judicial service. Until recently, the judicial annuity provided no early retirement benefits. Judges earned an entitlement to their full judicial annuity upon the earlier of the date of the modified Rule of 80 or attainment of age 75 with 10 years of service. In these

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[32] These reports are prepared every three years and the most recent one is dated March 31, 2001.

circumstances, the concept of pension benefit accrual did not apply. The value of accrued benefits went from a return of employee contributions to 100% of the judicial annuity overnight when the judge satisfied one of the retirement conditions. The addition of the early retirement benefits gave judges access to retirement benefits as early as age 55 with 10 years of service. However, such benefits did not change the unique nature of the judicial annuity and the fact that there is no defined benefit accrual rate.

Our recommendation provides a fairer basis for valuation than that proposed by the Government, which assumes that the annuity is fully accrued when a judge completes 15 years of service and satisfies the modified Rule of 80. Our recommendation also leaves "room" for an allocation to a second spouse, in the event of another conjugal breakdown, based on the years of the conjugal relationship, without impinging on the 50% share of the annuity remaining with the judge.

Considering the need for a clean break and full portability, we agree that the spouse should be given an option of a lump sum settlement. The judicial annuity would then be deemed to be earned over the expected judicial service, based on the demographic assumptions used for the most recent *Actuarial Report on the Pension Plan for the Federally Appointed Judges*.

In the previous example of a married judge appointed at the age of 50 and whose marriage ended at the age of 60, the portion of the judicial annuity subject to division would be 10/22, assuming that the expected retirement age of the judge is 72, based on the demographic assumptions of the last actuarial report and his or her current age (60) and service (10 years).

Should the same judge remarry at the age of 65 and subsequently be separated from the second spouse at the age of 70, the judicial annuity subject to division with the second former spouse would be 5/24 of the judicial annuity, assuming that the expected

retirement age of the judge is 74 based on the demographic assumptions of the last actuarial report and his or her current age (70) and service (20 years).

Finally, should a marital breakdown occur before the annuity is vested, that is before age 55 or the completion of 10 years of service, the former spouse would be allowed to exercise the lump-sum settlement option when the judge reaches age 55 and completes 10 years of service.

Recommendation 5:

The Commission recommends that the *Judges Act* be amended to provide for

- **the possibility of dividing, upon conjugal breakdown, the judicial annuity deemed to accrue during a relationship, up to a 50% limit;**
- **the judicial annuity to be deemed to accrue over the judge's entire period of judicial service, for the purpose of determining the portion of the judicial annuity that is subject to division upon conjugal breakdown;**
- **a lump sum settlement option, to ensure a clean break and the possibility of deferring such settlement until the date when the judge will have attained age 55 and completed 10 years of service, if applicable; and**
- **the demographic assumptions used for the most recent *Actuarial Report on the Pension Plan for the Federally Appointed Judges* to be used for purposes of determining the value of the judicial annuity and the expected retirement date of a judge in calculating the portion of the judicial annuity subject to division.**

The Commission also recommends that the government amend the *Judges Act* and the *Income Tax Act*, as necessary, to allow the transfer of a portion of the former spouses' lump-sum settlement to RRSPs, as if the judicial annuity were a registered pension plan, at least for the portion of the judicial annuity up to the defined benefit pension limits applicable to registered pension plans under the *Income Tax Act*.

3.4 Survivor Benefits for Single Judges

Madam Justice Alice Desjardins argued before us that "under the present state of affairs, married judges, those living as common-law couples and same-sex couples

enjoy benefits which are denied to single judges" and that "the exclusion of single judges from survivor benefits in the *Judges Act* infringes their rights under s.15 of the *Charter*. While a single judge is compelled to make contributions to a pension scheme in the same amount as each and every one of her colleagues, she is deprived of survivor benefits, a monetary compensation otherwise available to those of her colleagues living in a conjugal relationship."

This is the third commission to which Justice Desjardins has addressed a submission requesting that the right to survivor benefits be extended to single judges. Our predecessors rejected the submission on the grounds that it did not fall within their mandate. In this instance, Justice Desjardins, has based her case on *Charter* arguments and the extensive study *Beyond Conjugality* produced by the Law Commission of Canada, in which it concluded that the laws relating to conjugality in Canada are in need of extensive revision.

Justice Desjardins asks us to recommend that the *Judges Act* be amended to allow single judges to designate a close family member as the beneficiary of the survivor benefits attached to his or her pension.

The language of Justice Desjardins' submission and of the Government's reply is clearly *Charter*-oriented. The issue is a constitutional one. It cannot, however, be hived off from the rules that pertain across all government departments. The Law Commission report takes this broad perspective and recommends that the federal government overhaul its dependency benefits.

As its name implies, the Judicial Compensation and Benefits Commission is not a constitutional commission. It is charged with specific responsibilities having to do with recommendations concerning the remuneration and financial benefits of judges. The examples brought before us by Justice Desjardins are based on pension-related survivor benefits that can be addressed only by amendments to the legislation entailing

a redefinition of "survivor" as well as "conjugal relationship". Those amendments cannot focus on the judicial context in isolation.

In the case of federally appointed judges, the survivor benefit is 50 per cent of the judge's pension. If a judge has no eligible survivor, the death benefit is equal to a refund of his or her contributions, with accumulated interest, as set out in s. 51(3) of the *Judges Act*. In addition, a lump sum of one-sixth of the judge's yearly salary is paid to his or her estate or successors, all of which could presumably be left to a designated recipient in his or her will.

The legal definition of "survivor" for the purposes of pension and annuity payments has evolved over the last quarter of a century from married spouses to common-law spouses and now to same-sex spouses, but the definition continues to be based on a conjugal relationship. To provide single judges with prospective survivor benefits would involve a considerable shift in conceptual terms. Redefining a survivor outside the ambit of conjugality is a broadly based political exercise, well beyond our mandate. For the reasons set out above, we must refuse to entertain the request submitted by Madam Justice Alice Desjardins.

Recommendation 6:

The Commission recommends that there be no change in the provision for survivor benefits for single judges until the matter is addressed by the government in the wider federal context.

3.5 Annuities for Judges Who Retired During the Salary Freeze 1992–97

We received a submission from two former, now retired, judges, the Honourable Lawrence A. Poitras and the Honourable Claude Bisson, on the matter of annuities for judges who, like themselves, who retired during the 1992–97 salary freeze in Canada.

Their submission was neither supported nor opposed by the Association and Council, but the Government opposed it. A similar submission had been brought before the Drouin Commission in 2000.[33]

The argument put before the Drouin Commission was that the Scott Commission (1996) had recommended that there be a "catch up" of salaries for judges because of the freeze; then, when the Government implemented that recommendation, it did so as of April 1, 1997. It did nothing to adjust the annuity for the 131 judges who had retired in the period 1992–97 and whose annuities were based on the "frozen" salary in place when they retired. The Government's argument was that the "catch up" was done prospectively; when the freeze was lifted, all federal public servants were similarly affected by the wage freeze, and the freeze had the same effect on all such persons, active in the workplace or retired.

Messrs. Poitras and Bisson submitted to us that the approximately surviving 100 judges who retired during the freeze have been treated unfairly, and in effect have been discriminated against. They refer to the fact the increases in judicial salary that were made in 1997 and 1998 were specifically intended to make up for the effect of the wage freeze on judicial salaries. They point out that the judges who did not retire during the freeze but did so thereafter, got the benefit of those catch up increases in the calculation of their annuity upon retirement, whereas those who already had retired did not. The remedy they advocated before us was slightly different than the one advocated before the Drouin Commission. The present submission was that, at a minimum, there should be an adjustment in the annuities of those who presently receive them (and the survivors of any of the original group who receive a partial annuity), prospectively, to take into account the increases that were made to April 1998, together with the statutory indexing on the increased amount. It is proposed that these increases in the annuity take effect from April 1, 2004. In other words, they do not now look for a

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[33] Drouin (2000), at 87-8, which rejected it because "Judges were not singled out as targets of wage restraint and the adverse income of wage restraints were experienced by other Canadians as well. As a matter of principle, we do not accept that the adverse impact of the freeze should be redressed. We are not prepared to recommend the adjustment of pensions for those annuitants who retired during the freeze, or their survivors."

payment for past years, only to narrow the gap between their own annuity and annuities that came into being after the freeze was lifted.

An anomaly that illustrates the unfairness they point to is demonstrated by the case of a judge who retired in 1991, just before the freeze. Such a judge would, by virtue of statutory indexing, which was not frozen in the period 1992–97, have a greater pension than a judge who retired in 1996, whose annuity was based on the unindexed judges' salary of 1991. That discrepancy, of course, continues to exist.

The Government points out that nothing has changed since the Drouin Commission reported, and that no new information has been supplied that would warrant us coming to a different conclusion on what the Drouin Commission described as a "matter of principle". The Drouin Commission pointed out that the freeze did not single out judges; rather, it affected the entire federal public service, and it would be wrong to redress the perceived unfairness for only one group of those affected by what was a matter of federal public policy during that five-year period. We were told that the number of federal public servants affected was 34,713 and that there has been no similar adjustment for any group of federal public servants affected by the freeze. The Government points out that the value of such a restraint program will be placed in jeopardy if it could be affected, after the fact, in the manner now being proposed. The anomaly with respect to the indexing of those who retired in 1991 applied over the entire public service because, even during the freeze, pensions were indexed, though salaries were not.

We have considerable sympathy with the submission of Messrs. Poitras and Bisson and their similarly situated colleagues. However, our view is that their plight is the result of the effect of the general freeze that was undertaken as a matter of public policy and the economic conditions that then prevailed, and affected the entire federal public sector. It cannot be said to have been a policy that in any way diminished the independence of the judiciary.

We do not believe that we have the jurisdiction to remedy the unfairness that is said to exist, despite our understanding of, and sympathy for, the argument. The s. 26(1) criteria are to us forward looking, to ensure that judicial salaries and benefits during the four years following our report are adequate to ensure the independence of the judiciary, its financial security, and are at a level that will continue to attract outstanding candidates. Rectifying past injustices, if such there were, is simply not within our mandate. We could not, for instance, if we thought that previous judicial salaries had been inadequate based on the statutory criteria, rectify that inadequacy for the benefit of those who suffered under it, whether they retired during its currency or were still active. We can only make recommendations for the four-year time frame from April 1, 2004 to March 30, 2008, and only with respect to judges still active, or to be appointed during that period.

While Messrs. Poitras and Bisson attempted to modify their request to fit into that mandate, by suggesting that it only operate prospectively, the melancholy fact remains that their submission is based on the failure of the 1997 and 1998 increases to be made applicable to those who retired in the period 1992–97. We are of the view that we cannot accede to this request.

Recommendation 7:

The Commission declines to recommend any change to the judicial annuities payable to the judges who retired during the 1992–97 time period.

CHAPTER 4

SPECIAL ALLOWANCES

4.1 Incidental Allowance

The Association and Council submit that the incidental allowance of federally appointed judges be increased by $1,000 effective April 1, 2004, and that a further increase of $1,000 be effective April 1, 2006, to reflect the increased cost of the expenditures for which the judges are entitled to be reimbursed.

An incidental allowance of $1,000 per annum per judge was created in 1980. It was increased to $2,500 in 1989 and then doubled to $5,000 in 2000.

The Association and Council submit that the level of the incidental allowance should be adjusted to reflect the increased cost of the expenditures for which the judges are entitled to be reimbursed under s. 27(1) of the *Judges Act.* Federally appointed judges are entitled to be reimbursed up to $5,000 per annum for "reasonable incidental expenditures that the fit and proper execution of the office of judge may require". Incidental allowances "cover such things as the cost of repair and replacement of court attire, the purchase of law books and periodicals, membership in legal and judicial organizations, the purchase of computer and other assorted expenses associated with the position."[34]

In support of the claim that, after four years, this allowance is no longer sufficient to defray the cost of the items it is intended to cover, the Association and Council offered a selected list of comparative 1999 and 2002–03 prices.[35] As an example of additional expenses that must now be incurred by individual judges, it was pointed out that judges have been advised that they may now charge the monthly fee for high-speed Internet, which used to be provided to judges free of charge, to their incidental allowance.

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[34] Association and Council Submission at pages 21–22, citing Drouin Report (2000) at page 55.

[35] Association and Council Submission, December 15, 2003, Appendix B.

The Government, on the other hand, contends that an additional $1,000 in each of 2004 and 2006 represents an increase of 20 % in 2004 and 16.7 % in 2006, which does not appear warranted by an increase in the cost of goods and services covered by this allowance. Indeed, in its response to the request for an increase, the Government pointed out that the judges had already received an increase of 100 % in 2000 and that raising that sum at this time "would far outstrip any possible increase in costs of the goods related to judicial office."[36]

The Government makes a further argument by distancing itself from the responsibility for providing the kinds of tools and materials referred to in the Association and Council's submission on the incidental allowance by claiming that these expenses are "first and foremost the responsibility of the provinces and territories in the administration of the courts and the administration of justice" in their respective jurisdictions and that therefore "there is no justification for transferring such additional cost to the Federal Government."[37]

We make no value judgment on the division of jurisdictional responsibilities except to observe that the incidental allowance is already included in the *Judges Act* and, as such, is an accepted federal government responsibility.

We have, however, attentively examined the use being made of the provision as it is administered by the Office of the Commissioner for Federal Judicial Affairs and found it to be a very flexible benefit, covering a wide range of reimbursable goods and services, within three principal guidelines:

- that the expenses are required for the fit and proper execution of the office of judge;
- that the reimbursement of the expense is not provided for under any other section of the Act; and

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[36] Government Reply Submission, January 23, 2004, at page 8.
[37] *Ibid*, at page 8.

- that the expenses are reasonable.

Examination of the issue also points to a very flexible implementation of the yearly reimbursement mechanisms. Some judges never use it up, while there are others who go over the stipulated annual amount. Judges who exceed the $5,000 limit in any given year are allowed to carry over the unpaid portion against their next year's allowance.

Table 20
Usage of Incidental Allowance
2000–03

Year	# of Claims under $5,000	# of Claims above $5,000
2000–01	420	626
2001–02	392	765
2002–03	236	828

Source: Office of the Commissioner for Federal Judicial Affairs.

In the absence of any compelling evidence that the existing $5,000 incidental allowance (which translates into $20,000 per judge per quadrennial mandate) is inadequate for the purposes for which it was created, we see no justification in increasing it at this time. We believe that $20,000 over a four-year period remains a reasonable amount to cover these incidentals. While the Association and Council provided us with a generic description of items that might be applied against the judicial allowance, we believe that if a future request is made to increase the allowance, it ought to be accompanied by access to evidence about the actual use being made of the allowance by the judiciary.

Recommendation 8:

The Commission recommends that the Incidental Allowance of $5,000 per annum for each judge remain unchanged.

4.2 Representational Allowance for Regional Senior Judges in Ontario

The Association and Council ask us to recommend that regional senior judges in Ontario be entitled to a representational allowance of $5,000 per annum, to reimburse expenses actually incurred by them in the discharge of their extra-judicial obligations and responsibilities. Carrying this recommendation into effect would require an amendment to s. 27 of the *Judges Act* to include regional senior judges in Ontario, and fix the amount payable under that section at a maximum of $5,000 per annum.

At present, pursuant to s. 27(7) of the *Judges Act*, those individuals entitled to a representational allowance are:

- the Chief Justice of Canada at $18,750;
- each puisne judge of the Supreme Court of Canada at $10,000;
- the Chief Justice of the Federal Court of Appeal and each provincial chief justice at $12,500;
- other chief justices mentioned in ss. 10 to 21 at $10,000;
- each of the senior judges of the Supreme Court of the Yukon Territory, the Supreme Court of the Northwest Territories and the Nunavut Court of Justice at $10,000;
- each of the chief justices of the Court of Appeal of the Yukon Territory, the Chief Justice of the Court of Appeal of Northwest Territories and the Chief Justice of the Court of Appeal of Nunavut at $10,000; and
- the Chief Justice of the Court Martial Appeal Court of Canada at $10,000.

Alone among the provinces and territories, Ontario has divided the province into eight judicial regions, with a regional senior judge administering the judges in each of those

regions.[38] These positions were created for administrative efficacy, given the large number of judges in Ontario and its geography. The number of judges in each region who are administered by the senior regional judge is indicated in the following table.

Table 21
Regional Distribution of Judges in Ontario
As of March 3, 2004

Region	# of Judges
Central East	26
Central South	35
Central West	22
East	33
Northeast	20
Northwest	7
Southwest	33
Toronto	84
Total	262

Source: Office of the Commissioner for Federal Judicial Affairs – Judicial Appointments Secretariat.

The federal government acceded to Ontario's request that a provision be made for regional senior judges. The appointments are made by Order in Council by the federal government.

It is fair to say that, given the number of judges assigned to the various regions and the geographical size of each region, many of the regional senior judges have as many or more judges under their administrative supervision and direction than chief justices in

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38 *Courts of Justice Act*, R.S.O. 1990, c. C. 43.

many provinces. Like chief justices and associate chief justices, regional senior judges are required, among their many other duties, to host visiting judicial and legal delegations and attend many bar and judicial meetings and functions. These occur with great frequency. Given the geography of Ontario, it is not reasonable to expect that the chief justice and associate chief justice can be in the regions on a regular basis for these purposes.

At present, regional senior judges must either pay the expenses associated with these representational activities out of their own pocket or claim them against their incidental allowance provision. As indicated elsewhere in this report, we have not recommended that there be any increase in the incidental allowance for judges.

The Government concedes that the administrative responsibilities of regional senior judges in Ontario are significant. The Government's objection to a representational allowance is based on the proposition that the creation of regions in Ontario was a decision of the province, which has constitutional responsibilities for the administration of justice under s. 92 of the *Constitution Act*, *1867*. The Government concedes that, in providing in the *Judges Act* a representational allowance for chief justices and associate chief justices, it is already making a federal contribution in the area that, in its view of the Constitution, is primarily the responsibility of the provinces and territories. The Government submits that if such a representational allowance is provided for regional senior judges in Ontario, a similar request may be made in the future for judges in other provinces who carry on a similar function. There are, for instance, in Quebec four "coordinating" judges who perform administrative functions in the geographical areas in which they work. We have no evidence as to whether they carry out functions that would or would not involve the kind of expenses covered by a representational allowance. The concern of the Government is that if we make such a recommendation,

and it results in an amendment to the *Judges Act*, there is no reason why other large provinces would not seek to convert whatever delegation of administrative responsibility is currently within their jurisdictions into a similar office and request similar representational allowances.

The Government's second argument is that the representational allowances now given to the chief justice and the associate chief justices of the Superior Court are sufficient for all present purposes in Ontario.

We do not accept the Government's arguments on this issue. In a province the size of Ontario, with the number of judges that Ontario has, and the broad geographical distribution of those judges in the regions that regional senior judges administer, it is entirely reasonable and foreseeable that the expenses that would be covered by a representational allowance will be incurred on a regular basis. The allowance sought is only for reasonable expenses that are actually incurred. The federal government has established the principle of a statutory payment for representational allowances for chief justices and associate chief justices, and for senior judges in the territories. There is no reason, given the responsibilities of regional senior judges, that they should not have access to a similar representational allowance for amounts actually and reasonably spent. The $5,000 limit suggested is half, or less than half, of that paid to chief justices and associate chief justices, and is a reasonable amount.

Whether the provision for such an allowance will open the "floodgates" for other provinces is entirely speculative. We are dealing with the reality of the situation in Ontario, and the appointment of regional senior judges by Order in Council of the federal government. The position of the regional senior judge is an important one that

has onerous administrative and representational responsibilities, and a reasonable allowance for representational expenses is appropriate.

Recommendation 9:

The Commission recommends that effective April 1, 2004, s. 27(6) of the *Judges Act* be amended such that regional senior judges in Ontario be added to the judges entitled to representational allowance under that section, and that the representational allowance for such regional senior judges be set, in s. 27(7), at an accountable maximum yearly amount of $5,000.

4.3 Isolation Allowance – Resident Labrador Judge

The Association and Council propose that the resident Superior Court Judge in Labrador be entitled to receive the Northern Allowance currently provided to the judges of the Northern Territories. The express policy underlying the statutory provisions of the Northern Allowance to judges of the territorial superior courts is to compensate them for the higher cost of living in the territories. The same conditions pertain to the Goose Bay\Happy Valley, under the Isolated Posts Directive of the Treasury Board of Canada where federal public servants working in those isolated communities, are entitled to additional compensation to offset the abnormal cost differentials between isolated and non-isolated locations.

The Government recognizes that the situation of the judge living in Labrador, in particular the significant isolation involved, is similar to that of the judges in the Northern Territories. However, it warns that the establishment of compensation differentials based on regional disparities in cost of living is a complex issue and that any positive recommendation envisaged by this Commission be expressly confined to this specific circumstance. We accept that this provision ought to be so limited.

We find the positions adopted by the Association and Council and the Government to be both reasonable and compatible.

Recommendation 10:

The Commission recommends that the *Judges Act* be amended to provide for the payment of an isolated post allowance to the resident Labrador judge in the amount of $12,000 per annum, in conformity with the isolation allowances provided to the judges of the Northern Territories.

4.4 Removal Allowances

4.4.1 Relocation Expenses Extension

Relocation expenses are in place to assist judges who are required to move away from their places of residence upon judicial appointment. The *Judges Act* (through the Removal Allowance Order) offers assistance to judges having to incur relocation expenses in such circumstances, including the provision of limited reimbursement of a loss on the sale of the judge's principal residence. The Removal Allowance Order provides a six-month period for the judge to sell his or her house. In specific circumstances, that six-month period may be extended for "an additional period" which can run up to a year. The Association and Council now seek a change of regulation, which would allow for more than one extension, if warranted.

The Government's position is that the Removal Allowance Order is intended to limit the personal costs to the judge of the necessary relocation. It is not, however, intended to insulate a judge from any or all circumstances that may result in a sale of a residence at a price less than satisfactory to the judge. According to the Government, the Order already provides a generous level of assistance – both in terms of costs specifically related to the move and sale of the original residence as well as in terms of additional expenses that may be claimed until the judge's move is finalized. The Government further contends that to accede to the Association and Council's request that "additional periods" be available would reduce the incentive to expedite the sale and place the full brunt of an unfavourable real estate market on the government.

The guidelines issued by the Office of the Commissioner for Federal Judicial Affairs, and approved by the Minister of Justice, indicate that in the absence of unusual circumstances, any additional extension will be limited to one additional year, over and above the six-month period already provided for in the *Judges Act*. We recommend that the Commissioner of Federal Judicial Affairs be mandated to deal with any circumstances that, in the Commissioner's view, can reasonably be deemed "unusual"; we are of the view that the 18-month limit, which is arrived at by regulation, not legislation, is already flexible.

Recommendation 11:

The Commission recommends that the requested extension not be granted and that the Office of the Commissioner of Federal Judicial Affairs be mandated to deal with any circumstances that in the Commissioner's view can reasonably be deemed 'unusual'.

4.4.2 Relocation Expenses Within Two Years of Retirement

The Association and Council request that judges be reimbursed for relocation expenses incurred within two years prior to eligibility for retirement age, but in anticipation of retirement.

The Government does not oppose the proposal, but has stipulated that certain conditions would nevertheless have to be met. First, the implementation of the proposal should not conflict with any statutory residency requirements that apply to judges who benefit from this entitlement. Second, such an amendment to the current entitlement should not result in any additional costs to the public. The removal entitlement should apply only once. Furthermore, any additional travel and living costs, which might result from a judge's choice to relocate early, should not be reimbursable.

Recommendation 12:

The Commission recommends that notwithstanding sections 40(1) (*c*) and (*e*) of the *Judges Act*, claims under these subsections for expenses made in anticipation of a relocation, but prior to retirement or resignation from office, be reimbursable by a removal allowance, provided that:

(i) these anticipated expenses are incurred no earlier than two years prior to the judge becoming eligible to retire, and

(ii) that all relocation expenses connected with that relocation be paid within the time frames currently provided in the Removal Allowance Order and that no later expenses should be reimbursed.

4.4.3 Relocation Costs Program For Partners of Judges of the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court and the Tax Court of Canada

The Association and Council request that a spousal relocation costs program be set up, to an accountable maximum of $5,000 for partners of judges of the above-mentioned courts. This program would cover such services as French or English language training, employment search, employment assistance, interview travel, preparation of curriculum vitae, photocopying and transmittal costs for transcripts of academic records. It is the understanding of the judiciary that programs of this sort are now in place for the RCMP, the Canadian Forces and others within the federal public service.

The Government's position is that the general Removal Allowance Order for judges of this category already provides a generous level of assistance to judges and their families.

It is increasingly common that partners of persons who are transferred are required to incur expenses directly associated with that transfer. We have already identified what some of those expenses may be. In our judgment, it is reasonable to expect that the partner of a judicial appointee be reimbursed for such accountable expenses incurred, to a limit of $5,000.

Recommendation 13:

The Commission recommends that the partners of judges of the Supreme Court of Canada, the Federal Court, the Federal Court of Appeal and the Tax Court of Canada be reimbursed for expenses incurred in the obligatory relocation, up to an accountable $5,000 limit.

4.4.4 Relocation Expenses for All Superior Court Judges

The submission of Mr. Justice Wright proposes that the entitlement to post-retirement removal allowance, currently provided to members of the Supreme Court of Canada, the Federal Court of Appeal, the Federal and Tax Courts and Northern Judges, be extended to all superior court judges.

The purpose of the removal allowance in question reflects the fact that these judges are either statutorily required to reside in Ottawa or, in the case of northern judges, must often be appointed from southern jurisdictions due to the small populations in those northern communities. This is not the case for superior court judges. The Association and Council agree with this limitation on the allowance. We find Mr. Justice Wright's request unacceptable, because of the lack of a statutory residence requirement, and we decline to make a recommendation.

Recommendation 14:

The Commission recommends that there be no change to the entitlement to the post-retirement removal allowance.

CHAPTER 5

OTHER ISSUES

5.1 Retirement Age for Justices of the Supreme Court of Canada

The Association and Council submit that judges of the Supreme Court of Canada should be entitled to retire with full annuity after 10 years of service on the court irrespective of age. The *Judges Act*, as amended in 1998, permits Supreme Court of Canada justices to retire with a full annuity upon reaching the age of 65 with 10 years of service.

The government at that time (1998) accepted the reduced years of service on the basis of the unique nature of judicial service on the Supreme Court of Canada. However, it maintained the age requirement on the grounds that it was consistent with the "overall judicial annuity scheme."[39] Supreme Court of Canada judges are entitled to retire earlier than 65 if they satisfy the modified Rule of 80, which was also implemented in 1998. However, according to the Government, any attempt to "de-link" age requirements from entitlement to an annuity is not isolated to the Supreme Court of Canada judges but has “broader policy implications”, thus raising the spectre of a comprehensive review of the whole judicial annuity scheme.

The Association and Council submit that the removal of the age requirement for eligibility to retire from the Supreme Court of Canada does not raise an annuity issue, nor does it have broad implications, when due account is taken of the small number of judges involved, and the fact that the vast majority of appointees to Canada's highest court are judges having previous judicial service. Because these appointees' eligibility for retirement is governed by the modified Rule of 80, most of them would in any event be eligible to retire after 10 years on the Supreme Court of Canada, notwithstanding the minimum age requirement of 65.

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[39] Government Reply Submission, January 23, 2004, at page 15.

The Crawford Commission in 1993 and Professor Martin L. Friedland in his 1995 book, *A Place Apart: Judicial Independence and Accountability in Canada*, prepared for the Canadian Judicial Council, endorsed the concept that "one doesn't want a judge of this important court who wants to leave to be trapped into staying after a reasonable period of service" on the grounds of "the unusually heavy burden inherent in membership on the Supreme Court of Canada".[40]

We have, after anxious consideration, come to the conclusion that an age exception should be made for the few Supreme Court of Canada justices who might want to avail themselves of it. There will always be a few who are still under 65 and qualify for having 10 years on the Supreme Court without prior judicial service. The compelling objective of the proposed policy is that 10 years may well be enough for certain appointees to that bench. That could be so whether the judges in question were 62 years of age or 72.

Accordingly, we recommend that the exception be implemented, keeping in mind that in the infrequent cases when it is exercised, it may well have a beneficial effect on the maintenance of a well-functioning Supreme Court of Canada, which is, or ought to be, an overriding consideration and is profoundly in the public interest.

Recommendation 15:

The Commission recommends that justices of the Supreme Court of Canada be granted the exceptional privilege of eligibility for retirement on the full judicial annuity after 10 years of service on that bench, regardless of age.

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[40] Martin L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada*, at page 71.

5.2 Representational Costs For Judges to Participate in the Quadrennial Commission Review Process

The Association and Council seek reimbursement of 80 % of the judiciary's representational expenses in bringing their position on remuneration and other issues before the Commission.

At the present time, pursuant to s. 26(3) of the *Judges Act*, the judiciary is entitled to 50 per cent of their costs on a solicitor-client basis, as assessed by the Federal Court. The provision was enacted in 2001 following a recommendation from the Drouin Commission that the Government pay 80 % of the judiciary's representational costs. At the time, the Government considered the formula proposed by the Drouin Commission to be, as it said, unreasonable.

While the Association and Council did not judicially review the decision of the government not to implement the recommendation of the Drouin Commission, they have come back to us with the same request. And for similar reasons: that the proceedings had been materially improved by the active participation of both the judiciary and the Government, the latter of whose representational costs are paid out of public funds. This should also apply to all reasonable costs incurred by the Association and Council in connection with their participation in the Quadrennial Commission process.

There is agreement between the Association and Council and the Government on the principle of sharing the burden of cost. The Government argues that 50 % of assessed cost provides the judiciary, which is "the immediate beneficiary of the Commission's recommendations", with ample assistance to defray its representational costs and guards the public purse against "any largely unchecked discretion in deciding what costs would be incurred for legal counsel, expert witnesses and the like in preparation for a Commission."

The Association and Council, on the other hand, claim that their participation in the process is hardly at "their unchecked discretion", since the costs are reviewed by a Federal Court of Canada Assessment Officer and that it is unfair for them to have to pay half the expenses of a process they cannot control.

The constitutional context of Judicial Compensation and Benefits Commissions is to avoid direct, head-to-head negotiations between the federal government and federally appointed judges over the latter's remuneration by putting in place an independent, apolitical process that protects the independence of the judiciary and shields the government from accusations of trade-offs or any undue pressure (a constitutional imperative). What judges are paid is part and parcel of their standing in society. The economy and, therefore, the government's ability to pay will always have a bearing on the salaries of the judiciary. The value of the judiciary cannot be measured in terms of economic benefits or barter. It is measured by the role it plays in our society and, as such, it is in the public interest to ensure its remuneration is in line with the public trust.

Both the Government and the Association and Council were represented before this Commission by able and experienced counsel. As pointed out by the Drouin Commission and equally today, in the case of the Government, all of its representational costs are covered by public funds. In addition, it had available to it, also at public expense, the services of a variety of experts, as required or considered desirable by it and paid for by the government. We do not believe that the participation of the judiciary should become a financial burden on individual judges.

Recommendation 16:

The Commission recommends that the Government pay 100% of the disbursements and two-thirds of the legal fees (subject to assessment) incurred by the Association and Council in preparing their submissions and bringing them before the Commission.

CHAPTER 6

RECOMMENDATIONS FOR IMPROVEMENTS

1.a. Timing

The Drouin Commission noted in its report that it had nine months to consider its report.[41] This Commission effectively had six months. This was inadequate, in our view, and resulted in a compression of our activities that was inconvenient and unnecessary. The statutory requirement for reporting is May 31; the report must be completed by April 30, to permit translation and printing. Accordingly, we believe that the next commission should be constituted by June 1 of the year prior to the report date of May 31.

1.b. Continuity

The Drouin Commission noted that the commission infrastructure would remain in place, which concept it endorsed as being very useful.[42] Regrettably, that did not occur. As we have noted elsewhere, this Commission was first assembled in late September 2003 in Ottawa, to find that we had no staff and that the records of the Drouin Commission, which had been maintained, were not familiar to the staff we were able to enlist. We had the benefit of a very helpful memo, thoughtfully put together by the previous Executive Director, but the fact is we very nearly had to start with a blank slate, which was most inconvenient and inefficient for the work that had to be done.

We believe it would be most desirable that a staff – perhaps one person and possibly part-time – should be maintained throughout the term of the commission and perhaps from commission to commission.

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41 Drouin (2000), at page 115.
42 Ibid, at page 115.

Furthermore, we believe the Commissioners who are appointed for a four-year term should meet at least once a year to consider the events that have transpired and any trends regarding compensation or other matters within their jurisdiction. This would permit direction to be given to the staff and ensure continuity in the operation of the Commission's activities. This would better equip the next commission to more efficiently prosecute its work. To the extent this process was in place, it would ameliorate the time compression addressed in recommendation 1.a above.

2. Other Jurisdictions

The Drouin Commission had before it information about judicial compensation in other jurisdictions, but did not have enough information about the factors that went into that compensation to make use of the information.[43] Neither principal party to this Commission put similar information before us. In view of the problem of the existing comparators that we have noted, the study of the compensation of judges in jurisdictions with a legal system comparable to Canada's would be useful if it were completed sufficiently thoroughly to provide information on which a proper comparison could be made.

Inasmuch as we have a restricted number of comparators to start with, to expand those comparators ought to be useful. The jurisdictions that would be surveyed are those common law jurisdictions bearing most similarity to Canada, which would include the United Kingdom, some of the Commonwealth countries and probably the United States. Assembling the necessary information would be a significant undertaking at the outset, but maintaining it would be a relatively simple task. We suggest such an initiative be instituted.

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[43] Drouin (2000), at page 48.

3. Comparators

a. The DM-3 Group

The DM-3 comparator is a very important one and, while it will continue to be important and useful, it has limitations for the reasons expressed in the Judicial Salaries chapter of our report. We have agreed that at-risk pay should be taken into account in considering the use of the comparator, since it is now clear that at-risk pay is assuming, over time, a larger importance in the determination of the income of DM-3s and, indeed, of everyone at the deputy minister level. As we have noted, however, many of the reasons why at-risk pay is awarded have very little to do with the judicial function, which makes the comparison somewhat less useful.

Similarly, there is an unfortunate disconnect between the DM-3 comparator, which has been useful in the past, and the apparent current structure to compensate DM-3s. We note that the *Advisory Committee on Senior Level Retention and Compensation* reports bear no reference at all to judicial salaries, which is odd inasmuch as those acting on behalf of the Association and Council strongly suggest that the DM-3 is the most important comparator. The reciprocal consideration simply is not there. We have no way of knowing why this should be.

Inasmuch as the A*dvisory Committee on Senior Level Retention and Compensation* reports are the basis for the DM-3 and other DM compensation plans, we suggest that a meeting held between that committee and the Quadrennial Commission at least once would be a useful exercise and would permit an exchange of information that might be useful to both the committee and the Commission.

b. Incomes of Senior Practitioners in Private Practice

We were particularly troubled by the difficulties in obtaining appropriate current information on the income levels of self-employed lawyers in private practice. This is partly because of the way in which that information is collected by CRA, for which our purposes are irrelevant, and partly because there is no other currently available

method of obtaining this important information. As we have seen, both principal parties decried the usefulness of the information that was available, but to the extent they did use it, they had very different approaches as to how it could be used and what it meant.

As a result, we strongly recommend that some joint method (in conjunction with the Government and the Association and Council) be sought to provide an appropriate and common information and statistical base, the accuracy of which can be accepted by both parties as reliable. This information base is particularly important with respect to the income of self-employed lawyers and could be expanded to get some appreciation as to the income levels of those lawyers who are appointed to the judiciary.

There are many ways in which this might be done: a study by an independent consultant retained by this Commission to report to the principal parties could be commissioned. Statistical evidence could be gathered over time from those who are appointed to the bench in a way that would preserve their anonymity and privacy. There may be other ways.

There could be a clearing house for information, whereby some independent authority – such as the Quadrennial Commission – could obtain information from judges upon their appointment, by means of which their income for the three previous years could be ascertained and other useful information obtained from them with respect to their motives and expenses incurred on accepting their appointment. While this information might not be useful immediately, over a period of the next two Quadrennial Commissions it could be very useful indeed, having regard to the expected turnover of judges during that period of time.

We could meet with CRA and determine what information they would be able to extract from the income tax returns filed with the Agency.

We could begin to build a database, which, with the assistance of expert evidence of an actuarial and compensation nature, would be useful to future commissions.

The fact is that there is altogether too much speculation with respect to what senior practitioners in private practice currently earn and the extent to which the annuity and other benefits play a part in the decisions of persons on whether or not to apply for and accept judicial appointment.

The Minister of Justice has the power under s. 26(4) of the *Judges Act* to make a reference to a Quadrennial Commission with respect to the adequacy of salaries and other amounts payable under this Act. If the Minister of Justice were to so direct, we would be willing to undertake, with the help of the principal parties, any recommendations contained in this section, for the purpose of being of use to the next Quadrennial Commission, and those thereafter, with respect to important aspects of their work.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Roderick A. McLennan, Q.C.
Chair

Gretta Chambers, C.C., O.Q.
Commissioner

Earl A. Cherniak, Q.C.
Commissioner

May 31, 2004

LIST OF RECOMMENDATIONS

Recommendation 1:

The Commission recommends that the salary of puisne judges be established as follows. Effective April 1, 2004, $240,000, inclusive of statutory indexing on that date, and for the next three years: $ 240,000 plus cumulative statutory indexing effective April 1 of each of those years.

Recommendation 2:

The Commission recommends that the salaries of the justices of the Supreme Court of Canada and the chief justices and associate chief justices should be set as of April 1, 2004, and inclusive of statutory indexing, at the following levels:

Supreme Court of Canada:	
Chief Justice of Canada	$308,400
Justices	$285,600
Federal Court and Tax Court of Canada:	
Chief Justices	$263,000
Associate Chief Justices	$263,000
Appeal Courts, Superior and Supreme Courts and Courts of Queen's Bench:	
Chief Justices	$263,000
Associate Chief Justices	$263,000

Recommendation 3:

The Commission recommends that the senior northern judges receive equivalent compensation to that of a chief justice until such time as chief justices are appointed in those jurisdictions.

Recommendation 4:

The Commission does not recommend a salary differentiation between puisne judges who sit on courts of appeal and puisne judges who preside at trials.

Recommendation 5:

The Commission recommends that the *Judges Act* be amended to provide for

- the possibility of dividing, upon conjugal breakdown, the judicial annuity deemed to accrue during a relationship, up to a 50% limit;

- the judicial annuity to be deemed to accrue over the judge's entire period of judicial service, for the purpose of determining the portion of the judicial annuity that is subject to division upon conjugal breakdown;

- a lump sum settlement option, to ensure a clean break and the possibility of deferring such settlement until the date when the judge will have attained age 55 and completed 10 years of service, if applicable; and

- the demographic assumptions used for the most recent *Actuarial Report on the Pension Plan for the Federally Appointed Judges* to be used for purposes of determining the value of the judicial annuity and the expected retirement date of a judge in calculating the portion of the judicial annuity subject to division.

The Commission also recommends that the government amend the *Judges Act* and the *Income Tax Act*, as necessary, to allow the transfer of a portion of the former spouses' lump-sum settlements to RRSPs as if the judicial annuity were a registered pension plan, at least for the portion of the judicial annuity up to the defined benefit pension limits applicable to registered pension plans under the *Income Tax Act*.

Recommendation 6:

The Commission recommends that there be no change in the provision for survivor benefits for single judges until the matter is addressed by the government in the wider federal context.

Recommendation 7:

The Commission declines to recommend any change to the judicial annuities payable to the judges who retired during the 1992–97 time period.

Recommendation 8:

The Commission recommends that the Incidental Allowance of $5,000 per annum for each judge remain unchanged.

Recommendation 9:

The Commission recommends that effective April 1, 2004, s. 27(6) of the *Judges Act* be amended such that regional senior judges in Ontario be added to the judges entitled to a representational allowance under that section, and that the representational allowance for such regional senior judges be set, in s. 27(7), at an accountable maximum yearly amount of $5,000.

Recommendation 10:

The Commission recommends that the *Judges Act* be amended to provide for the payment of an isolated post allowance to the resident Labrador judge in the amount of $12, 000 per annum, in conformity with the isolation allowances provided to the judges of the Northern Territories.

Recommendation 11:

The Commission recommends that the requested extension not be granted and that the Office of the Commissioner of Federal Judicial Affairs be mandated to deal with any circumstances that in the Commissioner's view can reasonably be deemed 'unusual'.

Recommendation 12:

The Commission recommends that, notwithstanding paragraphs 40(1) (*c*) and (*e*), claims under these paragraphs for expenses made in anticipation of a relocation, but prior to retirement or resignation from office, shall be reimbursable by a removable allowance, provided that:

(i) the anticipated expenses are incurred no earlier than two years prior to the judge becoming eligible to retire, and

(ii) that all relocation expenses connected with that relocation be paid within the time frames currently provided in the Removal Allowance Order and that no later expenses should be reimbursed.

Recommendation 13:

The Commission recommends that the partners of judges of the Supreme Court of Canada, the Federal Court, the Federal Court of Appeal and the Tax Court of Canada be reimbursed for incurred expenses in the obligatory relocation, up to an accountable $5,000 limit.

Recommendation 14:

The Commission recommends that there be no change to the entitlement to the post-retirement removal allowance.

Recommendation 15:

The Commission recommends that justices of the Supreme Court of Canada be granted the exceptional privilege of eligibility for retirement on the full judicial annuity after 10 years of service on that bench regardless of age.

Recommendation 16:

The Commission recommends that the Government pay 100% of the disbursements and two-thirds of the legal fees (subject to assessment) incurred by the Association and Council in preparing their submissions and bringing them before the Commission.

Government of Canada | Gouvernement du Canada

GOVERNMENT RESPONSE TO THE 2003 JUDICIAL COMPENSATION AND BENEFITS COMMISSION

Canada

This is the Response to the Report of the Judicial Compensation and Benefits Commission, dated May 31, 2004, by the Minister of Justice on behalf of the Government pursuant to s. 26(7) of the *Judges Act*.

1. Background: Supreme Court of Canada Independence Decision and a Revised Judicial Compensation and Benefits Process

The current federal Judicial Compensation and Benefits Commission (the Commission) was established in 1998 to meet the constitutional requirements established in support of the principle of judicial independence in the *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*.[1] The purpose of this independent, objective and effective commission is to depoliticize the process of judicial remuneration, so that the "courts are both free and appear to be free from political interference through economic manipulation by the other branches of government".[2]

The Commission is required to convene every four years, and to issue a report with recommendations within nine months of the commencement of its work. The statutory mandate of the Commission is to inquire into the adequacy of judicial compensation and benefits.[3] In doing so the Commission is directed by statute to consider:[4]

a) the prevailing economic conditions in Canada, including the cost of living, and the overall economic and financial position of the federal government;
b) the role of financial security of the judiciary in ensuring judicial independence;
c) the need to attract outstanding candidates to the judiciary; and
d) any other objective criteria that the Commission considers relevant.

The Commission's recommendations are not binding. However the Government is required to respond publicly to the Commission's report. Where recommendations are not accepted, or where it is proposed that a recommendation should be modified, the government must provide a reasonable justification for its decision. The reasonableness of the government's response is reviewable in a court of law and must meet the legal standard of "simple rationality", measured by the reasons and the evidence offered in support by the government.

It should be noted that while the Minister of Justice is responding publicly today on behalf of the Government of Canada,[5] it will be for Parliament to consider and approve the Government's proposed amendments to the *Judges Act*. Section 100 of the *Constitution Act, 1867* requires that the salaries and allowances of the federally appointed judiciary be established by Parliament. The Government will introduce a Bill for consideration by Parliament at the earliest reasonable opportunity.

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[1] [1998] 1 S.C.R. 3 (*P.E.I. Judges Reference*)
[2] *Ibid.* 88, para. 131.
[3] *Judges Act*, R.S. 1985, c. J-1, as amended (the *"Judges Act"),* s. 26 (1).
[4] *Ibid.,* s. 26(1.1).
[5] *Ibid.*, s. 26(7).

2. Report of the 2003 Quadrennial Judicial Compensation and Benefits Commission

The current Commission was established on September 1, 2003. As required by the *Judges Act,* the judiciary and the Government each nominated one member of the Commission. Those two members nominated a third member to serve as Chair of the Commission. The three members, Chairman Roderick McLennan, Q.C., and Commissioners Gretta Chambers, C.C., O.Q., and Earl Cherniak, Q.C., were appointed by the Governor in Council to hold office for a term of four years on good behaviour.[6]

The Commission sought and received written submissions, supported by expert and other evidence, from a broad range of interested persons, including representatives of the judiciary and the Government. Two days of public hearings were held in February 2004. The Commission heard submissions from representatives of the Government, the Canadian Judicial Council and the Canadian Superior Court Judges Association, and all others who chose to make oral submissions. In addition to the expert evidence provided in the various submissions, the Commission retained its own consultants to assist its deliberations.

The Commission delivered its Report[7] to the Government on May 31, 2004. An excerpt from the Report setting out the text of the Commission's recommendations is attached as Annex A.

3. Response to the Report

At the outset, the Government wishes to acknowledge and thank the Chair and the Commissioners for their comprehensive report on the full range of submissions received by the Commission. The Commission process was transparent and accessible, which contributed in an important way to public perception of the Commission's independence and objectivity in developing its recommendations. The thorough and thoughtful explanations provided in the Report reflect the seriousness with which the Commission approached its mandate and the care it took in its deliberations and recommendations.

As indicated throughout the Commission proceedings, the Government is fully committed to ensuring the effectiveness of the Judicial Compensation and Benefits Commission process in support of the principle of judicial independence. The Government regards this public Response to the Commission recommendations as a critical element in ensuring public confidence in the legitimacy of this constitutionally mandated process.

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[6] *Ibid.*, s. 26.1. The Commissioners' curriculum vitae can be found on the Commission website (www.quadcom.gc.ca)

[7] *Judicial Compensation and Benefits Commission Report*, May 31, 2004 ("*Report*"). The *Report*, written submissions and supporting materials can be found at www.quadcom.gc.ca.

Briefly, for reasons set out below, the Government is prepared to accept all of the recommendations of the 2003 Judicial Compensation and Benefits Commission, with one exception. As also explained below, the Government does not fully accept Recommendation 16 relating to judicial representational costs, but rather will propose a modified costs formula. [8] The Government will propose to Parliament that the necessary amendments to the *Judges Act* be implemented at the earliest reasonable opportunity.

a) Recommendations 1-2: Salary Adjustments

The Commission recommended a 10.8% salary increase effective April 1, 2004, inclusive of statutory indexing[9]. The proposed salary of a puisne[10] judge would rise from $216,600 to $240,000 as of April 1, 2004. There would be equivalent increases for Chief Justices and judges of the Supreme Court of Canada.[11] Notably, the Commission declined to recommend a continuation of an additional annual salary component for the following three years, other than statutory indexing effective April 1 of each year.

In arriving at its salary recommendation, the Commission engaged in a careful balancing of all the factors listed in s. 26(1.1), including the prevailing economic conditions in Canada, the role of financial security in ensuring judicial independence, and the need to continue to attract outstanding candidates to the judiciary.

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[8] The alternative formula is discussed *infra.*, Recommendation 16, Representational Costs.

[9] Recommendation 1: The Commission recommends that the salary of puisne judges be established as follows. Effective April 1, 2004, $240,000, inclusive of statutory indexing on that date, and for the next three years: $240,000 plus cumulative statutory indexing effective April 1 of each of those years. ("Statutory indexing": under the *Judges Act*, judicial salaries are indexed to the Industrial Aggregate Wage.)

[10] "puisne" refers to a judge who does not hold the office of Chief Justice.

[11] Recommendation 2: The Commission recommends that the salaries of the justices of the Supreme Court of Canada and the chief justices and associate chief justices should be set as of April 1, 2004, and inclusive of statutory indexing, at the following levels:

Supreme Court of Canada:

Chief Justice of Canada	$308,400
Justices	$285,600

Federal Court and Tax Court of Canada:

Chief Justices	$263,000
Associate Chief Justices	$263,000

Appeal Courts, Superior and Supreme Courts and Courts of Queen's Bench:

Chief Justices	$263,000
Associate Chief Justices	$263,000

As with past Commissions, this Commission grappled with the challenge of identifying appropriate salary comparators given the unique nature of the judicial role. In arriving at its salary recommendations, the Commission had regard to a wide range of information concerning remuneration in both the public and private sector provided by the Government, the judiciary, and its own compensation experts. In addition to examining the traditional comparator of the DM-3[12] salary mid-point, the Commission broadened its consideration to the compensation of other senior officials appointed by the federal Government, including all levels of deputy ministers and other Governor in Council appointees.

However, the Commission regarded private sector legal income as "…an important, and perhaps the most important, comparator…"[13], because most appointees to the bench are drawn from senior lawyers from the Bar.[14] The specialized professional nature of the pool from which the judiciary is drawn is one aspect of its unique nature. Accordingly the Commission gave particular consideration and weight to available information about the incomes of lawyers in private practice.

The Government is prepared to accept the Commission's salary recommendations for several reasons.

The proposed increase appears reasonable when considered as an increase of approximately 2.7% per year, above annual indexing, over the relevant four-year period (April 1, 2004 to March 31, 2008) given that the Commission declined to recommend the continuation of the annual salary increment that was implemented following the Drouin Commission's recommendations[15] and that had been proposed by both the Government and judiciary. [16]

Such annual increases are within a reasonable range of general compensation trends for senior members of the federal public service.

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[12] Deputy Minister, Level 3
[13] p. 41, *Report*
[14] pp. 31-32, *Report*
[15] The 1999 Judicial Compensation and Benefits Commission was chaired by Richard Drouin, Q.C., and the other Commissioners were Eleanore Cronk and Fred Gorbet.
[16] The Government proposal was for a 4.48% increase in the first year, with a $2,000 annual increment plus statutory indexing in the next three years. The judiciary's proposal was for a 17.2% first year increase, with a $3,000 annual increment plus statutory indexing in the next three years.

While the Commission's recommended increase (10.8%) is greater than what the Government proposed (4.48%, plus an annual increment of $2,000), it is nevertheless significantly less than the increase sought by the judiciary (17.2%, plus an annual increment of $3,000).

In light of all these factors, the Government is of the view that the Commission's salary recommendations are reasonable and will propose their implementation to Parliament.

It is important to note however that the Government's acceptance of the Commission salary recommendations should not taken as a complete acceptance of all of the assumptions made by the Commission with respect to the comparative analysis undertaken. The Commission itself identified the particular difficulty of assessing trends in the incomes of private practice lawyers. While significant efforts and progress had been made by both the Government and the judiciary in developing improved data and analysis, the Commission was left to do the best it could in light of the unsatisfactory nature of the information that is currently available in this area.

The Commission has in fact made a number of constructive suggestions to improve the process for future Commissions, particularly in relation to the development, under the auspices of the Commission itself, of more detailed and reliable comparative information in advance of the next Commission. As indicated, the Government is committed to ensuring that the Commission process is both objective and effective, and therefore welcomes these suggestions. The Government is fully prepared to participate in any discussions and joint efforts with the Commission and judiciary that would serve to improve the timeliness and reliability of information upon which the next Commission can rely.

b) Recommendation 3: Salaries for Senior Judges of the North

The Government accepts the Commission recommendation that the Senior Judges of the Northern Territories receive the same salary as provincial superior court Chief Justices.[17] At the same time the Government is pleased to take this opportunity to announce that the Government will also propose that the necessary amendments be made to designate the northern Senior Judges as Chief Justices of their respective courts.

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[17] Recommendation 3: The Commission recommends that the senior northern judges receive equivalent compensation to that of a chief justice until such time as chief justices are appointed in those jurisdictions.

c) Recommendation 4: Salary Differential between Trial and Appellate Judges

The Commission declined to recommend a salary differential between trial judges and court of appeal judges as had been proposed by some members of Court of Appeal.[18] The Government accepts and endorses the Commission's reasons in this regard.

d) Recommendation 5: Division of Annuity on Relationship Breakdown

As proposed by the Government, and supported by the judiciary, the Commission recommended a mechanism to divide the judicial annuity in the event of a relationship breakdown.[19] The annuity scheme for the federally appointed judiciary is unique in failing to provide for such a mechanism.

The Commission's recommendation largely mirrors the Government's own proposal, but for one aspect, the deemed accrual period. Unlike most pension plans, the judicial annuity scheme does not provide for an annual accrual formula. In order to calculate the division of an annuity on relationship breakdown, a "notional" accrual period must be established. The Government had proposed that the deemed period of accrual would cease on the date the judge became entitled to a full annuity.

The Commission's recommendation would calculate the accrual period based on the expected period of judicial service. In the Commission's view, this formula would be fairer for both judges and spouses, as it can accommodate the annuity being shared with a spouse in the circumstances of a second conjugal breakdown. The Government is prepared to accept that the Commission's recommended approach represents a reasonable, cost-neutral mechanism for dividing the judicial annuity.

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[18] Recommendation 4: The Commission does not recommend a salary differentiation between puisne judges who sit on courts of appeal and puisne judges who preside at trials.

[19] Recommendation 5: The Commission recommends that the *Judges Act* be amended to provide for:

- the possibility of dividing, upon conjugal breakdown, the judicial annuity deemed to accrue during a relationship, up to a 50% limit;
- the judicial annuity to be deemed to accrue over the judge's entire period of judicial service, for the purpose of determining the portion of the judicial annuity that is subject to division upon conjugal breakdown;
- a lump sum settlement option, to ensure a clean break and the possibility of deferring such settlement until the date when the judge will have attained age 55 and completed 10 years of service, if applicable; and
- the demographic assumptions used for the most recent *Actuarial Report on the Pension Plan for the Federally Appointed Judges* to be used for purposes of determining the value of the judicial annuity and the expected retirement date of a judge in calculating the portion of the judicial annuity subject to division.

The Commission also recommends that the government amend the *Judges Act* and the *Income Tax Act*, as necessary, to allow the transfer of a portion of the former spouses' lump-sum settlements to RRSPs as if the judicial annuity were a registered pension plan, at least for the portion of the judicial annuity up to the defined benefit pension limits applicable to registered pension plans under the *Income Tax Act*.

e) Recommendation 6: Survivor Benefits for Single Judges

The Commission declined to recommend a change in the provision of survivor benefits for single judges.[20] In doing so, the Commission accepted the Government's submission in this regard.

f) Recommendation 7: Enhanced Annuity for Judges who Retired between 1992-1997

The Commission also accepted the Government's position with respect to, and declined to recommend, proposed changes to annuities payable to judges who retired during the period of fiscal restraint between 1992 and 1997.[21]

g) Recommendations 8-14: Allowances

The Commission recommended that the Incidental Allowance[22] remain unchanged[23]. The Government accepts the reasons given by the Commission in this regard.

The Commission recommended that Regional Senior Judges[24] of Ontario receive a representational allowance[25] of $5,000 per year[26]. In view of Ontario's size and the distribution of its population, Regional Senior Judges take on responsibilities in representing their courts within defined geographical areas of the province that are akin to the duties undertaken by Chief Justices and other senior judges. In light of all of the circumstances, the Government accepts this recommendation.

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[20] Recommendation 6: The Commission recommends that there be no change in the provision for survivor benefits for single judges until the matter is addressed by the government in the wider federal context.

[21] Recommendation 7: The Commission declines to recommend any change to the judicial annuities payable to the judges who retired during the 1992-97 time period.

[22] The incidental allowance of $5,000 per year (s. 27(1), *Judges Act*) permits the judiciary to purchase items and equipment, such as robes, law books and computers, which assist in the execution of judicial functions.

[23] Recommendation 8: The Commission recommends that the Incidental Allowance of $5,000 per annum for each judge remain unchanged.

[24] "...Ontario has divided the province into eight judicial regions, with a regional senior judge administering the judges in each of those regions." (p. 76, *Report*)

[25] A representational allowance (s. 27(6), s. 27(7), *Judges Act*) reimburses Chief Justices and other like senior judges for travel and other expenses actually incurred as they discharge their special extra-judicial obligations such as representing their courts at conferences and public events.

[26] Recommendation 9: The Commission recommends that effective April 1, 2004, s. 27(6) of the *Judges Act* be amended such that regional senior judges in Ontario be added to the judges entitled to a representational allowance under that section, and that the representational allowance for such regional senior judges be set, in s. 27(7), at an accountable maximum yearly amount of $5,000.

The Government also accepts the Commission recommendation that a Northern Allowance[27] should be paid to the superior court judge resident in Labrador.[28] This allowance is merited given that the higher cost of living and isolation experienced in Labrador is similar to that experienced by judges currently entitled to the Northern Allowance.

The Commission made a number of recommendations concerning relocation expenses[29] for judges. Presently, the *Removal Allowance Order*[30] provides a six-month time period for a judge to sell his or her home. In specific circumstances, that six-month period may be extended for "an additional period" which can run up to a year.[31] The judiciary had requested that this period of time be extended. The Commission declined to make this recommendation, but did recommend that the Commissioner for Federal Judicial Affairs have the discretion to provide an additional period time in the case of "unusual" circumstances.[32] In the Government's view, the current Removal Allowance Order guidelines provide sufficient discretion so that such an additional period may be granted where circumstances warrant.

The Government also accepts Recommendation 12,[33] that judges of the federally constituted courts and superior courts in the Northern territories be reimbursed for relocation expenses incurred within two years prior of the judge becoming eligible to retire. Judges of these courts are required to comply with statutory residency requirements when they accept their appointments, and many will incur relocation expenses upon their retirement as they return to the parts of Canada in which they resided prior to appointment. The recommendation is designed to be cost-neutral, and will

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[27] The Northern Allowance (s. 27(2), *Judges Act*) of $12,000 is intended to contribute to the higher cost of living in the territories.

[28] Recommendation 10: The Commission recommends that the *Judges Act* be amended to provide for the payment of an isolated post allowance to the resident Labrador judge in the amount of $12,000 per annum, in conformity with the isolation allowances provided to the judges of the Northern Territories.

[29] Pursuant to s. 40 of the *Judges Act*, certain judges are entitled to reimbursement of moving expenses in prescribed circumstances, such as upon appointment to a place other than where the judge resided at the date of appointment.

[30] The *Removal Allowance Order* is the regulation made under the *Judges Act* which guides the specific entitlements to reimbursement of moving expenses.

[31] p. 81, *Report*

[32] Recommendation 11: The Commission recommends that the requested extension not be granted and that the Office of the Commissioner of Federal Judicial Affairs be mandated to deal with any circumstances that in the Commissioner's view can reasonably be deemed 'unusual'.

[33] Recommendation 12: The Commission recommends that, notwithstanding paragraphs 40(1)(c) and (e), claims under these paragraphs for expenses made in anticipation of a relocation, but prior to retirement or resignation from office, shall be reimbursable by a removable allowance, provided that:

(i) the anticipated expenses are incurred no earlier than two years prior to the judge becoming eligible to retire, and

(ii) that all relocation expenses connected with that relocation be paid within the timeframes currently provided in the Removal Allowance Order and that no later expenses should be reimbursed.

provide flexibility to these judges to aid their retirement planning. The Government therefore accepts this proposal.

The Commission also recommended that the partners of judges of the federally constituted courts be reimbursed for expenses incurred in an obligatory relocation, up to an accountable $5,000 limit[34]. The Government accepts this recommendation on the understanding that "partners" mean married spouses and common-law partners, and the expenses in question relate to expenses incurred as a result of a disruption in the partner's employment.

The Government accepts Recommendation 14[35], wherein the Commission declined to recommend that all superior court judges be entitled to relocation expenses to permit relocation to any part of Canada upon retirement.

h) Recommendation 15: Supreme Court of Canada Retirement after Ten Years

The Commission recommended that judges of the Supreme Court of Canada should be eligible to retire with 10 years of service on that Court irrespective of age.[36] The Government accepts this recommendation. Service as a member of the Supreme Court of Canada is extremely demanding. As the court of last resort, these judges must not only manage a uniquely heavy case load but are required to do so with the highest level of personal commitment and professional rigour. Also, most Supreme Court judges have already served for extensive periods on courts of appeals prior to their appointment to the Supreme Court. In most cases, members of the Supreme Court of Canada would therefore be eligible to retire under the normal "Modified Rule of 80" retirement rule.[37] As a result, this special retirement provision for Supreme Court of Canada judges will not be used frequently.

i) Recommendation 16: Representational Costs

As indicated above, the Government is not prepared to fully accept the Commission's recommendation that the judiciary's current entitlement to reimbursement of legal

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[34] Recommendation 13: The Commission recommends that the partners of judges of the Supreme Court of Canada, the Federal Court, the Federal Court of Appeal and the Tax Court of Canada be reimbursed for incurred expenses in the obligatory relocation, up to an accountable $5,000 limit.

[35] Recommendation 14: The Commission recommends that there be no change to the entitlement to the post-retirement removal allowance.

[36] Recommendation 15: The Commission recommends that justices of the Supreme Court of Canada be granted the exceptional privilege of eligibility for retirement on the full judicial annuity after 10 years of service on that bench regardless of age.

[37] s. 42(1)(a), *Judges Act*; with at least 15 years of service, when age plus years of service total 80.

representational costs be increased. The Commission recommended that the judiciary be reimbursed for 100% of disbursements and 66% of legal fees.[38]

The current *Judges Act* provision provides for 50% reimbursement of the judiciary's legal costs on a solicitor-client basis as assessed by the Federal Court[39]. It should be recalled that this formula modified the Drouin Commission recommendation for 80% reimbursement of the judiciary's legal representational costs.[40] In its December 13, 2000 Response, the Government justified its modification of the Drouin recommendation on the basis that it would afford the representatives of the judiciary a largely unchecked discretion in deciding what costs would be incurred for legal counsel, expert witnesses and the like in preparation for a Commission. The concern was that the public would be held responsible for the payment of the significant and unpredictable expenditures incurred by the judiciary.

The Government's 50% formula provided a reasonable contribution to the costs of the participation of the judiciary, while at the same time establishing reasonable limits on such expenditures. The equal sharing of costs by public and the judiciary was regarded as fair, given that the members of the judiciary are the immediate beneficiaries of the Commission's recommendations. It also provided an appropriate financial incentive to ensure that the costs are incurred reasonably and prudently.

The Government continues to hold the view that there should be a financial incentive to ensure that representational costs are prudently incurred. This rationale applies equally to disbursements as well as legal fees, especially given that disbursements in these matters – for example in retaining expert compensation consultants – can be quite significant.

Accordingly, the Government will propose that representatives of the judiciary should be entitled to reimbursement of 66% of representational costs, both disbursements and legal fees. These costs would continue to be subject to assessment as currently required.

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[38] Recommendation 16: The Commission recommends that the Government pay 100% of the disbursements and two-thirds of the legal fees (subject to assessment) incurred by the Association and Council in preparing their submissions and bringing them before the Commission.

[39] *Judges Act,* s. 26.3

[40] The Drouin Commission made the following recommendation concerning representational costs: Recommendation 22. The Government pay 80% of the total representational costs of the Conference and Council incurred in connection with their participation in the process of this inquiry as of May 31, 2000, such payments by the Government not to exceed the aggregate amount of $230,000, inclusive of the amount of $80,000 already contributed by the Government as of the date of this report and any extraordinary and explicitly identifiable increase to the budge of the Council in order to fund the participation of the Judiciary in the work of this Commission, and that the remainder of such costs be paid by the Conference and Council in such proportion as they deem appropriate.

ANNEX "A"

LIST OF RECOMMENDATIONS

Recommendation 1:

The Commission recommends that the salary of puisne judges be established as follows. Effective April 1, 2004, $240,000, inclusive of statutory indexing on that date, and for the next three years: $240,000 plus cumulative statutory indexing effective April 1 of each of those years.

Recommendation 2:

The Commission recommends that the salaries of the justices of the Supreme Court of Canada and the chief justices and associate chief justices should be set as of April 1, 2004, and inclusive of statutory indexing, at the following levels:

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Recommendation 3:

The Commission recommends that the senior northern judges receive equivalent compensation to that of a chief justice until such time as chief justices are appointed in those jurisdictions.

Recommendation 4:

The Commission does not recommend a salary differentiation between puisne judges who sit on courts of appeal and puisne judges who preside at trials.

Recommendation 5:

The Commission recommends that the *Judges Act* be amended to provide for:

- the possibility of dividing, upon conjugal breakdown, the judicial annuity deemed to accrue during a relationship, up to a 50% limit;

- the judicial annuity to be deemed to accrue over the judge's entire period of judicial service, for the purpose of determining the portion of the judicial annuity that is subject to division upon conjugal breakdown;

- a lump sum settlement option, to ensure a clean break and the possibility of deferring such settlement until the date when the judge will have attained age 55 and completed 10 years of service, if applicable; and

- the demographic assumptions used for the most recent *Actuarial Report on the Pension Plan for the Federally Appointed Judges* to be used for purposes of determining the value of the judicial annuity and the expected retirement date of a judge in calculating the portion of the judicial annuity subject to division.

The Commission also recommends that the government amend the *Judges Act* and the *Income Tax Act*, as necessary, to allow the transfer of a portion of the former spouses' lump-sum settlements to RRSPs as if the judicial annuity were a registered pension plan, at least for the portion of the judicial annuity up to the defined benefit pension limits applicable to registered pension plans under the *Income Tax Act*.

Recommendation 6:

The Commission recommends that there be no change in the provision for survivor benefits for single judges until the matter is addressed by the government in the wider federal context.

Recommendation 7:

The Commission declines to recommend any change to the judicial annuities payable to the judges who retired during the 1992-97 time period.

Recommendation 8:

The Commission recommends that the Incidental Allowance of $5,000 per annum for each judge remain unchanged.

Recommendation 9:

The Commission recommends that effective April 1, 2004, s. 27(6) of the *Judges Act* be amended such that regional senior judges in Ontario be added to the judges entitled to a representational allowance under that section, and that the representational allowance for such regional senior judges be set, in s. 27(7), at an accountable maximum yearly amount of $5,000.

Recommendation 10:

The Commission recommends that the *Judges Act* be amended to provide for the payment of an isolated post allowance to the resident Labrador judge in the amount of $12,000 per annum, in conformity with the isolation allowances provided to the judges of the Northern Territories.

Recommendation 11:

The Commission recommends that the requested extension not be granted and that the Office of the Commissioner of Federal Judicial Affairs be mandated to deal with any circumstances that in the Commissioner's view can reasonably be deemed 'unusual'.

Recommendation 12:

The Commission recommends that, notwithstanding paragraphs 40(1)(c) and (e), claims under these paragraphs for expenses made in anticipation of a relocation, but prior to retirement or resignation from office, shall be reimbursable by a removable allowance, provided that:

(i) the anticipated expenses are incurred no earlier than two years prior to the judge becoming eligible to retire, and

(ii) that all relocation expenses connected with that relocation be paid within the timeframes currently provided in the Removal Allowance Order and that no later expenses should be reimbursed.

Recommendation 13:

The Commission recommends that the partners of judges of the Supreme Court of Canada, the Federal Court, the Federal Court of Appeal and the Tax Court of Canada be reimbursed for incurred expenses in the obligatory relocation, up to an accountable $5,000 limit.

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The Commission recommends that there be no change to the entitlement to the post-retirement removal allowance.

Recommendation 15:

The Commission recommends that justices of the Supreme Court of Canada be granted the exceptional privilege of eligibility for retirement on the full judicial annuity after 10 years of service on that bench regardless of age.

Recommendation 16:

The Commission recommends that the Government pay 100% of the disbursements and two-thirds of the legal fees (subject to assessment) incurred by the Association and Council in preparing their submissions and bringing them before the Commission.

Department of Justice Canada | Ministère de la Justice Canada

Response of the Government of Canada to the Report of the 2003 Judicial Compensation and Benefits Commission

May 29, 2006

Canada

Response of the Government of Canada to the Report of the 2003 Judicial Compensation and Benefits Commission

On May 31, 2004, the 2003 Judicial Compensation and Benefits Commission delivered its Report as required by the *Judges Act*. In its Response on November 30, 2004, the former Government accepted all of the Commission's recommendations, except one which it accepted in modified form.[1] Bill C-51, which was introduced on May 20, 2005, would have implemented the Response, died on the order paper when the House of Commons was dissolved on November 29, 2005.

On assuming office in early February 2006, the Minister of Justice, on behalf of the new Government, made it a priority to review the Commission Report and Recommendations in light of the constitutional principles and the statutory criteria that govern the process, discussed more fully below. The Government has accepted the recommendation of the Minister of Justice to move quickly to accept all of the Commission's recommendations as proposed in Bill C-51, with the exception of the salary proposal.[2] This Response will explain the reasons for the Government's decision to depart from the Commission recommendation that judicial salaries increase by 10.8% effective April 1 2004. It will also provide the rationale for the proposed alternative increase of 7.25% effective April 1, 2004.

1. The Constitutional Framework of Judicial Compensation and Benefits

The establishment of judicial compensation is governed by constitutional principles designed to ensure public confidence in the independence and impartiality of the judiciary. At the federal level, s. 100 of the Constitution requires that Parliament, and not the Executive alone, establish judicial compensation and benefits following full and public consideration and debate.[3]

In addition to the protections of s. 100, the Supreme Court of Canada has established a constitutional requirement for an "independent, objective and effective" commission whose purpose is to depoliticize the process of judicial remuneration and thereby preserve judicial independence.[4] This applies to both federal and provincial judicial appointments. These judicial compensation commissions make non-binding recommendations to governments, and governments must publicly respond within a reasonable period of time. A government which rejects or modifies a recommendation must provide a justification for the departure that meets the standard of rationality.

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[1] The November 30, 2004 *Response* can be found at www.canada.justice.gc.ca/en/dept/pub/jcbrj/index.html The Commission's recommendations are attached as Annex 1. The full Commission Report, entitled *Judicial Compensation and Benefits Commission Report*, May 31, 2004 ("*Report*") can be found on the Commission's web site at www.quadcom.gc.ca.

[2] The Government accepts Recommendation 16 relating to judicial representational costs, as modified by and for the same reasons as provided by the former Government, which may be found in its November 30, 2004 *Response*, under the heading "Recommendation 16, Representational Costs".

[3] *Constitution Act, 1867*, s. 100.

[4] *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 S.C.R. 3 (*P.E.I. Judges Reference*), para. 131.

In July 2005, the Supreme Court of Canada clarified the standard against which the reasonableness of a government or legislative response to a commission report will be assessed. In *Bodner v. Alberta*,[5] the Court clearly acknowledged that decisions about the allocation of public resources belong to legislatures and to governments. Governments are entitled to reject or modify Commission recommendations provided:

1. They have articulated a legitimate reason for doing so.
2. The government's reasons rely upon a reasonable factual foundation.
3. It can be shown that, viewed globally and with deference to the government's opinion, the commission process has been respected and the purposes of the commission – namely, preserving judicial independence and depoliticizing the setting of judicial remuneration – have been achieved.

Governments and legislatures are required to take the requisite steps to implement commission recommendations, as modified if necessary, with "due diligence and reasonable dispatch". [6]

In 1998, the *Judges Act* was amended to provide for a Judicial Compensation and Benefits Commission to be established every four years to inquire into the adequacy of judicial compensation and benefits.[7] The *Judges Act* establishes express criteria which govern the Commission's consideration as well as that of the Government and Parliament in determining "adequacy" of compensation: [8]

a) the prevailing economic conditions in Canada, including the cost of living, and the overall economic and financial position of the federal government;
b) the role of financial security of the judiciary in ensuring judicial independence;
c) the need to attract outstanding candidates to the judiciary; and
d) any other objective criteria that the Commission considers relevant.

The Commission is required to Report with recommendations to the Minister of Justice within nine months of commencement. The Minister must table the Report in Parliament and must respond within six months of receipt.[9] As indicated, the former Government responded in November, 2004, but did not table a Bill until May 2005. The Bill did not proceed beyond First Reading and subsequently died on the Order Paper.

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[5] [2005] 2 S.C.R. 286.
[6] *P.E.I. Judges Reference*, para. 179.
[7] *Judges Act*, R.S. 1985, c. J-1, as amended (the *"Judges Act"*), s. 26(1).
[8] *Ibid.*, s. 26(1.1).
[9] *Ibid.*, ss. 26(2), (6).

2. Response of the Present Government

The Government is fully committed to the important constitutional principles that govern the establishment of judicial compensation. We recognize that significant time has already passed since the Commission Report and recommendations, and that the integrity and effectiveness of the Commission process require that we take the necessary steps to move this matter forward to Parliament as quickly as possible to complete the 2003 Commission process.

At the same time, the Government is firmly of the view that we have a responsibility to consider the Report and Recommendations of the Commission in light of the mandate and priorities upon which we have been elected. We have undertaken this review with all reasonable dispatch, and in light of the applicable legal standards including the statutory criteria established by Parliament. As we shall discuss, we have given particular consideration to the first and third criteria, which are: "1. the prevailing economic conditions in Canada, including the cost of living, and the overall economic and financial position of the federal government" and "3. the need to attract outstanding candidates to the judiciary".

Before turning to a detailed elaboration of our response with respect to the Commission salary recommendation, some preliminary observations with respect to the Commission Report are warranted.[10] The Commission is to be congratulated for its efforts to encourage public participation and to engage in a full and transparent process of deliberation.[11] The Commission has clearly conducted a thoughtful consideration of the relevant issues and produced a comprehensive and thorough report based on the evidence and arguments presented. This is critical to ensuring public confidence in the independence and objectivity of the process.

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[10] The Commission was established on September 1, 2003. As required by the *Judges Act*, the judiciary and the Government each nominated one member of the Commission. Those two members nominated a third member to serve as Chair of the Commission. The three members, Chairman Roderick McLennan, Q.C., and Commissioners Gretta Chambers, C.C., O.Q., and Earl Cherniak, Q.C., were appointed by the Governor in Council to hold office for a term of four years on good behaviour. (www.quadcom.gc.ca).

The Commission sought and received written submissions, supported by expert and other evidence, from a broad range of interested persons, including representatives of the judiciary and the Government. Two days of public hearings were held in February 2004. The Commission heard submissions from representatives of the Government, the Canadian Judicial Council and the Canadian Superior Court Judges Association, and all others who chose to make oral submissions. In addition to the expert evidence provided in the various submissions, the Commission retained its own consultants to assist its deliberations.

[11] The Commission published a public notice inviting written submissions in 48 newspapers in Canada having national, regional and local coverage. The text of the public notice and the list of newspapers is found at Appendix 4 of the Commission Report, http://www.quadcom.gc.ca/rpt/appendix4.html. A list of submissions from organizations and individuals is found at Appendix 5 of the Commission Report, http://www.quadcom.gc.ca/rpt/appendix5.html.

It is also clear that the Commission undertook a detailed assessment and analysis of data and information available with respect to the relevant comparators for establishing the overall adequacy of judicial compensation. This has been a perennial challenge with which all previous federal judicial compensation commissions have grappled. As successive commissions and governments have discovered, it is as much an art as a science. There is no readily available mathematical formula to apply and a high degree of well-informed judgement is ultimately involved.

As we shall discuss, ultimately the Commission formed its judgement based on compensation methodology involving a number of assumptions in relation to available comparators. It is the relative weight that the Commission gave to the various factors -- and to one particular assumption that appears to have been especially persuasive in its ultimate salary recommendation -- with which this Government does not fully accord. In essence we have arrived at a different judgement as to the manner in which various considerations should be weighed. We now turn to provide a more specific explanation for our response.

3. Salary Proposals

(a) The Commission's Recommendation

The Commission recommended a 10.8% salary increase effective April 1, 2004, inclusive of statutory indexing after considering submissions from the Government and the judiciary.[12] The proposed salary of a *puisne*[13] judge would rise from $216,600 to $240,000 as of April 1, 2004. There would be equivalent increases for Chief Justices and judges of the Supreme Court of Canada.[14] Statutory indexing would continue effective April 1 in each of the following years.

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[12] Recommendation 1: The Commission recommends that the salary of *puisne* judges be established as follows. Effective April 1, 2004, $240,000, inclusive of statutory indexing on that date, and for the next three years: $240,000 plus cumulative statutory indexing effective April 1 of each of those years. ('Statutory indexing": under the *Judges Act*, judicial salaries are indexed to the Industrial Aggregate Index.)

[13] "*puisne*" refers to a judge who does not hold the office of Chief Justice.

[14] Recommendation 2: The Commission recommends that the salaries of the justices of the Supreme Court of Canada and the chief justices and associate chief justices should be set as of April 1, 2004, and inclusive of statutory indexing, at the following levels:

Supreme Court of Canada:	
Chief Justice of Canada	$308,400
Justices	$285,600
Federal Court and Tax Court of Canada:	
Chief Justices	$263,000
Associate Chief Justices	$263,000
Appeal Courts, Superior Courts and Courts of Queen's Bench:	
Chief Justices	$263,000
Associate Chief Justices	$263,000

(b) Economic Conditions and the Overall Economic and Financial Position of the Government

The Commission's analysis of this criterion is found at pages 9 to 11 of its Report. The Commission's overall approach to this factor is summarized as follows: "[w]e interpret this direction as obliging us to consider whether the state of economic affairs in Canada would or should inhibit or restrain us from making the recommendations we would otherwise consider appropriate".[15]

We do not accept such a narrow characterization of this criterion. In particular, we do not agree that paragraph 26(1.1)(a) is simply directed at establishing whether the Government has sufficient funds to pay for whatever amount the Commission might otherwise think is appropriate. Rather, the Government's economic and financial position is a key contextual element in the determination of the "adequacy" of judicial compensation. The Commission is required to undertake its analysis in light of the overall state of the Government's finances and in view of the other economic and social priorities of the Government. In other words, all of the factors must be considered in an integrated fashion, rather than isolating the economic criterion and applying it only as a negative consideration after a proposed quantum has been otherwise determined.

In its 2006 Budget, the Government identified its key priorities, including measures to enhance accountability, create greater opportunity for Canadians, invest in our families and communities, protect Canadians' security and restore fiscal balance.[16] Among other measures, the Government has committed to reducing the Goods and Services Tax, lowering personal and corporate income taxes, introducing Canada's Universal Child Care Plan, investing in Canada's military, hiring more Royal Canadian Mounted Police officers and working to develop a Patient Wait Times Guarantee.[17]

At the same time, and as importantly, the Government is committed to ongoing fiscal responsibility in order to ensure our future economic health and prosperity. Accordingly, we have committed to reducing the national debt by $3 billion each year, starting in this fiscal year, as well as to reducing growth in federal spending to a more sustainable level. The President of the Treasury Board has been tasked with identifying $1 billion of savings in 2006-07 and 2007-08 in order to support new and on-going program expenses that are expected to grow by 5.4% in 2006-07 and 4.1% in 2007-08.[18]

This is not to deny that the particular nature of the judicial office and function imposes unique considerations in terms of claims on public resources. However the first statutory criterion itself recognizes that legitimate expectations in terms of judicial compensation are conditioned by the fact that judges are paid from the public purse – upon which there are many competing and legitimate demands. Canadians expect that any expenditure

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[15] *Report*, p. 9.
[16] Budget 2006 documents can be found at www.fin.gc.ca/budtoce/2006/budliste.html.
[17] *Ibid.*
[18] *Ibid.*

from the public purse should be reasonable and generally proportional to all of these other economic pressures and fiscal priorities. In sum, the Government does not believe that the Commission's salary recommendation pays adequate heed to this reality, as embodied in the first statutory criterion.

(c) The Need to Attract Outstanding Candidates to the Judiciary

This Government recognizes that it is in the public interest to attract outstanding candidates to the judiciary and acknowledges that the pool of potential candidates from which the judiciary is drawn consists of a specialized group of professionals who typically enjoy a much higher income than the average Canadian. It is because of the unique nature of judicial office that judicial compensation commissions have always faced the challenge of finding appropriate "comparator" positions against which the judicial salary can be assessed. This Commission was no exception, receiving a broad array of information concerning remuneration of private-sector lawyers and senior officials appointed to the federal public service, including all levels of deputy ministers and other Governor-in-Council appointees.

It is noteworthy that this Commission appears to have placed less weight on what had become a more traditional comparator for judicial salaries, that of the mid-point of the Deputy Minister 3 level of senior public servants. And while the Commission was prepared to consider a broader spectrum of the Deputy Minister community (levels 1 through 4), it also took the step of considering the full average of "at-risk" pay in calculating DM salaries.[19] We believe that step was misguided. According the full equivalent of at-risk pay for comparative purposes is in our view completely inconsistent with the unequalled security of tenure which is one of the undisputed benefits of judicial office, even though established for constitutional purposes.

In the Government's view, the Deputy Minister comparator is one that should be accorded significant weight. It bears noting that the financial position of the Government is reflected in part in the salaries it is prepared to pay its most senior employees. The Commission heard evidence that annual salary increases, excluding at-risk pay, in the executive and deputy minister ranks of the public service were in the range of 2.5% to 3.1% in the three years prior to the Report.[20] This trend has continued since the publication of the Report, with increases of 2.5%, effective April 1, 2004, and 3.0 per cent, effective April 1, 2005.[21]

The Commission placed greatest analytical weight and emphasis on lawyers in the private-sector – described by the Commission as "perhaps the most important"

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[19] The first "quadrennial" Judicial Compensation and Benefits Commission – the 1999 Drouin Commission – also took at-risk pay into consideration.

[20] *Report*, p. 26.

[21] Public Service Human Resources Management Agency of Canada, *News Release*, December 13, 2004, available at http://www.hrma-agrh.gc.ca/media/20041213-nr_e.asp; Public Service Human Resources Management Agency of Canada, *News Release*, June 29, 2005, available at http://www.hrma-agrh.gc.ca/media/20050629-nr_e.asp.

comparator.[22] The Commission regarded private sector legal income as critical because most appointees to the bench are drawn from senior lawyers from the Bar.[23] And in considering private sector candidates, the Commission observed:

> The rationale, of course, is that it is in the public interest that senior members of the Bar should be attracted to the bench, and senior members of the Bar are, as a general rule, among the highest earners in private practice. While not all the "outstanding" candidates contemplated by s.26(1.1)(c) of the *Judges Act* will be senior lawyers in the higher earning brackets, many will, and they should not be discouraged from applying to the bench because of inadequate compensation.[24]

The Government agrees with the Commission that private practice lawyer incomes are an important comparator. However, judicial appointments are not made exclusively from the ranks of private-sector lawyers. Fully 27.2% of appointees between January 1, 1997 and March 30, 2004 came from non-private practice settings.[25] The Government believes that due account should be given to the fact that a sizeable percentage of appointees are not private practice lawyers.

However, the fact that the Commission has given predominant, almost exclusive weight, to the income of self-employed lawyers is not the primary concern from our perspective. Rather it is apparent that the Commission not only focussed on the higher end of private sector legal incomes, it utilized an even narrower subset of those incomes, drawn from the eight largest urban centers in Canada (Calgary, Edmonton, Montreal, Ottawa, Québec, Toronto, Vancouver, and Winnipeg). The impact of concentrating on this subset of urban lawyers must be considered in light of the fact that it excludes almost half (48.1%) of private practitioners, many undoubtedly as experienced and capable as their urban counterparts. Lawyers from the eight largest urban centers comprised only 51.9% of appointees to the bench between January 1, 1997 and March 30, 2004.[26]

In explaining its reliance on the income data from urban centers, the Commission observed:

> [T]he fact remains that most appointees do come from private practice. It is also fair to say that many appointees do come from the higher-income brackets, and come from those centres where the income for self-employed lawyers is the highest. There will always be lawyers who earn significantly more than the 75th percentile of lawyers' professional income that we use for this comparator group and, while many in that group may choose not to seek judicial office, many highly qualified persons in that group do accept the financial sacrifice involved, because of the other attractions of judicial life. It is important,

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[22] *Report*, p. 41.
[23] *Report*, pp. 31-32.
[24] *Report*, p. 32.
[25] Table 2, *Report*, p. 17.
[26] Table 5, *Report*, p. 19.

> we believe, to establish a salary level that does not discourage members of that group from considering judicial office.[27]

The effect of what the Government considers to be undue weight having been given to legal incomes from the urban subset can be seen in the Commission's representation of the resulting data.[28] Examining Table 17 in the Commission's Report, which illustrates average income by province, it is notable that the proposed salary of $240,000 exceeds, in some cases to a significant degree, the 75th percentile of self-employed income in every province with the exception of Alberta and Ontario.[29]

Moreover, when the value of the judicial annuity (22.5% of salary) is included in the $240,000, effective April 1, 2004, the real value would be $294,000, exceeding by a significant degree the 75th percentile for Canada overall and for every province except Alberta and Ontario.[30] And the value of the security that is provided by such an annuity entitlement should not be underestimated. A judge who becomes disabled at any time, even the day after appointment, is immediately entitled to an annuity of two thirds the judicial salary, for life. The partner of a judge who dies at any time, even the day after appointment, is entitled to half of that pension, for life.

The Government has other concerns about the validity of the methodology and assumptions on which the Commission has relied. In analyzing the income of lawyers in private practice, the Commission used data from the income-tax filings of those who identified themselves to the Canada Revenue Agency as self-employed lawyers, and adopted a compensation methodological approach of using the 75th percentile of overall income. However, contrary to the Government's submission, the Commission also excluded from consideration lawyers who had incomes below $60,000, on the assumption that they would not be likely candidates for office, and lawyers who were outside the age range of 44-to-56, using the rationale that this is the age group from which the large majority of judicial appointments are made.[31] The effect of doing so was to introduce a statistical bias into the data in favour of lawyers who earn higher incomes.

In the end, it remains difficult to identify with any degree of certainty the cumulative assumptions that led the Commission to make its salary recommendation. Indeed, while the former Government accepted the salary recommendation of the Commission, it is noteworthy that its November, 2004 Response included a very strong caveat that acceptance of the Commission salary recommendations should not to be taken as a

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[27] *Report*, pp. 48-49.
[28] Table 19, *Report*, p. 48 illustrates incomes at the 75th percentile of legal practitioners in large urban centres.
[29] *Report*, p. 46. Note that Table 17 calculates the 75th percentile using the age range of 44-56 and excluding lawyers whose income is below $60,00 – two methodologies with which the Government takes issue in this Response. If these methodologies are not used, the $240,000 figure is higher that the 75th percentile in all provinces. Table 17 is attached to this Response as Annex 2. Note that information is not presented for Prince Edward Island or Newfoundland and Labrador.
[30] *Report*, pp. 46, 58. Even in Alberta, the 75th percentile is only slightly higher – at $297,700. The value of the annuity was calculated by the Commission's expert as 22.5% of salary: see *Report*. P. 58.
[31] *Report*, p. 43.

complete acceptance of all of the assumptions made by the Commission with respect to the comparative analysis undertaken.[32]

Ultimately, the present Government accepts that the Commission was required to rely on data that was unsatisfactory from a variety of perspectives, and that it was therefore not unreasonable to rely on private sector income data for comparative purposes. However we are of the view that the Commission put excessive weight on the income of lawyers from the eight urban centers, resulting in an inflated income proposal that is well beyond what is reasonable across Canada.

In reviewing the Commission's salary recommendation and in deciding to modify it, the Government has taken into account its overall economic and financial position and considered all of the various comparators set out by the Commission, including the income of lawyers in private practice and all levels of Deputy Minister. In terms of income from lawyers in private practice, a more reasonable approach in our judgement and one that better accords with all the statutory criteria, including current economic and fiscal considerations, is to consider incomes at the 75th percentile across all provincial centers, urban and rural, as illustrated in Table 17 (Annex 2).

It is also highly relevant that there is no indication that the current judicial salary is a deterrent to high-quality lawyers applying for judicial office. During the period from 1988 to March 2004, the number of recommended and highly recommended candidates for judicial office exceeded the number of candidates appointed by a factor of approximately 3.3:1.[33] In Ontario, where eight positions are currently vacant, there are 36 highly recommended candidates, 114 recommended candidates, and 25 provincial court judges currently qualified for appointment. Similarly, in Alberta, where there are currently 2 vacancies, there are 5 highly recommended candidates, 22 recommended candidates, and 5 provincial court judges qualified for appointment.[34] Provided that excellent candidates continue to seek judicial office and that the Canadian public is well served by committed and experienced individuals, the fact that some of the highest paid lawyers, who might be otherwise interested in applying, may not do so due to salary expectations remains entirely a matter of personal choice. It should also be emphasized that compensation is only one in a range of factors for those considering applying for judicial office.

In sum, the Government believes that the Commission's salary recommendation places undue emphasis on the third statutory criterion and overshoots the mark in defining the level of salary increase necessary to ensure outstanding candidates for the judiciary. Instead, the Government is proposing a modified judicial salary proposal for *puisne* judges of $232,300, or 7.25%, as of April 1, 2004, with statutory indexing to continue

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[32] *Response*, p. 5.
[33] Table 6, *Report*, p. 21.
[34] Information provided by the Office of the Commissioner for Federal Judicial Affairs.

effective April 1 in each of the following years.[35] The Chief Justice of Canada, the Justices of the Supreme Court and the Chief Justices of the superior courts would receive a salary that maintains a proportionate relationship with *puisne* judges.[36]

4. Conclusion

It is ultimately for Parliament and not the Government to decide whether the Commission recommendation, the Government's proposal or some other salary increase is to be established. This remains Parliament's function under s. 100 of the *Constitution Act*, 1867. The Government calls on all parliamentarians to assume and carefully discharge their important constitutional responsibilities in light of the constitutional and statutory principles that are engaged. In the current circumstances in which implementation has been delayed for a number of reasons, however legitimate, it is of critical importance that we move forward with all possible dispatch to complete the 2003 Judicial Compensation and Benefits Commission process, so that planning can begin for the next quadrennial process in September, 2007. We will therefore immediately move to introduce the necessary proposals to amend the *Judges Act* and refer the matter to Committee for immediate consideration. We call on all parties to agree to make this Bill a priority so that our constitutional duty to address this issue with necessary dispatch is honoured. The integrity of the process requires no less.

As the Supreme Court of Canada recognized in *Bodner*[37] , respect for the integrity of the Commission process is key to ensuring public confidence in the independence and objectiveness of the process, and as a result, confidence in the independence and impartiality of our judiciary. The effectiveness of the Commission is not in our view measured by whether all its recommendations are implemented unchanged, but rather by whether it played a central role in informing the ultimate determination of judicial compensation.

In its deliberations on this matter, the Government has both relied on and responded to the central role played by the Commission in the establishment of judicial compensation. The Commission's work and guidance, informed by the case law and the relevant statutory criteria, has been critical in the Government's deliberations. Even more

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[35] It is worth noting that the Government's proposed salary, even excluding the value of the annuity, compares favourably with the 75th percentile in most of the provinces, based on the elements of the Commission's methodology that are most favourable to higher salaries.

[36]

Supreme Court of Canada:	
Chief Justice of Canada	$298,500
Justices	$276,400
Federal Court and Tax Court of Canada:	
Chief Justices	$254,600
Associate Chief Justices	$254,600
Appeal Courts, Superior and Supreme Courts and Courts of Queen's Bench:	
Chief Justices	$254,600
Associate Chief Justices	$254,600

[37] *Bodner*, para. 38 and generally.

importantly, it will be critical to Parliament as it engages in its s. 100 constitutional functions.

The Government looks forward to participating in the consideration of the Commission Report in Parliament and particularly in the Commons Justice and Human Rights Committee in what we anticipates will be an informed and respectful deliberation of the Government's response. This will be an important opportunity for Parliamentarians and the public to hear from the Commissioners and others with respect to the evidence and the analysis that has gone into all of the Commission's recommendations, including the salary proposal. This will enable Canadians to better understand the unique context of judicial office, as well as to more fully appreciate the basis and justification that are ultimately provided for the proposals that are finally accepted and implemented by Parliament.

Judicial Compensation and Benefits Commission

Commission d'examen de la rémunération des juges

CANADA

Chairperson/Présidente

Sheila Block

Commissioners/Commissaires

Paul Tellier P.C., C.C., Q.C.
Wayne McCutcheon

99 Metcalfe Street
Ottawa, Ontario K1A 1E3

Executive Director/ Directrice générale
Jeanne N. Ruest

Tel./Tél. : 613-992-4304
e-mail/courriel :
info@quadcom.gc.ca

May 30, 2008

The Honourable Robert Douglas Nicholson
Minister of Justice and Attorney General of Canada
284 Wellington Street
Ottawa, Ontario K1A 0H8

Dear Minister:

Pursuant to the provisions of Section 26.(2) of the *Judges Act*, I am pleased to submit the report and recommendations of the third Judicial Compensation and Benefits Commission.

Yours truly,

Sheila Block

Sheila Block
Chair

Encl.

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Report of the Third Quadrennial Judicial Compensation and Benefits Commission

CHAPTER 1

INTRODUCTION

1. The third Quadrennial Judicial Compensation and Benefits Commission (the 'Quadrennial Commission' or 'Commission') was established in October, 2007 with the appointment by the Governor in Council of its three members: Chairperson Sheila R. Block, and Commissioners Wayne McCutcheon and Paul M. Tellier, P.C., C.C., Q.C.[1] As provided in the federal *Judges Act*, R.S.C. 1985, c. J-1 (as amended) ('*Judges Act'*), the Commission's mandate is to inquire into the adequacy of judicial compensation and benefits for all federally-appointed judges. Its term extends over a four-year period, terminating on August 31, 2011. The principal obligation of the Commission is to conduct an inquiry into the adequacy of judicial compensation and benefits and to provide the Minister of Justice with its recommendations in report form within nine months of the date of the commencement of the inquiry.[2] This report fulfills that obligation.

The Quadrennial Commission Process

2. The Quadrennial Commission process reflects the Constitutional requirement that in order to preserve the independence of the judiciary, judicial compensation must be determined by a body that is independent of the executive and legislative branches.[3] This

[1] A copy of the October 12, 2007 press release announcing the appointments is found at Appendix A along with a short biography of each of the Commissioners. The Commissioners wish to express their gratitude to Kate Wilson, M.A., LL.B., B.C.L., who provided them with invaluable assistance and unfailing support in the discharge of their mandate. The Commissioners also thank their Executive Director, Jeanne Ruest, for her sound advice and her unstinting dedication in keeping all parties informed and the Commission process running smoothly.

[2] *Judges Act,* ss. 26(2).

[3] *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 at paras. 125, 170 [*PEI Reference*].

requirement was articulated by the Supreme Court of Canada in 1997 in *Reference Re Remuneration of Judges* (the '*PEI Reference*'),[4] and the current Commission process is a direct response to that articulation.

Judicial Independence

3. It is worth briefly considering the concept of judicial independence, since this principle is central to the work of the Commission. As the late Chief Justice of Canada, Antonio Lamer once observed, the fundamental nature of the principle of judicial independence makes it difficult to understand and arguably to articulate. Judicial independence is so much a part of our legal culture, like the rule of law or the presumption of innocence, that there is a tendency to take it for granted. However, in order "to keep these fundamental principles alive and current — contemporary truths not shibboleths", we must periodically review them and remind ourselves of their roots.[5]

4. It is however difficult to overstate the importance of judicial independence as a key element in the maintenance of a healthy democracy. One need only consider those societies where judicial independence has not been as jealously guarded to be reminded of its importance. Even in societies such as ours, with a strong history of judicial independence, complacency poses an unacceptable risk; judicial independence must be actively safeguarded in order to be maintained and protected from possible infringement.

5. In Canada, judicial independence is an unwritten constitutional principle,[6] whose origins can be traced to the *Act of Settlement* passed by the English Parliament in 1701, which enshrined a guarantee of security of tenure for the English judiciary.[7] The articulations of this principle are found in the preamble to the *Constitution Act, 1867*, which provides that the Canadian Constitution shall be "similar in Principle to that of the United Kingdom", as well as section 99(1) of the Constitution, which is closely modelled

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[4] *PEI Reference, ibid*.
[5] Remarks by the Rt. Honourable Antonio Lamer, P.C., Chief Justice of Canada, to the Council of the Canadian Bar Association Annual Meeting (August 20, 1994) at 3-4 [unpublished].
[6] *PEI Reference*, *supra* note 3 at para. 83.
[7] *Act of Settlement* (U.K.), 12 & 13 Will. 3, c.2, s.3, para 7.

on the *Act of Settlement*.[8] Section 11(d) of the *Canadian Charter of Rights and Freedoms* articulates judicial independence in the criminal context by making express the right to a hearing by "an independent and impartial tribunal" for any person charged with a criminal offence.[9] These articulations do not exhaust the principle of judicial independence; instead they represent elaborations of the principle in particular contexts.[10]

6. Judicial independence can be understood at both an individual and collective level. Individual independence has been described as the "historical core" of judicial independence, and defined as "the complete liberty of individual judges to hear and decide the cases that come before them".[11]

7. The institutional independence of the judiciary enables courts to fulfill a second and distinctly constitutional role:

> [It] arise[s] out of the position of the courts as organs of and protectors 'of the Constitution and the fundamental values embodied in it — rule of law, fundamental justice, equality, preservation of the democratic process…
>
> The institutional independence of the courts emerges from the logic of federalism, which requires an impartial arbiter to settle jurisdictional disputes between the federal and provincial orders of government. Institutional independence also inheres in adjudication under the Charter, because the rights protected by that document are rights against the state.[12]

8. In order to achieve judicial independence, judges, both individually and collectively, must be free to operate without interference from the parties that appear before them (including the state) and from the executive and legislative branches. Not only must this independence exist in fact; equally important is that the public perceive that it exists.

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[8] *Constitution Act, 1867*, (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, preamble and ss. 99(1) [*Constitution Act, 1867*]. *PEI Reference, supra* note 3 at para. 106; *Valente v. the Queen*, [1985] 2 S.C.R. 673 at para. 26 [*Valente*].
[9] *Canadian Charter of Rights and Freedoms*, s. 11, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
[10] *PEI Reference, supra* note 3 at para. 83.
[11] *Ibid.* at para. 123.
[12] *Ibid.* at paras. 123-124.

9. As the Supreme Court outlined in the *PEI Reference*, judicial independence has three core characteristics: security of tenure, administrative independence and financial security.[13] These characteristics may focus on either the individual or collective dimension of judicial independence, or, in the case of financial security, may address both.[14]

10. The collective or institutional dimension of financial security requires that politicization of the relationship between the executive and legislative branches and the judiciary be avoided. In practice, this requirement has three primary implications:

1) Changes to judicial remuneration should not be made without recourse to an independent, effective and objective process for determining judicial remuneration;

2) The judiciary must not engage in negotiations concerning remuneration with the executive or legislative branches; and

3) There is a minimum level below which judicial salaries cannot be reduced.[15]

11. Section 100 of the *Constitution Act, 1867*, provides that the salaries, allowances and pensions of superior court judges shall be fixed and provided by Parliament. Parliament discharges this obligation through the *Judges Act*, which also provides for the salaries, allowances and pensions of judges of the federal courts (the Supreme Court of Canada, the Federal Courts, and the Tax Court of Canada).

12. In order to avoid infringing the principle of judicial independence, before Parliament can modify judicial salaries for any federally-appointed judges, it must have recourse to an "independent, effective and objective process for determining judicial remuneration" — the Quadrennial Commission process. The Commission acts as an

[13] *PEI Reference, supra* note 3 at para. 115, citing *Valente, supra* note 8 at paras. 27, 40, 47.
[14] *PEI Reference, ibid.* at paras. 119-121.
[15] *Ibid.* at paras. 133-135.

"institutional sieve" to prevent the setting of judicial remuneration "from being used as a means to exert political pressure through the economic manipulation of the judiciary".[16]

13. The Quadrennial Commission process is the third iteration of a process adopted for the determination of judicial compensation and benefits. Prior to the *PEI Reference*, between 1982 and 1996, judicial compensation recommendations were made through a Triennial Commission process, established under the *Judges Act*. Despite the efforts of five separate Commissions, this process was largely perceived as a failure: the process did not impose on Government any obligation to respond to the Commission's recommendations and the majority of the recommendations made were ignored and therefore not implemented. In turn, the Triennial Commission process had replaced the practice of having judicial salaries and benefits reviewed by advisory committees, a process which was not seen as sufficiently independent by the judiciary.[17]

14. The *PEI Reference* not only confirmed the need for the establishment of a commission process but provided important guidance as to what form such a process should take. As the Drouin Commission outlined in the first Quadrennial Commission report, a compensation commission should possess the following characteristics:

> Members of compensation commissions must have some kind of security of tenure, which may vary in length;
>
> The appointments to compensation commissions must not be entirely controlled by any one branch of government;
>
> A commission's recommendations concerning judges' compensation must be made by reference to objective criteria, not political expediencies;
>
> It is preferable that the enabling legislation creating the commission stipulate a non-exhaustive list of relevant factors to guide the commission's deliberations;
>
> The process of compensation commissions must be employed before implementation of any changes or freezes to judicial compensation;
>
> To guard against the possibilities that government inaction might lead to a reduction of judges' real salaries because of inflation, compensation commissions

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[16] *Ibid.,* at para. 170.
[17] Report of the Judicial Compensation and Benefits Commission, submitted to the Minister of Justice of Canada, May 31, 2000, at 2 [Drouin Report].

> must convene at least every three to five years to ensure the adequacy of judges' salaries and benefits over time;
>
> The reports of the compensation commissions must have a "meaningful effect on the determination of judicial salaries". Thus, while the report of a compensation commission need not be binding, at a minimum the responsible legislative or executive authority must formally respond to the report within a specified time; and
>
> Finally, the executive or the legislature, as applicable, must be prepared to justify any decision rejecting one or more of the recommendations in a compensation commission's report, if necessary, in a court of law.[18]

15. The design and adoption of a specific process however was left to individual governments.[19] The Quadrennial Commission process incorporates the above elements in the following manner:

> Each member of the Commission holds office during good behaviour and may be removed for cause at any time by the Governor in Council. Members hold office for a term of four years (sections 26.1(2) and (3) *Judges Act*).
>
> The Commission consists of three members appointed by the Governor in Council: one person nominated by the judiciary; one person nominated by the Minister of Justice of Canada; and one person, who shall act as Chairperson, nominated by the other two members (section 26.1(1) *Judges Act*).
>
> The Commission commences its inquiry on September 1 of every fourth year after 1999, and must submit a report containing its recommendations to the Minister of Justice within nine months after the date of commencement (section 26(2) *Judges Act*).
>
> The Minister of Justice must respond to a report of the Commission within six months after receiving it (section 26(7) *Judges Act*).
>
> In conducting its inquiry, the Commission must consider the non-exhaustive list of objective criteria set out in the *Judges Act* (section 26 (1.1) *Judges Act*).

The result therefore is a statutory process which is nevertheless governed by the constitutional requirements which led to its enactment.

Commissioner Independence

16. It is important to underline that while the process for the nomination of members provides that the judiciary and the federal Government each nominate one member in

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[18] *Ibid.* at 5.
[19] *PEI Reference, supra* note 3 at para. 167.

order to ensure that the Commission's composition is representative of the parties[20] and that these two members in turn nominate a Chairperson, all three members function entirely independently of the parties who nominated them.[21] We adopt the statement of the McLennan Commission that "[t]he members of the Commission owe no allegiance to those who appointed them and the Commission has acted completely independently throughout the process."[22]

Mandate

17. As noted earlier, the mandate of the Quadrennial Commission is to inquire into

a) the adequacy of the salaries and other amounts payable under the *Judges Act*; and

b) the adequacy of judges' benefits generally.[23]

18. In conducting its inquiry, the Commission must consider the following criteria:

a) the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government;

b) the role of financial security of the judiciary in ensuring judicial independence;

c) the need to attract outstanding candidates to the judiciary; and

d) any other objective criteria that the Commission considers relevant.[24]

19. As the Supreme Court has directed, these criteria have served as the guide to our deliberations.[25] The specific importance of each of these criteria will be discussed in more detail in later sections of the report.

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[20] *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice); Ontario Judges' Assn. v. Ontario (Management Board); Bodner v. Alberta; Conférence des juges du Québec v. Quebec (Attorney General); Minc v. Quebec (Attorney General),* [2005] 2 S.C.R. 286 at para. 16 [*Bodner*].
[21] For this Commission, the judiciary nominated Mr. Tellier and the Government nominated Mr. McCutcheon; these nominees then nominated Ms. Block as Chair of the Commission.
[22] Report of the Judicial Compensation and Benefits Commission, submitted to the Minister of Justice of Canada, May 31, 2004, at 3 [McLennan Report].
[23] *Judges Act*, s. 26.
[24] *Ibid.*, s. 26.
[25] *PEI Reference, supra* note 3 at para. 173.

20. The term of the Commission is also relevant to an understanding of the scope of our mandate. Our inquiry is prospective in nature and must assess the adequacy of judicial compensation over a four-year period, aware that the next Commission will not present its recommendations until the spring of 2012.

Precedential Value of Previous Quadrennial Commissions

21. As noted above, this is the third Quadrennial Commission. As such, we have had the benefit of the work undertaken by the first and second Commissions, the Drouin and McLennan Commissions. While we are not bound by the conclusions reached by previous Commissions — "each Commission must make its assessment in its own context"[26] — they nevertheless form an important part of the background and context that a Commission should consider and we have given careful consideration to both reports and to the lessons learned during earlier iterations of this process.[27] Later in our report, we also offer suggestions as to how the Commission process might further build on the work of previous Commissions while respecting the independence of future Quadrennial Commissions.[28]

Process Followed by this Commission

22. The membership of the Commission was announced on October 12, 2007.[29]

23. In November, we issued a public notice which was posted on the Quadrennial Commission website, and which appeared in newspapers across the country providing a preliminary timetable for our inquiry and inviting written submissions from interested parties on any of the questions within our mandate.[30]

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[26] *Bodner, supra* note 20 at para. 15.
[27] *Ibid.*
[28] See *infra* "Enhancing the Efficiency of Future Commissions".
[29] The press release confirming the appointments appears at Appendix A.
[30] Online: <http://www.quadcom.gc.ca/pg_Notices.en.php>.

24. Initial written submissions were received in December 2007, copies of which were posted on our website. Comments on, or replies to the first round of submissions were made by the end of January 2008.[31]

25. Requests to appear before the Commission were received by January 22, 2008. Public hearings were held on two separate dates. The first day of hearings was held on Monday March 3, 2008 at the premises of the Canadian International Trade Tribunal. A second day of hearings was held on March 13, 2008 at the premises of the Canadian Human Rights Tribunal.[32]

26. In addition to the various submissions received, as noted earlier, we carefully reviewed the reports of the Drouin and McLennan Quadrennial Commissions as well as the Government responses to them. We also reviewed the reports of the various Triennial Commissions which preceded the Quadrennial Commission process.[33] We considered the reports of the Advisory Committee on Senior Level Retention and Compensation.[34] We also considered the relevant jurisprudence, including the various decisions of the Supreme Court dealing with judicial independence and in particular its decisions in the *PEI Reference* and in *Bodner*, the latter decision having been released after the tabling of the McLennan Commission report.[35]

27. Throughout our inquiry, we maintained open channels of communication with the principal parties, seeking clarifications or additional information when necessary in order to assist in our work.

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[31] A list of all submissions received by the Commission appears at Appendix B.
[32] A list of all parties who appeared before the Commission is found at Appendix C. Transcripts of these public proceedings are available for review through the Commission office.
[33] The five Triennial Commissions were the Lang Commission (1983), the Guthrie Commission (1987), the Courtois Commission (1990), the Crawford Commission (1993) and the Scott Commission (1996).
[34] The Advisory Committee on Senior Level Retention and Compensation has released nine reports; its first report was released in January 1998.
[35] The McLennan Commission's report was submitted to the Minister of Justice on May 31, 2004 and the Supreme Court's reasons in *Bodner* were released on July 22, 2005. McLennan Report, *supra* note 22; *Bodner, supra* note 20.

Safeguarding the Integrity of the Commission Process

28. The judiciary, as represented by the Canadian Superior Courts Judges Association and the Canadian Judicial Council ('Association and Council'), raised a number of concerns before us relating to the Commission process. The Government, in response, submitted that such questions were not properly before us and should be the subject of direct discussions between the parties. We wish to address the question of our jurisdiction to deal with what can broadly be termed 'process issues' and then to specifically address one of the process concerns raised in this instance.

29. As is evident from the origins of the Quadrennial Commission process, there has been a long struggle to achieve a process which meets all three criteria enunciated by the Supreme Court: independent, objective and effective. The current process replaced the Triennial Commission process, which was widely perceived as lacking effectiveness; it, in turn, had replaced an advisory committee process which was not considered sufficiently independent.

30. Process issues figured prominently in every Triennial Commission report. In fact, by the time of the fifth Triennial Commission, the Government expressly sought the assistance of the Commission in recommending how some of the perennial process concerns might be addressed.[36] Arguably, concerns over the integrity of the Triennial Commission process were at the root of its demise.

31. Unlike its predecessors, the Quadrennial Commission process benefits from the explicit guidance of the Supreme Court in the *PEI Reference* and more recently in *Bodner* regarding implications of the constitutional requirement of an independent, objective and *effective* Commission. We are all the beneficiaries of this judicial 'road map' and, although the selection of a particular process and various elements of process design were specifically left to individual governments, the process remains one governed by the Constitutional requirements enunciated in those decisions.

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[36] Report and Recommendations of the 1995 Commission on Judges' Salaries and Benefits, chaired by David W. Scott, Q.C., September 30, 1996 at 1 [Scott Report].

32. The fact that the Quadrennial Commission is structured in order to address some of the process concerns that plagued previous Commissions does not mean that Quadrennial Commissions will no longer be confronted by process issues or that they should no longer comment on them when they do arise. On the contrary, the Quadrennial Commission process is still in its relative infancy, and history suggests that process issues will continue to arise as the process matures.

33. The Government has suggested that process concerns should be addressed by one of two means: direct discussions between the judiciary and Government or, in certain instances, review by the courts. In our view, the former is inadvisable; the latter is an option that must be carefully weighed.

34. Although the Supreme Court has indicated that the prohibition against direct negotiations with Government relates to issues of remuneration and does not necessarily prohibit other types of negotiations,[37] in many instances, negotiations relating to the process of establishing judicial compensation may be difficult to clearly separate from the forbidden negotiations on the merits. In the *PEI Reference*, the Court suggested that it would be acceptable for governments and the judiciary to engage in negotiations relating to what form a compensation commission should take.[38] This example of a process negotiation was acceptable precisely because it was a discussion of process issues in the abstract, entirely divorced from any discussion of the merits of particular recommendations. Where concerns arise that relate to a particular iteration of the process however, we would suggest that negotiations between the parties are more likely to infringe the prohibition. It might require unreasonable parsing to distinguish process concerns relating to implementation for example, from the recommendations issued by a particular Commission.

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[37] *PEI Reference, supra* note 3 at para. 191.
[38] *Ibid.*

35. The Supreme Court's decisions in the *PEI Reference* and in *Bodner* make clear that the judiciary can approach the courts for the purpose of seeking judicial review of Government decisions relating to questions of judicial remuneration.[39] It is equally clear however, that this option is available as a last resort and that its use has serious implications.[40] As the Supreme Court indicated in *Bodner*, litigation on these questions "casts a dim light on all involved".[41] The Court also expressed its hope that courts would rarely be involved in these questions;[42] not only does litigation between the judiciary and the executive branch risk creating strains between the parties, it also runs the real risk of affecting the public perception of the judiciary and the judicial system.

36. In addition, the Supreme Court's focus in *Bodner* on articulating a standard against which Government responses to Commission recommendations could be reviewed, suggests that the type of review contemplated as a last resort was a review of the substance of the Government response rather than a review related to issues of Commission process.[43]

37. The parties nevertheless require access to a forum where concerns related to process can legitimately be raised. It is our view that Quadrennial Commissions, by virtue of their independence and objectivity, are well-placed to serve as that forum and to offer constructive comments on process issues as they arise. While the structure and mandate of the Commission are outlined in statute, any question of process that affects the independence, objectivity or effectiveness of the Commission is properly within its mandate. It is entirely appropriate and arguably imperative that the Commission serve as guardian of the Quadrennial Commission process and actively safeguard these Constitutional requirements.

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[39] *Ibid.* at para. 180; *Bodner, supra* note 20 at para. 28.
[40] As the Supreme Court indicated in the *PEI Reference*, "Litigation, and especially litigation before this Court, is a last resort for parties who cannot agree about their legal rights and responsibilities. It is a very serious business. In these cases, it is even more serious because litigation has ensued between two primary organs of our constitutional system - the executive and the judiciary - which both serve important and interdependent roles in the administration of justice." *PEI Reference, ibid.* at para. 7.
[41] *Bodner, supra* note 20 at para. 12.
[42] *Ibid.* at para. 28.
[43] *Ibid.* at paras. 28-44.

38. In addition, although "each commission must make its assessment in its own context",[44] Commissions can and have offered their suggestions for future Commissions concerning ways of enhancing the effectiveness of the current process. Both the Drouin and McLennan Commissions addressed relevant process issues in their reports[45] and we have similarly done so at the end of our report, offering several suggestions relating to enhancing the effectiveness of the process.[46] There is however one process issue which we wish to address at the outset because of its importance, namely the question of the Government's response to the McLennan Commission's report.

Government Response to the McLennan Report

39. The McLennan Commission issued its report on May 31, 2004, as required by the *Judges Act*. The Government issued its response to that report on November 20, 2004, within the time frame provided under the *Judges Act*. In May 2005, the Government introduced legislation based on its response to the McLennan Report. However, the Government Bill died on the order paper when Parliament was dissolved in November 2005.

40. A new Government was elected in January 2006. Four months into office, the then Minister of Justice issued a second response to the McLennan Report on May 29, 2006. Two days later, it tabled a bill reflecting that second response, a bill which received Royal Assent in December 2006.

41. The Association and Council expressed considerable concern in their submissions (both written and oral) regarding the issuance of a second response in principle and regarding its particular effect in this instance:

> The *Judges Act* does not contemplate multiple government responses. The Association and Council are firmly of the view that multiple responses undermine the cardinal constitutional requirement of effectiveness and are inconsistent with the Supreme Court's rationale for requiring of government that it formally respond, with diligence, to a commission report.

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[44] *Ibid.* at para. 15.
[45] See "Reflections on Process", Drouin Report, *supra* note 17 at 113-118; see also "Recommendations for Improvements", McLennan Report, *supra* note 22 at 89-93.
[46] See *infra* "Enhancing the Efficiency of Future Commissions".

> The Association and Council submit that the Second Response was, in essence, the expression of a newly elected Government's disagreement, for political reasons, with a previous government's formal response to the McLennan Report. While the original Response was issued under, in accordance with, and within the time-limit set out in the *Judges Act*, the Second Response has no status whatsoever under the *Judges Act* or the constitutional process expounded in the *PEI Reference*.[47]

42. Without commenting on the substance of the second Government response, we wish to express our concern with the issuance of more than one response in principle. As the Association and Council note, such a practice is not provided for under the current process. Not only does the issuance of a second response not conform to the current process, it also has significant Constitutional implications.

43. Apart from concerns about whether a second response may have the effect, real or perceived, of threatening the apolitical nature of the Commission process, it also has the very real effect of introducing an additional step and therefore additional delay in a process that imposes strict timelines on all parties involved. In this case, the second response was issued 18 months after the first response, and 18 months after the expiry of the legislative deadline for responding to a Commission report under the *Judges Act*. Although the Government tabled draft legislation almost immediately after issuing the second response, this still resulted in an additional four-month delay which could have been avoided had the new Government moved to re-introduce legislation reflecting the first response upon being elected.

44. The Commission acknowledges the potential challenges of advancing a legislative agenda faced by a minority government. This does increase the possibility that legislation tabled to enact the Government responses to Commission recommendations could die on the order table, as occurred in November 2005. Should this occur again in the future, we submit that the integrity of the Commission process is only maintained if the newly-elected Government proceeds with the process of implementation, even where the election has resulted in a change of Government. Any deviation from the process as currently outlined raises questions about whether a Commission's recommendations have

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[47] Submission of the Association and Council, December 14, 2007 at paras. 45-46 [A&C Submission].

had a meaningful effect on the legislative outcome and risks undermining the integrity of the Commission process.

45. While the Commission's effectiveness is most important in the context of the preservation of judicial independence, on a related note, the perceived effectiveness of the Commission is likely to influence the ability of the parties to convince nominees to accept appointment to future Commissions. Advisory committees, Triennial Commissions and Quadrennial Commissions have been populated by individuals who considered it an honour to serve the public interest in this capacity; the current Commission is no exception. However, continuing to attract suitable members for future Commissions will depend to a large extent on the ability to assure them that they will be participating in a process that is independent, objective and effective.

Serving the Public Interest

46. We have heeded the Supreme Court's instructions that the Commission process "is neither adjudicative interest arbitration nor judicial decision making".[48] Our recommendations concerning judicial remuneration are made with the aim of preserving and enhancing judicial independence, an aim we recognize is pursued, not as an end in itself, but rather as a means of achieving a set of goals which are essential to a fundamental societal interest: maintaining public confidence in the impartiality of the judiciary and maintaining the rule of law.[49] In presenting our report, we take the first step in this important process as provided for under the legislation; we look forward to receiving the Government's response to our recommendations and rely on the good faith of Government and of Parliament in acting with due dispatch to turn that response into legislative action.

[48] *Bodner, supra* note 20 at para. 14.
[49] *PEI Reference, supra* note 3 at paras. 9-10, 173, 193.

CHAPTER II

JUDICIAL SALARIES

1) Salary for *Puisne* Judges

47. Under Section 100 of the *Constitution Act, 1867*, the Parliament of Canada has the responsibility to establish and provide for the compensation of all Superior Court judges. Section 100 provides as follows:

> The Salaries, Allowances, and Pensions of the Judges of the Superior, District and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.

48. Section 101 of the Constitution, which grants the federal Government authority to create a General Court of Appeal for Canada (the Supreme Court) and any additional courts for the better administration of the laws of Canada (the Federal Courts and the Tax Court of Canada), indicates that the federal Government is also responsible for the maintenance of any courts so created, including the remuneration of judges appointed to them.

49. The process set out in the *Judges Act* sets salaries for this full range of federally-appointed judges. As mentioned earlier, section 26(1.1) of that Act directs that in conducting its inquiry, the Commission shall consider:

a) the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government;

b) the role of financial security of the judiciary in ensuring judicial independence;

c) the need to attract outstanding candidates to the judiciary; and

d) any other objective criteria that the Commission considers relevant.

50. We have addressed the first three of these factors in the following sections of this report. The fourth factor is raised later in the report under the headings “Salary

Differential between Appellate and Trial Court Judges" and "Salary Levels of Other Judges".

Prevailing Economic Conditions in Canada, Including the Cost of Living, and the Overall Economic and Current Financial Position of the Federal Government

51. The Government, in its submissions to the Commission, makes reference to the Economic Statement tabled by the Minister of Finance on October 30, 2007. In the Government's view, this Statement

> … demonstrates the continued robustness of the Canadian economy, but also notes that recent turbulence in global financial markets, stemming largely from developments in the U.S. housing sector and mortgage markets, and the rapid appreciation of the Canadian dollar have led to increased uncertainty regarding … near-term growth in Canada and abroad.[50]

52. The Government notes that inflation (based on the Consumer Price Index) "is projected to increase by 2.3% in 2007 and 2.2% in 2008. However, the GST reduction effective January 1, 2008 is likely to result in a downward revision of this projection. Inflation for 2009 to 2012 is forecast at 2.0%".[51]

53. In applying this economic information, the Government takes the position that:

> … the Commission must undertake its analysis in light of Canada's economic position and the overall state of the Government's finances and [the] economic and social priorities of its mandate. Secondly, any increases in judicial compensation must be reasonable and justifiable in light of the expenditure priority that the Government has accorded to attracting and retaining professionals of similarly high, indeed outstanding, qualities and capacity within the federal public sector."[52]

54. The Association and Council share the Government's view regarding the general economic conditions in Canada. However, the Association and Council take issue with the Government's contention that the Commission should consider the economic, social and expenditure priorities of the Government. In their view, the Commission cannot, under the prevailing economic conditions criterion, "be influenced by a reference to other social and economic priorities of the Government to justify a compensation level that

[50] Submission of the Government of Canada, December 14, 2007, at para. 20 [Government Submission].
[51] *Ibid*. at para. 21.
[52] *Ibid*. at para. 18.

would compromise other statutory criteria, and, in particular, the third criterion: the need to attract outstanding candidates to the judiciary."[53]

55. The Association and Council also refer to the submission of the Canadian Bar Association in making their case that government priorities would normally include judicial compensation. The Canadian Bar Association makes the following comment on how it thinks the Commission should be guided when it considers the prevailing economic conditions criterion:

> The CBA accepts that judges are paid from the government purse and that the competing demands on public monies can mitigate the amount that might otherwise be paid for judicial salaries. The CBA further accepts that a dollar spent on judicial salaries or benefits is a dollar that cannot be spent on another priority (or not collected). However, judicial independence is not just a government priority. It is, for the reasons expressed above, a constitutional imperative. Before competing priorities are used as a rationale to reduce what the Commission concludes to be appropriate compensation for judges, the Government must show conclusive evidence of other more pressing government fiscal obligations of similar importance to judicial independence.[54]

56. At the public hearing held by the Commission on March 3, 2008, the Canadian Bar Association reiterated its view that the Commission is not required to consider government priorities beyond the consideration of the Government's ability to pay the salaries recommended by the Commission. If the Commission were to consider government priorities, in the view of the Canadian Bar Association, it would place the Commission in a "highly politicized process".[55]

57. We agree with the views expressed by the Canadian Bar Association. The Government's contention that the Commission must consider the economic and social priorities of the Government's mandate in recommending judicial compensation would add a constitutionally questionable political dimension to the inquiry, one that would not be acceptable to the Supreme Court, which has warned that commissions must make their

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[53] Reply Submission of the Association and Council, January 28, 2008, at para. 7 [A&C Reply Submission].
[54] Submission of the Canadian Bar Association, December 2007, at 6 [emphasis added] [CBA Submission].
[55] Presentation of the Canadian Bar Association, Transcript of the March 3, 2008 Quadrennial Commission Public Hearing at 230.

recommendations on the basis of "objective criteria, not political expediencies". [56] In its written and oral submissions to us, the Government has not raised any pressing fiscal obligations that would influence our recommendations. The Government notes in its 2008 Budget that "[t]he Canadian economy has been expanding for 16 consecutive years and our economic fundamentals are strong".[57] It further notes that "[f]rom a position of economic strength, Canada is well prepared to successfully respond to the current period of economic uncertainty arising from the slowdown of the U.S. economy and the ongoing global financial market turbulence."[58]

58. With regard to the Government's contention that any increases in judicial compensation must be reasonable and justifiable in light of the expenditure priority that the Government has accorded to attracting and retaining professionals of similarly high qualities and capacity within the federal public sector, we find no such requirement in the statutory criteria that the Commission must consider. In fact, were the Commission required to justify compensation increases in this way, it would make the Commission accountable to the Government and allow the Government to set the standard against which increases must be measured. This would be an infringement on the Commission's independence. Since the maintenance of the financial security of the judiciary requires that judicial salaries be modified only following recourse to an independent commission, any measure that would have the effect of threatening or diminishing the Commission's independence would conflict with this constitutional requirement.

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[56] *PEI Reference, supra* note 3 at para. 173.
[57] Department of Finance Canada. "Responsible Leadership", The Budget Plan 2008, tabled in the House of Commons by the Honourable Jim Flaherty, February 26, 2008 at 9. Online: <http://www.budget.gc.ca/2008/pdf/plan-eng.pdf>.
[58] *Ibid.* at 10.

The Role of Financial Security of the Judiciary in Ensuring Judicial Independence

59. Judicial independence is essential to maintaining public confidence in the administration of justice, and financial security is an essential element in ensuring that independence. The Supreme Court has identified three components of financial security:

1) the requirement of an independent, objective and effective commission;

2) the avoidance of negotiations between the judiciary and the executive; and

3) the requirement that judicial salaries not fall below a minimum level.[59]

60. The first two components are met through the establishment of this Commission and through the effective functioning of the process whereby the Commission's recommendations are dealt with by Parliament objectively and expeditiously. With regard to a minimum salary level, as previous commissions have noted, there is no simple way to determine this level. Section 55 of the *Judges Act* precludes judges from engaging in any form of occupation or business other than their judicial duties. Their only salary is that fixed by Parliament.

61. What, then, should be the minimum salary for judges, described by the Courtois Commission as "individuals of outstanding character and ability"?[60] The Canadian Bar Association proposes that:

> … the proper functioning of our justice system depends on a high level of judicial competence. Judges' salaries and benefits, including the benefits for their families, must be at a level to attract the best and most qualified candidates to the judiciary. They must also be commensurate with the position of a judge in our society and must reflect the respect with which our courts are to be regarded.[61]

62. We believe that this is a succinct description of the considerations to take into account in ensuring that judicial salaries do not fall below a minimum level and that underlie the statutory criteria that must be considered by this Commission in its inquiry into the adequacy of judicial compensation.

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[59] *PEI Reference*, *supra* note 3 at paras. 131-135.
[60] Report and Recommendations of the 1989 Commission on Judges' Salaries and Benefits, chaired by E. Jacques Courtois, Q.C., March 5, 1990 at 10 [Courtois Report].
[61] CBA Submission, *supra* note 54 at 3-4 [emphasis added].

63. In its submission, the Government states that:

> A *puisne* judge salary rose 41% between March 31, 2000 and April 1, 2007, rising from $178,100 to its current level of $252,000. There can be no serious suggestion that judicial salaries have fallen below an acceptable minimum.[62]

64. The Association and Council respond that the Government's position does not take into account that judicial compensation has fallen behind that of DM-3s and notes that DM-3s:

> … saw their total average compensation rise by 69% between the period of April 1, 1997 and April 1, 2007, while judicial compensation rose by 52% during this same period, hence widening the gap between the two groups.[63]

65. We considered these positions as part of our overall deliberations on judicial salaries.

The need to attract outstanding candidates to the judiciary

66. The Association and Council take the position that it is "axiomatic that there is a correlation between the ability to attract talented individuals and adequate compensation".[64] They go on to note that the majority of appointees come from private practice, and they support the view of the McLennan Commission that

> …it is in the public interest that senior members of the Bar should be attracted to the Bench, and senior members of the Bar are, as a general rule, among the highest earners in private practice.[65]

67. The Government submits that there is no shortage of qualified candidates for the Bench:

> Since 2003, 229 judges have been appointed from a pool of 1,186 recommended candidates, a ratio of five to one. This qualified pool … demonstrates that outstanding candidates are attracted to the superior courts at the current compensation levels.[66]

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[62] Government Submission, *supra* note 50 at para. 29.
[63] A&C Submission, *supra* note 47 at para. 10.
[64] *Ibid*. at para. 78.
[65] *Ibid.* at para. 83, citing the McLennan Report, *supra* note 22 at 32.
[66] Government Submission, *supra* note 50 at para. 37.

68. The Government goes on to state that the current level of judicial compensation is not causing a retention problem:

> Between 1997 and November 23, 2007, a mere eight judges elected to retire from judicial office before they were eligible to receive an annuity benefit. Even assuming some judges decide to take early retirement because of dissatisfaction with compensation (and there are many other possible reasons for electing early retirement), during this period only 12 judges opted for the pro-rated, early retirement annuity.[67]

69. Finally, the Government notes that "it is important to recognize that judicial candidates should not be regarded as being exclusively, or even primarily, motivated by considerations of salary".[68] It refers to a survey conducted in Great Britain that found that "[m]ost judges took up a judicial post because of the challenge or to achieve ambitions (42 %), because the work was considered interesting and provid[ed] greater job satisfaction (24 %), or to contribute to society and the development of the law (19 %)".[69] Interestingly, the reasons given by barristers as to why they would accept a judicial post were somewhat different from those of the judges. The most commonly mentioned reasons were:

- The challenge or to achieve ambitions (25 %)
- To contribute to society and the development of the law (22 %)
- Judicial pension (20 %)
- Natural career progression (19 %)
- Because the work was considered interesting and would provide job satisfaction (18 %)
- The ability to utilise skills and experience (18 %).[70]

70. We accept that remuneration is not the only motivation for candidates to seek a judicial appointment and that for many candidates, judicial salary, pension and benefits

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[67] *Ibid*, at para. 38.
[68] *Ibid.* at para. 66.
[69] Ipsos Public Affairs. "Survey of Pre-Appointment Earnings of Recently Appointed Judges and Earnings of Experienced Barristers", commissioned by the Office of Manpower Economics (U.K.), June 2005, Government Submission, Appendices Volume II, Tab 20 at 3-4.
[70] *Ibid*, at 4.

are already attractive. However, for judicial appointments to be attractive to the full range of candidates, including senior members of the Bar, adequate compensation must remain an important consideration.

71. The current situation in the United States is instructive. The American College of Trial Lawyers reports that:

> Since 1969, as the real wages adjusted for inflation earned by the average U.S. worker have increased approximately 19%, federal judicial salaries have decreased by 25%. Starting salaries for new law school graduates at top tier law firms now equal or exceed what we pay district court judges. Our federal judges make less that many law school professors and a fraction of what most could make in private practice.[71]

72. The report goes on to note that:

> During the Eisenhower administration, approximately 65% of federal judicial appointments were filled from the private sector, 35% from the public sector. Since then, the %ages have gradually inverted: currently, more than 60% of judicial appointments come from the public sector.[72]

73. In contrast, between April 1, 2004 and March 31, 2007, 78% of new Canadian judges came from private practice.[73]

74. In the United States, according to the American College of Trial Lawyers, judicial salaries are not only proving to be a barrier to attracting the best possible candidates for the Bench, but are resulting in retention problems whereby judges are leaving the Bench well before normal retirement age.

75. While Canadian judges are far from facing a situation similar to that of American judges, we agree with the conclusion of the McLennan Commission that:

> Judicial salaries and benefits must be set at a level such that those most qualified for judicial office, those who can be characterized as outstanding candidates, will not be deterred from seeking judicial office.[74]

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[71] American College of Trial Lawyers, "Judicial Compensation: Our Federal Judges Must Be Fairly Paid", March 2007, at 1. Online:<http://www.actl.com>.
[72] *Ibid*, at 5.
[73] Government Submission, *supra* note 50 at para. 32.
[74] McLennan Report, *supra* note 22 at 15.

76. It is not sufficient to establish judicial compensation only in consideration of what remuneration would be acceptable to many in the legal profession. It is also necessary to take into account the level of remuneration required to ensure that the most senior members of the Bar will not be deterred from seeking judicial appointment. To do otherwise would be a disservice to Canadians who expect nothing less than excellence from our judicial system — excellence which must continue to be reflected in the calibre of judicial appointments made to our courts.

Salary Increases Proposed by the Association and Council

77. The Association and Council arrive at their proposed salary increases through a comparison of judicial salaries with the remuneration of the most senior deputy ministers (DM-3s and DM-4s) and lawyers in the private sector. In the case of deputy ministers, they examine the mid-point salaries and averages salaries of DM-3s and DM-4s, as well as their average at-risk pay. In the case of lawyers in the private sector, they note that for the period April 1, 2004 to March 31, 2007, 78% (110/141) of judges were appointed from the private Bar. [75] To obtain data about private-sector lawyers' income in Canada, the Association commissioned Navigant Consulting, Inc. ('Navigant'). Navigant found that "lawyers' income in the private sector at the 75th percentile for Canada as a whole in 2006 was $366,216."[76] The Government, as discussed below under the heading "Lawyers in Private Practice Comparator", does not accept the methodology or results of the Navigant study.

78. The Association and Council propose the following salary increases: "3.5% as of April 1, 2008 and 2.0% as of each of April 1, 2009, 2010, and 2011, the whole exclusive of statutory indexing."[77] The Association and Council explain that:

> The current salary of *puisne* judges is $252,000 and, as of April 1, 2008, will be increased by statutory indexing of, as currently estimated, 2.4% to $258,048.[78] If the proposed 3.5% increase were awarded, total remuneration would be $266,868 as of April 1, 2008. With an annual 2% increase thereafter and estimated annual

[75] A&C Submission, *supra* note 47 at para 123.
[76] *Ibid*, at para. 132.
[77] *Ibid*, at para. 136.
[78] The actual increase in statutory indexing (Industrial Aggregate) effective April 1, 2008 is 3.2%.

> statutory indexations in subsequent years of 2.6%, 2.8%, and 3%, respectively, the salary of *puisne* judges at the end of this Commission's mandate would be $307,170.[79]

Salary Increases Proposed by the Government

79. In developing its proposal, the Government takes the position that "the most relevant comparator group is that of the most senior federal public servants (EX 1-5; DM 1-4; Senior LA [lawyer cadre])".[80] The Government uses this range of comparators since the McLennan Commission "noted that many officials in this broad spectrum of senior government officials and not just those at the DM-3 level, potentially have a level of experience and capacity comparable to that of candidates for appointment to the Bench".[81]

80. The Government then goes on to develop its proposal for judicial salary increases based on the %age increases provided to the EX/DM community over the past four years. It finds these increases important because

> …they provide an indication of the financial capacity of the Government to compensate and the priority the Government accords to compensat[ing] senior professionals of high ability who have chosen service in the public interest over the private sector".[82]

The Government excludes what it terms at-risk pay from consideration because deputy ministers serve at the pleasure of the Governor in Council while judges have security of tenure, and because at-risk pay is dependent upon the achievement of specific commitments and must be earned annually while judges receive a guaranteed salary which is not dependent upon the attainment of performance objectives.

81. Additionally, the Government provides information about the pre-appointment income of judges between 1995 and May 18, 2007. The McLennan Commission was troubled by the difficulties in obtaining information on the income of lawyers in private practice. It strongly recommended that:

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[79] A&C Submission, *supra* note 47 at para. 137.
[80] Government Submission, *supra* note 55 at para. 47.
[81] *Ibid.*, citing the McLennan Report at 28-29.
[82] *Government Submission ibid*, at para. 49.

> …some joint method (in conjunction with the Government and the Association and Council) be sought to provide an appropriate and common information and statistical base, the accuracy of which can be accepted by both parties as reliable. The information base is particularly important with respect to the income of self-employed lawyers and could be expanded to get some appreciation as to the incomes of those lawyers who are appointed to the judiciary.[83]

82. The Government and the Association and Council have not been able to agree on the methodology to be used in providing the information sought by the McLennan Commission. However, the Government did obtain information on the income of lawyers in private practice and on the pre-appointment income of judges.

83. The Government retained the actuary and compensation expert, Haripaul Pannu, to review the data produced by the Canada Revenue Agency ('CRA') on the income of self-employed lawyers for 2002 through 2005. Mr. Pannu determined that the age-weighted income of self-employed lawyers in 2005 (most recent tax data year) is $183,128 at the 65th percentile and $251,176 at the 75th percentile.[84]

84. Additionally, the Government obtained information from the CRA on the income levels of lawyers appointed to the judiciary ('Pre-Appointment Income data' or 'PAI data'). The Government engaged Mr. Pannu to analyze and report on this information ('Pre-Appointment Income study' or 'PAI study').

85. Mr. Pannu's PAI study reveals the following:

- 62 % of appointees who had been self-employed lawyers received a significant increase in income upon their appointment to the Bench.
- 19 % of all appointees were earning less than half of a judicial salary.
- Among the 69 % of appointees who had been self-employed prior to appointment, 38 % had pre-appointment incomes that exceeded judicial salaries, and 5% had incomes that were more than 275 % of a judicial salary.[85]

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[83] McLennan Report, *supra* note 22 at 92.
[84] Book of Additional Documents of the Government of Canada, Tab 11 [Government Book of Additional Documents].
[85] Reply Submissions of the Government of Canada at para. 21 [Government Reply Submissions].

86. The Government concludes that the "pre-appointment income study demonstrates that current judicial salaries are not a disincentive to attracting significant numbers of judges who enjoyed high pre-appointment incomes".[86]

87. The Government proposes "an increase of 4.9 % in the first year (2008-09), inclusive of indexation under the Industrial Aggregate (projected to be 2.4 % on April 1, 2008)".[87] The Government notes that:

> An increase of 4.9 % will raise a *puisne* judge salary to $264,300. This will result in a 48 % increase since the first Quadrennial Commission cycle began. The Government further proposes the continuation of annual indexing in the following three years (2009-10 to 2011-12). The Industrial Aggregate annual adjustments are projected to be 2.6 % in 2009-10, 2.8 % in 2010-2011 and 3.0 % in 2011-12. The overall cost of the Government proposal from the years 2008-09 to 2011-12 is approximately $29.6 million.[88]

88. The Association and Council take great exception to the PAI study. They are concerned that they were not properly informed of the Government's intention to conduct this study; that they were not consulted on the methodology to be used; that the data, while aggregated, was gathered on sitting judges who had not provided their consent; and that there were numerous defects undermining the data.

> The Association and Council submit that the Commission should decline to consider the PAI data on the basis that the Government ought to have disclosed to the judiciary that it would be seeking to collect this data for use before the Commission, so as to give the judiciary an opportunity to comment on the proposed data collection and the methodology applied by the CRA.[89]

The Association and Council are also concerned that the data is not prospective in nature. It reveals what individuals earned before appointment, not the future earning prospects that they would take into account in deciding whether to accept a judicial appointment.

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[86] *Ibid*. at para. 23.
[87] Government Submission, *supra* note 50 at para. 70. The actual increase in statutory indexing (Industrial Aggregate) effective April 1, 2008 is 3.2%.
[88] *Ibid*, at para. 71 [footnote omitted].
[89] Supplementary Reply Submission of the Canadian Superior Court Judges Association and the Canadian Judicial Council to the Judicial Compensation and Benefits Commission in Respect of the CRA Pre-Appointment Income Data of Judges, February 12, 2008 at para. 17 [A&C Supplementary Reply Submission].

89. We appreciate that an attempt was made to obtain information considered relevant to the Commission's inquiry. We regret that the collection of this data was a source of acrimony between the parties. Both parties have expended significant resources on this matter. However, we are not in a position to judge whether there were appropriate consultations between the parties in obtaining the information. We are also not in a position to judge whether the information obtained is accurate. In any case, the information provided to us only served to confirm that some appointees earn less prior to appointment and some earn more.

90. We do not believe that a snapshot of appointees' salaries prior to appointment is particularly useful in helping to determine the adequacy of judicial salaries. Such a study does not tell us whether judicial salaries deter outstanding candidates who are in the higher income brackets of private practice from applying for judicial appointment. A study that revealed this information would be more helpful in determining the adequacy of judicial salaries. Ideally, this information would be obtained through a targeted survey of individuals who were at the higher end of the earnings scale and who could be objectively identified as outstanding potential candidates for judicial appointment. We acknowledge however the difficulties inherent in the design and implementation of any such survey. Such information might also be indirectly obtained through an analysis of whether the number of high-earning appointees to the Bench is increasing or decreasing over time.

91. Should similar information be sought in the future, we urge the Government and the Association and Council to consult on the design and execution of such studies to ensure that future commissions are provided with information that both parties agree is reliable and useful.

Compensation Comparators

92. Throughout our inquiry into the "adequacy" of judicial salaries, we have been guided by the statutory criteria in the *Judges Act*. We have carefully considered the positions of the Government and of the Association and Council. We have reviewed the

reports of past Commissions, and we have undertaken our own analysis of the information available to us.

93. Our deliberations have led us to use two comparator groups in arriving at our recommendations on judicial salaries: deputy ministers at the third level (DM-3) and lawyers in private practice.

DM-3 Comparator

94. The previous five Triennial Commissions on Judges' Salaries and Benefits considered judicial salaries in relation to those of deputy ministers, as did the previous two Quadrennial Commissions.

95. The Lang Commission concluded that in determining judicial remuneration "the most appropriate basis for comparison is with salaries or incomes of members of the legal profession of comparable experience, and with the salaries of senior deputy ministers".[90]

96. The Guthrie Commission noted that:

> As a result of 1975 amendments to the *Judges Act*, the salary level of superior court puisne judges was made roughly equivalent to the mid-point of the salary range of the most senior level (DM-3) of federal deputy minister. This was not intended to suggest equivalence of factors to be considered in the salary determination process, for no other group shares with the judiciary the necessities of maintaining independence and of attracting recruits from among the best qualified individuals in a generally well-paid profession. In 1975, judicial salary equivalence to senior deputy ministers was generally regarded, however, as satisfying all of the criteria to be considered in determining judicial salaries. At that level, a sufficient degree of financial security was assured and there were few financial impediments to recruiting well-qualified lawyers for appointment to the bench.[91]

97. The Commission went on to conclude that the 1975 judicial salary scale was satisfactory for that year and recommended a new salary be established by applying a formula including the Industrial Aggregate Index.[92]

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[90] Report and Recommendations of the 1982 Commission on Judges' Salaries and Benefits, chaired by Otto Lang, P.C., Q.C., April 6, 1983 at 3 [Lang Report].
[91] Report and Recommendations of the 1986 Commission on Judges' Salaries and Benefits, chaired by H. Donald Guthrie, Q.C., February 27, 1987 at 8 [Guthrie Report].
[92] *Ibid.*

98. The Courtois Commission believed that the DM-3 salary range mid-point "reflects what the marketplace expects to pay individuals of outstanding character and ability, which are attributes shares by deputy ministers and judges".[93]

99. Similarly, the Crawford Commission believed that "an appropriate benchmark by which to gauge judicial salaries is rough equivalence with the mid-point of the salary range of the most senior level of federal public servant, the Deputy Minister 3, commonly referred to as DM-3."[94]

100. The Scott Commission, however, stated that "[a] strong case can be made for the proposition that the comparison between DM-3's and judges' compensation is both imprecise and inappropriate."[95] The Commission did not focus on the comparison to DM-3 compensation. Rather, it addressed what it considered "a far more significant aspect of judicial compensation, specifically the relationship between judicial income and income at the private Bar from which the candidates for judicial office are largely drawn."[96] In discussing DM-3 equivalence, the Scott Commission interpreted the work of previous Triennial Commissions and the Courtois Commission by concluding that:

> … Triennial Commissions subsequent to the 1975 amendments to the *Judges Act* have endorsed this measure of equivalence, not as a precise measure of "value", but as one that appeared to them to: '…reflect what the market place expects to pay individuals of outstanding character and ability, which are attributes shared by deputy ministers and judges'.[97]

101. The Drouin Commission agreed with the substance of this observation and concluded that "rough equivalency between the overall remuneration of DM-3s and the salary level of judges is both proper and desirable in the public interest".[98]

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[93] Courtois Report, *supra* note 60 at 10.
[94] Report and Recommendations of the 1992 Commission on Judges' Salaries and Benefits, chaired by Purdy Crawford, March 13, 1993 at 11 [Crawford Report].
[95] Scott Report, *supra* note 36 at 14.
[96] *Ibid.*
[97] *Ibid*. at 13, citing the Courtois Report, *supra* note 60 at 10.
[98] Drouin Report, *supra* note 17 at 32.

102. The McLennan Commission also accepted the proposition that the relationship between judicial and DM-3 compensation is "a reflection of 'what the marketplace expects to pay individuals of outstanding character and ability, which are attributes shared by deputy ministers and judges' ".[99] However, the Commission did not base its recommendations on a direct comparison to DM-3 compensation. It looked at compensation of all deputy ministers, other Governor in Council appointees and private sector lawyers.[100]

103. The DM-3 level, as can be seen, has been a comparator for nearly every previous commission, and we believe, like the Courtois Commission, that this "reflects what the marketplace expects to pay individuals of outstanding character and ability, which are attributes shared by deputy ministers and judges".[101] The EX/DM community proposed by the Government as a comparator would be a significant departure from the DM-3 comparator used by previous commissions. The salary increases provided to the EX/DM community may provide an indication of the "priority the Government accords to compensate senior professionals of high ability who have chosen service in the public interest over the private sector",[102] but it does not provide the single, consistent benchmark that is provided by the DM-3 level and the remuneration associated with that level.

104. With regard to the DM-4 level that was introduced a few years ago, further to the recommendations of the Advisory Committee on Senior Level Retention and Compensation, we note that only deputy ministers in two positions are paid at this level. In its second report, the Advisory Committee expressed its belief that certain deputy minister positions were significantly larger in scope than others and raised the possibility of another DM level. The Committee stated that:

> [D]etermination of the need for this additional level is important to ensure equity with the CEOs of some of the larger Crown corporations and to ensure the

[99] McLennan Report, *supra* note 22 at 25.
[100] *Ibid.* at 30-31.
[101] Courtois Report, *supra* note 60 at 10.
[102] Government Submission, *supra* note 50 at para. 49.

retention of critical expertise in the deputy minister community".[103]

In its subsequent report, the Committee did recommend the creation of a DM-4 level. This recommendation "ensures greater equity between the most senior deputy ministers and the CEOs of some of the larger Crowns and sends an important message in terms of the government's willingness to attract and retain qualified and experienced staff".[104]

105. Since only two deputy ministers are paid at the DM-4 level, and this level appears to be reserved for exceptional circumstances and positions of particularly large scope, we see no justification at this time to use it as a comparator in determining the adequacy of judicial salaries. Therefore, like the Courtois Commission and other Commissions before us, we used the mid-point of the DM-3 salary range as the senior public service reference point in our deliberations on judicial compensation.

106. We also used the mid-point of the DM-3 salary range because it is an objective, consistent measure of year over year changes in DM-3 compensation policy. Average salary and performance pay may be used to demonstrate that judges' salaries do retain a relationship to actual compensation of DM-3s. However, average salary and performance pay are not particularly helpful in establishing trends in the relativity of judges' salaries to the cash compensation of DM-3s. They do not provide a consistent reflection of year over year changes in compensation. The DM-3 population is very small, varying between eight and ten people over the past few years, and average salaries and performance pay fluctuate from year to year. A person who has been promoted recently has a lower salary than one who has been in a position for many years. Turnover could cause significant changes in the averages over time. Similarly, a few very high performers or low performers in a year could significantly affect the average performance pay.

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[103] Advisory Committee on Senior Level Retention and Compensation, Second Report, March 2000 at 9-10. Online: < http://www.psagency-agencefp.gc.ca/reports-rapports/rep-rap-menu_e.asp>.
[104] Advisory Committee on Senior Level Retention and Compensation, Third Report, December 2000 at 41. Online: < http://www.psagency-agencefp.gc.ca/reports-rapports/rep-rap-menu_e.asp>.

107. In considering the DM-3 salary range mid-point as a comparator, we included performance pay. Like both the Drouin Commission and the McLennan Commission before us, we are of the view that it is necessary to consider all of the compensation elements in developing our recommendations.

108. We were not persuaded that performance pay should be excluded from our considerations because deputy ministers do not enjoy the same security of tenure as judges or because performance pay must be earned each year. Performance pay is an integral component of deputy ministers' cash compensation, and it has been growing in recent years as a percentage of their cash compensation. For a DM-3, it has increased from a maximum of 20% of salary in 2005 to a maximum of 27.4% in 2007. We also noted that performance awards, like salary, are pensionable. DM-3s on average have received more than one half of the performance pay for which they were eligible. In the four years from 2003-04 to 2006-07, DM-3s earned on average 59% of the performance pay for which they were eligible.[105] To exclude performance pay from consideration would not accurately reflect the normal income of DM-3s.

109. The Government, itself, recognizes the importance of including performance pay in its calculations when determining the salaries of other federal office holders such as members of the GCQ Group (which includes heads and members of administrative tribunals), for whom, like judges, performance pay would be inappropriate. When determining the remuneration of office holders paid in the GCQ Group the Government adds a percentage of the maximum performance pay for which office holders in the GC Group are eligible to the GCQ salary ranges. In this way, members of the GCQ Group receive compensation comparable to their counterparts classified at the same level in the GC Group. This policy was established pursuant to the advice of the Advisory Group on Senior Level Retention and Compensation:

> The Committee looked at how best to develop a compensation structure for the majority of the appointees who are not eligible for performance pay, given the quasi-judicial and regulatory nature of their responsibilities. We concluded that the approach followed should be similar to that used for the position of the Governor of the Bank of Canada, another position where performance pay is not appropriate.

[105] Government Submission, Appendices Volume II, Tab 13.

> For that position, two thirds of maximum at-risk pay was added to the job rate. As noted earlier, this tends to be the average at-risk payment, and the Committee is comfortable adjusting the job rates for positions with quasi-judicial responsibilities accordingly.[106]

110. For example, the 2007 maximum salary for a GC-9 is $239,800. In addition, the person can earn a performance award up to 21.3% of salary. A GCQ-9 has a maximum salary of $276,500 and is not eligible for performance pay.[107] The GCQ-9 maximum salary, therefore, represents the maximum salary of the GC-9 plus an amount equal to 72% of the maximum performance award that the GC-9 can earn.

111. We used one half of the performance pay for which a DM-3 is eligible in our considerations. This, we believe, is a conservative position. As well, similar to the mid-point of the salary range, this reference point is an objective, consistent measure that does not vary over time like average performance pay does.

Lawyers in Private Practice Comparator

112. We found ourselves faced with the same difficulties as the McLennan Commission in obtaining reliable data on the income of lawyers in private practice. The Government provided information obtained from the CRA and analyzed by Mr. Pannu. The Association and Council provided information obtained through a survey of private sector lawyers conducted by Navigant. The Association and Council have expressed serious concerns about the methodology used by Mr. Pannu, and the Government has expressed serious concerns about the methodology used by Navigant.

113. Mr. Pannu determined that the age-weighted income of self-employed lawyers in 2005 was $251,176 at the 75th percentile.[108] The Government's view is that this income compares very favourably with the 2005 judicial salary of $237,400. If one adds the value

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[106] Advisory Committee on Senior Level Retention and Compensation, Fourth Report, March 2002 at 30-31. Online:<http://www.psagency-agencefp.gc.ca/reports-rapports/rep-rap-menu_e.asp.>.

[107] Privy Council Office. "Salary Ranges and Maximum Performance Pay for 2007 for Governor in Council Appointees ". Online:< http://www.pco-bcp.gc.ca>.

[108] Government Book of Additional Documents, *supra* note 84 at Tab 11.

of the judicial annuity to this, a value the Government calculates to be 24.6 % of salary, the judicial salary would equate to self-employed income of $295,777.[109] This amount is significantly greater than the income that Mr. Pannu determined self-employed lawyers were earning. Mr. Pannu did find two major metropolitan centres where the incomes of self-employed lawyers exceeded that of a judicial salary plus the pension value: Calgary with an income of $326,348 at the 75th percentile, and Toronto with an income of $393,790.[110]

114. Navigant, on the other hand, found that lawyers' income in the private sector in Canada at the 75th percentile in 2006 was $366,216.[111] If one assumes a value of 24.6 % for the judicial annuity, the 2006 judicial salary of $244,700 would equate to self-employed income of $304,896. This amount is significantly less than the income that Navigant found lawyers in the private sector were earning. Navigant did find five provinces however, where lawyers' income at the 75th percentile was less than the judicial salary plus the pension value: New Brunswick at $264,286, Newfoundland and Labrador at $275,000, Nova Scotia at $291,667, Prince Edward Island at $300,000 and Saskatchewan at $192,857. It found five provinces and the territories where lawyers' income at the 75th percentile was greater than the judicial salary plus the pension value: British Columbia at $341,304, Alberta at $415,789, Manitoba at $309,091, Ontario at $437,500, Quebec at $356,522 and the Northwest Territories, Nunavut and the Yukon at $316,667.[112]

115. We do not repeat here the lengthy arguments from both parties as to why the methodology used by the other party is flawed. We are satisfied that there are lawyers in private practice whose incomes greatly exceed those of judges, whether the value of the

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[109] Government Submission, *supra* note 50 at para. 65.
[110] Haripaul Pannu, "Report on the Earnings of Self-Employed Lawyers ", Government Submission, Appendices Volume II, Tab 10 at 8.
[111] A&C Submission, *supra* note 47 at para. 132.
[112] Navigant Consulting, Inc., A Review of Canadian Private-Sector Lawyer Income, December 13, 2007, at 14.

judicial annuity is included or not. We are fortunate that many appointees to the Bench do not appear to be primarily motivated by income in accepting judicial appointments.

116. The issue is not how to attract the highest earners; the issue is how to attract outstanding candidates. It is important that there be a mix of appointees from private and public practice, from large and small firms and from large and small centres. However, there is no certainty that if the income spread between lawyers in private practice and judges were to increase markedly that the Government would continue to be successful in attracting outstanding candidates to the Bench from amongst the senior members of the Bar in Canada.

Recommendation Concerning Salary for *Puisne* Judges

117. We carefully considered the submissions provided to us, and we paid great heed to the factors enumerated in section 26(1.1) of the *Judges Act* in arriving at our recommendations on judicial salaries.

118. At this time, taking into account the overall remuneration of judges and DM-3s, we believe that a judicial salary with rough equivalence to the mid-point of the DM-3 salary range, plus one half of maximum performance pay, will provide the necessary financial security to ensure judicial independence and will serve to attract outstanding candidates to the judiciary. This level of remuneration takes into account the prevailing economic conditions in Canada, including the cost of living and the overall economic and current financial position of the federal government. It respects the historical level of remuneration for *puisne* judges and should not act as a deterrent to high-earning individuals in private practice who are prepared to consider public service. This is the level of remuneration that the Government accords to its senior public servants of "outstanding character and ability, which are attributes shared by deputy ministers and judges". It recognizes the role that the judiciary plays in our democracy, including its role as protector of the Constitution and of the values embodied in it.

119. In 2007, judges were paid 91 % of the DM-3 salary range mid-point plus one half of maximum performance pay. The judges' salary was $252,000, while the DM-3 salary range mid-point plus one half of performance pay was $276,632.[113]

120. What compensation increase is required, then, to bring the salary of *puisne* judges to rough equivalence with the DM-3 salary range mid-point plus one half of maximum performance pay? To achieve this outcome, it is our view that the Government's proposed 4.9 % increase inclusive of statutory indexing should be implemented effective April 1, 2008 and that in each subsequent year the salary of *puisne* judges should be increased by statutory indexing plus 2 % as proposed by the Association and Council.

Recommendation 1

The Commission recommends that:

> **The salary of *puisne* judges should be set at $264,300 effective April 1, 2008, inclusive of statutory indexing effective that date; and**
>
> **The salary of *puisne* judges should be increased by statutory indexing effective April 1, 2009, 2010 and 2011 plus an additional 2 % effective each of those dates, not compounded (*i.e.*, the previous year's salary should be multiplied by the sum of the statutory indexing and 2 %).**

2) Payment of Interest on Retroactive Salary Increases

121. The Association and Council seek the payment of interest on retroactive salary adjustments. They note that the statute by which the last salary increase was implemented:

> …was adopted on December 14, 2006 and the increased salary was paid in January 2007. The McLennan Commission issued its recommendations in May 2004. The Government therefore took 2 1/2 years to implement an increase.[114]

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[113] This amount consists of a salary range mid-point of $243,300 and performance pay of $33,332, which is one half of the maximum 27.4 % for which DM-3s were eligible.
[114] A&C Submission, *supra* note 47 at para. 141.

122. The Association and Council are of the view that "[i]nterest is the only way to compensate for the benefit lost during the period of delayed implementation".[115]

123. The Government rejects the recommendation of the Association and Council that interest be paid on retroactive salary increases. The Government notes that "the implementation of its Response to the McLennan Commission recommendations was the subject of a unique confluence of circumstances in the course of the democratic process that is not likely to be repeated".[116] It also notes that "judges are assured the significant continued financial security of annual statutory indexing adjustments while the legislation makes its way through the process".[117] Nevertheless, the Government indicates that it is ready to "work with representatives of the judiciary in developing policy options that might result in a more expeditious implementation of Commission recommendations accepted by the Government."[118]

124. We do not support the payment of interest on retroactive salary adjustments. It is our view that such payments are unnecessary to the maintenance of an adequate judicial salary; that they would not materially contribute to the financial security of the judiciary in ensuring judicial independence or to the attraction of outstanding candidates to the judiciary. We do, however, encourage the parties to pursue the development of policy options that might expedite the implementation of Commission recommendations.

Recommendation 2

The Commission recommends that:

> **Interest should not be paid on retroactive salary adjustments to federally-appointed judges.**

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[115] *Ibid,* at para. 143.
[116] Government Reply Submissions, *supra* note 85 at para. 56.
[117] *Ibid,* at para. 58.
[118] *Ibid,* at para. 7.

3) Salary Differential between Appellate and Trial Court Judges

125. We were presented with a request that judges appointed to courts of appeal receive a salary differential as compared to those appointed to trial courts. This is the fourth time that such a request has been made to a Triennial or Quadrennial Commission, but the question has yet to be considered on its merits.

Past Requests for a Differential

126. A request for a salary differential in favour of appellate judges was first advanced by the judges of the Quebec Court of Appeal in a submission to the Scott Commission. The submission was received as the Scott Commission's report was in the final stages of preparation and was therefore received too late to be given serious consideration.[119] The Scott Commission did however underline that the question was one which would require "very careful assessment":

> While some interesting points, in substance, in favour of the concept are advanced, a very persuasive case would have to be made to depart from the present regime which assumes that the burden of judicial office, while different in nature as between the trial and appellate court levels of our courts, nonetheless requires an equivalent discipline and dedication on the part of the judges at both court levels. The cultural impact on the system in the event of such differentiation would have to be very carefully weighed.[120]

127. Before the Drouin Commission, the appellate judges of six courts of appeal (Alberta, Saskatchewan, Manitoba, Ontario, Quebec and New Brunswick) supported the request for a differential. The Commission also received a submission from a *puisne* judge of a court of appeal opposing the request. The Government also opposed the request. The Association and Council remained neutral on the question.

128. The Drouin Commission concluded that it did not have before it sufficient information to be able to properly consider the question. It suggested that additional information in the following areas would be helpful:

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[119] Scott Report, *supra* note 36 at 30.
[120] *Ibid.*

- Data concerning the current workloads and responsibilities of trial and appellate courts across the country;
- The history of salary differentials in other comparable jurisdictions; and
- Consideration of potential constitutional issues raised by the parties.

The Commission concluded by indicating that it would be willing to consider the matter in further detail if it were made the subject of a referral to it pursuant to the *Judges Act* before the expiry of its term, but no such referral was made.[121]

129. Four years later, the McLennan Commission received a submission made on behalf of 74 of the 142 federally-appointed appellate judges. The request had what the Commission characterized as "an irregular constituency": it received the support of approximately 50 % of appellate judges, but did not include support from two of the country's provincial courts of appeal (one of which expressly opposed the request). The Government once again opposed the proposal. The Association and Council maintained its neutral position.[122]

130. Notwithstanding the fact that it described the submission as "compelling", the McLennan Commission concluded that there was no evidence before it that the implementation of a differential would impact either the financial security of the judiciary (and therefore its independence) or the ability to attract outstanding candidates to the country's courts of appeal. The Commission also appeared to conclude that the implementation of a differential would be tantamount to "re-design[ing] the court system in Canada", most likely a reference to concerns raised before it that the implementation of a differential would risk infringing provincial authority over the structure of the courts under section 92 (14) of the Constitution. Accordingly, in the absence of any ability to tie the request to the factors listed in section 26 of the *Judges Act*, the McLennan Commission considered that it was obliged to refuse to recommend that a differential in favour of appellate judges be implemented.[123]

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[121] Drouin Report, *supra* note 17 at 51-52.
[122] McLennan Report, *supra* note 22 at 53-54.
[123] *Ibid.* at 54-55.

Submissions Received

131. The request for a differential in favour of appellate judges presented to this Commission was coordinated by the Honourable Joseph R. Nuss of the Quebec Court of Appeal and was submitted on behalf of 99 of the then 141 judges of Canadian courts of appeal (approximately 70 % of appellate judges).[124]

132. We also received 18 submissions opposing the request. Some were made on behalf of particular courts and others were made on an individual basis. The Honourable James K. Hugessen of the Federal Court of Canada and the Honourable Gordon L. Campbell of the Supreme Court of Prince Edward Island each made oral submissions at the public hearing.

Positions of the Parties

133. There was consensus among the parties that the Commission had the jurisdiction to consider the request. The question of a differential was acknowledged as being one related to judicial compensation, and therefore within the mandate of the Commission (at least on a *prima facie* basis). For the judges opposed to the request, including Justices Campbell and Hugessen, it was submitted that such a recommendation would exceed the jurisdiction and mandate of the Commission for several reasons, most importantly however because it would involve a restructuring of the court system and therefore fall within provincial authority over court structure under section 92(14) of the *Constitution Act, 1867*. In a similar vein, it was suggested that the recommendation would have the effect of creating two classes of superior court judges where at present only one exists.[125]

134. The Government indicated that the Commission would have the jurisdiction to make such a recommendation, as long as it was able to support the recommendation with reference to the section 26 criteria. In such a scenario, the Government raised a number of

[124] At the time the submission was made, there were 141 federally-appointed appeal judges in Canada, with three vacancies, all at the Federal Court of Appeal. An additional appointment was made to that court in February 2008. Online: < http://www.justice.gc.ca/eng/index.html>.
[125] Submission of Justice James K. Hugessen, January 9, 2008 at para. 10.

issues it termed “Practical Difficulties” and indicated that implementation of a differential would not be possible without the federal government first engaging in consultation with the provinces.

135. On the merits, although we address many of the specific arguments raised in the course of our analysis below, the general positions for and against the granting of a differential can be summarized as follows. According to those judges who favour the implementation of a differential, a differential is warranted in order to recognize the unique role and responsibilities of judges of provincial courts of appeal, in much the same way as the unique role of the Supreme Court of Canada is recognized by means of a differential. A differential is required in order to ensure the adequacy of the remuneration of appellate judges under section 26 of the *Judges Act* and is justified with reference to the objective criterion of the role and responsibilities of judges appointed to courts of appeal.

136. While much opposition to the awarding of a differential focuses on the jurisdictional and Constitutional obstacles identified above, it was also suggested that the proposal cannot be linked to any of the criteria under section 26, including to any relevant objective criterion under paragraph (d). Furthermore, any attempt to distinguish trial courts and courts of appeal relates to differences between the institutions and not the judges appointed to them. Perhaps most importantly, it is submitted that the implementation of a salary differential would have a strongly divisive effect among members of the judiciary and would threaten the collegiality which has historically been the hallmark of the relationship between trial and appellate courts across the country.

Analysis

137. We have reached the conclusion that the granting of a differential in favour of appellate judges would not involve a restructuring of the court system and would not infringe upon provincial authority under section 92 (14) of the Constitution. We have reached this conclusion based on the way in which superior courts have evolved over time and on the basis of the scope of the federal powers relating to appointment and to

remuneration of superior court judges under sections 96 and 100 of the Constitution. As we outline below, we have also concluded that a differential is justified and indeed warranted under section 26 of the *Judges Act* in order to ensure that judges of courts of appeal are adequately compensated within the meaning of that section.

Evolution of the Structure of Superior Courts

138. The structure of the provincial superior courts has evolved considerably over the last hundred years. At the beginning of the twentieth century, most Canadian jurisdictions did not have separate courts of appeal. The appellate function was only beginning to evolve and the practice in many jurisdictions was for several *puisne* judges of the superior court to sit *en banc* for the purpose of hearing appeals. While this generally involved avoiding having a judge sit on appeal of his own decision, this was by no means a universal prohibition.

139. Although some jurisdictions, such as Nova Scotia, retained the *en banc* system for many decades, the beginning of the last century saw a trend towards the formalizing of the appellate function in superior courts and the creation of a separate appeal division, as occurred for example in Alberta in 1921.

140. An overlapping development was the creation in some jurisdictions of a separate court of appeal, to which s.96 judges would be specifically appointed. This trend slowly played out over the course of the last century to the point where only two jurisdictions in Canada still retain appeal divisions instead of separate courts. In each of those jurisdictions, Newfoundland & Labrador and Prince Edward Island, we have been informed that legislation has been drafted which would create a separate court of appeal.[126] Within the next few years therefore, the already strong trend may become a uniform state of affairs across the country. This structural evolution has had a corresponding impact on the function and level of responsibility assumed by courts of

[126] Comments with Respect to Documents Received by the Commission Regarding the Submission for a Salary Differential for Judges of Courts of Appeal, submitted by 99 judges of Courts of Appeal, January 28, 2008 at 5-6 [Pro-Differential Judges Reply Submission].

appeal across the country and by the judges appointed to those courts. We will discuss this impact in our analysis of the factors under section 26 of the *Judges Act.*

141. Although the aforementioned trend was generally acknowledged, it was suggested to us by one of the intervenors that it was nevertheless inappropriate to rely on this trend because the power over the structure of superior courts is a matter of provincial jurisdiction and the provinces could therefore decide to revert to the *en banc* system if they wished, thereby eliminating the structural basis for any differentiation between trial and appellate judges.[127]

142. While we agree that it would be within provincial authority to contemplate and effect such a reorganization, we see no sign that any jurisdiction is planning to do this. As noted above, any signs of change continue to point towards increased separation between the trial and appellate functions. Furthermore, were the trend to move in the other direction in the future, such a change could be addressed by a future Quadrennial Commission. We note in passing that similar arguments would have applied to the implementation of a differential in favour of Chief Justices, since their roles and responsibilities are determined by virtue of provincial authority. This potential for provincial legislative action was not seen as a sufficient obstacle to prevent the implementation of a differential in their favour.

Ex officio Membership and the Nature of Judicial Appointments

143. In several Canadian jurisdictions, a judge of the superior trial court is *ex officio* a member of the court of appeal.[128] In some jurisdictions, judges of the court of appeal are also *ex officio* members of the trial court.[129] It was submitted before us that these provincial decisions regarding *ex officio* status might act as a bar to the implementation of a salary differential. Under this argument, the *ex officio* status provisions would prevent any kind of distinction between trial and appellate judges, whose Orders in Council

[127] Presentation of Justice Campbell, Transcript of the March 13, 2008 Quadrennial Commission Public Hearing at 316.
[128] See *e.g.*, Alberta's *Court of Appeal Act*, R.S.A. 2000, c.C-30, ss.3(3).
[129] See *e.g.*, Saskatchewan's *Court of Appeal Act*, S.S. 2000, Chapter C-42.1, ss. 5(1).

confirming appointment even include reference to the *ex officio* membership where applicable.

144. We are not persuaded that such a bar exists. While the *ex officio* status of judges in several jurisdictions does have practical implications which we will address below, we do not consider that it prevents the federal government from differentiating between the remuneration paid to trial judges and those on courts of appeal. The process of appointment, while it acknowledges *ex officio* status where it exists, is nevertheless a process of appointment to a particular court. When a judge is elevated from a trial court to a court of appeal, the *ex officio* confirmation on his or her original Order in Council does not suffice to make the new appointment a reality. A second Order in Council is required in order to effect the elevation, even where the individual concerned is already an *ex officio* member of the appellate court. Just as the federal appointment process clearly differentiates between appointment to a trial court and to a court of appeal, so too can the federal process for setting judicial remuneration. In fact, where such differences exist and have been brought to our attention, our mandate suggests that we are required to give them due consideration.

145. It was also brought to our attention that salary differentials have previously existed in several provinces between trial and appellate judges. In 1920, the *Judges Act* provided that superior court judges across Canada should be paid the same salary, regardless of whether they were appointed to the trial court or court of appeal. This amendment removed differentials between trial and appeal judges in Manitoba, British Columbia and Saskatchewan.[130] The fact that such differentials previously existed suggests that the federal Government is competent in principle to legislate in this area.

Evaluating the Request under Section 26

146. Our evaluation of the request for a differential must take place in accordance with section 26 of the *Judges Act.* First, the question must be one tied to the adequacy of judicial compensation or benefits. In this case, do we consider that appellate judges are

[130] Pro-Differential Judges Reply Submission, *supra* note 127 at 9.

adequately compensated if they receive the same level of remuneration as trial judges? In order to answer this question, we turn to the factors listed in section 26 (1.1).

147. The McLennan Commission concluded that there was "no evidence" before it which linked the request for a differential to either the financial security of the judiciary or to the ability to attract outstanding candidates. Before us, neither of these criteria was the subject of significant emphasis. The analysis therefore turns on the identification of an objective criterion under paragraph (d) "any other objective criterion that the Commission considers relevant".

148. As noted earlier, the Drouin Commission had suggested that information regarding the workload of trial and appellate judges would help a future Commission undertake its analysis of the request. We agree with those judges who support a differential that such a comparison would be of limited utility and value and do not feel that it is necessary in order to properly deal with the request. Furthermore, we recognize the onerous work demands placed on all judges, whether appointed to trial courts or to courts of appeal. [131]

149. As discussed below, we do however believe that there is a substantive difference in the role and responsibilities of the judges who are appointed to appellate courts and that this difference constitutes a relevant objective criterion within the meaning of paragraph (d) of section 26 (1.1).

150. With the evolution in court structure described above came an evolution in the role and responsibilities of an appellate court and of the judges appointed to it. We can now identify two essential functions of a court of appeal:

1) Correcting injustices or errors made at first instance; and
2) Stating the law.

151. A court of appeal's primary function is the correction of injustices or errors made at first instance. The focus of this role is on the correction of errors of law. The standard of

[131] *Ibid*. at 8.

review on a question of law is that of correctness, with the consequence that, on a question of law, an appellate court is free to replace the opinion of the trial judge with its own.[132] Appellate courts rarely interfere with findings of fact and there are constraints on their power to do so.

152. This error-correcting role discharges the court's obligations with regard to the first of its client groups, the litigants before it. It also discharges part of the court's obligations towards a second client group, the general public, by upholding the principle of universality, which "requires appellate courts to ensure that the same legal rules are applied in similar situations":[133]

> It is fundamental to the due administration of justice that the authority of decisions be scrupulously respected by all courts upon which they are binding. Without this uniform and consistent adherence the administration of justice becomes disordered, the law becomes uncertain, and the confidence of the public in it undermined.[134]

Courts of appeal are therefore not only burdened with correcting injustices that relate to a particular case, but of correcting errors that arise from the incorrect application of the law by a court of first instance. Courts of appeal not only create the decisions which are binding on trial courts; they ensure that those decisions are consistently and correctly applied by the lower courts.

153. A second, intimately related function of a court of appeal is to state the law. As with the upholding of the principle of universality, this function requires the court to address its decisions beyond the particular litigants before it, to a broader audience that includes all potential future litigants as well as all courts which will be bound by the resulting decision. This responsibility imposes particular burdens on the reviewing court:

> The call for universality, and the law-setting role it imposes, makes a considerable demand on a reviewing court. It expects from that authority a measure of expertise about the art of just and practical rule-making, an expertise that is not so critical for the first court. Reviewing courts, in cases where the law requires settlement, make law for future cases, as well as for the case under review.[135]

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[132] *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at para. 8.
[133] *Ibid*. at para. 9.
[134] *Woods Manufacturing Co. v. The King*, [1951] S.C.R. 504 at 515, cited in *Housen v. Nikolaison, supra* note 132 at para. 9.
[135] *Woods Manufacturing Co. v. The King*, *ibid*. at 5, cited in *Housen v. Nikolaisen, ibid*. at para. 9.

In *Housen v. Nikolaisen*, having just cited the above passage with approval, the Supreme Court summarized the difference in functions in the following manner:

> Thus, while the primary role of trial courts is to resolve individual disputes based on the facts before them and settled law, the primary role of appellate courts is to delineate and refine legal rules and ensure their universal application. [136]

154. The impact of appellate work therefore extends far beyond the individual litigants in a particular case. Appeal decisions are binding not only on the parties, but on all future cases, unless the appeal decision is overturned at the Supreme Court. Appeal reasons must therefore be drafted in the awareness that they are unlikely to benefit from further review for error.

155. In addition to being binding law within the province, the decisions of provincial and territorial courts of appeal have considerable persuasive value in other Canadian jurisdictions. This expands the likely audience for decisions of courts of appeal and illustrates the breadth of impact of such decisions.

156. The advent of the Charter has affected the role of courts at all levels, but has imposed on appeal courts in particular an expanded role in the interpretation and development of the law. When one combines this function with the fact that very few decisions of provincial courts of appeal are appealed to the Supreme Court, it becomes clear that provincial courts of appeal play a central role in the settlement and development of the law.[137] This includes the role appellate courts play in hearing references on constitutional questions — questions which may be particularly complex and controversial. In fact, courts of appeal have been responsible for settling the law nation-wide in several key areas in the past two decades, including on the question of same-sex marriage and on language rights.

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[136] *Housen v. Nikolaisen, ibid.*

[137] For example, in Ontario, fewer than 3% of decisions are appealed to the Supreme Court of Canada; in Quebec, the number is as low as 1%. Online: <http://www.ontariocourts.on.ca/coa/en/> and <http://www.tribunaux.qc.ca/mjq_en/c-appel/index-ca.html>.

Institutions versus Individuals

157. It was submitted to us that, even if we were to recognize a distinct role for courts of appeal, that institutional role would not imply any distinction between the judges appointed to trial courts and appeal courts. The differences being underlined by those in favour of a differential all relate to the institution and should not impact questions of remuneration which must be evaluated on an individual basis. We are not persuaded that judges of courts of appeal can be so separated from the role they are expected to play and the various responsibilities they take on when they accept appellate appointment. While the roles and responsibilities are those associated with the institution, they must be carried out by the individual judges who accept appointment to it. We would underline that a similar argument could be raised regarding the Supreme Court of Canada, where the unique nature of the role of that institution has been asserted as a justification for the implementation of special retirement provisions for its individual judges.

158. In evaluating to what extent the role of the institution 'rubs off' on the individual judges appointed to it, it is also interesting to consider recent trends for appointment to the Supreme Court of Canada. The vast majority of judges appointed to the Supreme Court have come from courts of appeal across the country. In the case of the few judges who were not elevated from courts of appeal, the appointments came from private practice or from the public sector. At a minimum, this suggests that there is something in the work of appellate courts which prepares judges for the unique nature of service at the Supreme Court of Canada.

The Exercise of Appellate Functions by Trial Courts and Judges

159. Arguments were made before us relating to the fact that trial judges are from time to time called upon to exercise what can best be classified as appellate functions. For example, in some jurisdictions, trial judges sit on sentencing appeals. In Ontario, all Superior Court judges are also judges of the Ontario Divisional Court, which is an appellate court and is a branch of the Superior Court of Justice. The Divisional Court is the main forum for judicial review of government action in Ontario. It also hears

statutory appeals from administrative tribunals and civil appeals for claims not exceeding $50,000 as provided for under the *Courts of Justice Act*.[138]

160. We would however distinguish these examples of the exercise of appellate functions in several ways. The scope of the exercise of the appellate function, even in the case of the Divisional Court, is limited. The ceiling imposed on which civil appeals can be heard by the Divisional Court is reflective of the intention that larger cases will make their way directly to the Court of Appeal. Furthermore, the decisions of trial courts exercising appellate functions, and of the Divisional Court in Ontario, remain subject to appeal to the relevant court of appeal. These decisions are less likely to represent the 'final word' on important questions of general application.

161. It is the combination of the functions exercised and the relative importance of the cases in which those functions are exercised which justifies a differential. We would not for example equate the appellate work of provincial courts of appeal with that of the Supreme Court of Canada, even though partial functional analogies may be drawn. Similarly, while we recognize that trial judges do exercise appellate functions in certain circumstances, we do not consider that these appellate functions can be equated with those assumed on a regular basis by judges of provincial courts of appeal.

Practical Considerations

162. A number of what can be termed practical concerns were raised before us. While none in our estimation constitutes an obstacle to the implementation of a differential, all merit consideration and some may need to be addressed as part of the implementation process.

Ad hoc participation by trial judges on courts of appeal

163. Provincial legislation governing court structure in most Canadian jurisdictions provides Chief Justices of courts of appeal (and in some cases of trial courts) with

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[138] *Courts of Justice Act*, R.S.O. 1990, Chapter C.43, s.19. See also online: <http://www.ontariocourts.on.ca/scj/en/divct/index.htm>.

considerable flexibility with regard to staffing arrangements, within the limits permitted by the federal power of appointment. The fact that in several jurisdictions, judges of the trial court are *ex officio* judges of the court of appeal is a key aspect of this flexibility. Chief Justices of courts of appeal frequently have the ability to ask the Chief Justice of the trial court that a judge be provided to the court of appeal for the purpose of sitting on a particular panel.[139] This kind of *ad hoc* participation by trial judges provides flexibility in cases of illness, conflict or delayed appointment.[140] While this flexibility is required in order to ensure the smooth functioning of courts of appeal, its use in most jurisdictions is infrequent. In several jurisdictions, the creation of supernumerary positions has also provided courts of appeal with an alternate means of dealing with situations of conflict or illness and has accordingly reduced the reliance on the *ad hoc* participation of trial court judges in appeal hearings.

164. The Government suggested that, if we recognized that a differential was required in order to provide adequate remuneration, then our only option would be to recommend the abolition of the *ad hoc* arrangements, something which is clearly within provincial jurisdiction as a matter pertaining to the structure of the courts. If we concluded that a differential is required in principle, then the Government submitted that it would not be acceptable to have a trial judge sit on appeal without receiving the appellate differential during the corresponding period, even if the time spent sitting on appeal were very brief. It was also submitted that the enactment of a threshold for triggering a form of 'acting pay' for trial judges sitting on appeals would be problematic, because Chief Justices considering which judge to nominate for an appeal would then logically consider not only which judge was most suitable for the task at hand, but would also attempt to avoid suggesting judges who had already sat enough days on appeals to quality for the salary differential.

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[139] See *e.g.*, Ontario's *Courts of Justice Act*, R.S.O. 1990, Chapter C.43, ss.4(1).

[140] Pursuant to Quebec's *Courts of Justice Act,* the Chief Justice of the Court of Appeal can certify to the Governor General his opinion that the administration of justice would be promoted by the appointment to the Court of Appeal of an assistant judge from among the judges of the Superior Court during the absence of a judge of a court of appeal, where it appears probable that such absence will continue for a term or more. Note how this more formal, longer-term arrangement requires contact with the Governor General. *Courts of Justice Act*, R.S.Q. c. T-16, s.12.

165. We do not agree that the options are limited in these ways. This is not the first time that the Government has had to contemplate the practical implications of the implementation of a differential. The differential in favour of Chief Justices poses similar challenges. Most provincial legislation governing court structure includes provision for the temporary replacement of the Chief Justice if she or he is unable to act for reason of illness, etc. The question of whether and when to award the corresponding differential to the individual who replaces a Chief Justice provides a useful analogy. The *Judges Act* does not provide for any adjustment of salary for an acting Chief Justice but does provide that the individual will receive the representational allowance assigned to the Chief Justice. The salary of an acting Chief Justice remains that of a *puisne* judge, despite the temporary assumption of the role and responsibilities of the head of a court. In keeping with this legislative decision, we are of the view that the concept of 'acting pay' should also be rejected for those trial judges who serve as *ad hoc* judges of the court of appeal.

Courts of mixed composition

166. Our attention was drawn to the composition of certain Canadian courts, in particular the courts of appeal of the territories and the Court Martial Appeal Court. In the case of the territorial courts, although these courts are permanent courts of appeal and perform functions analogous to the provincial courts of appeal, the unique confluence of remote locations and the much smaller populations that these courts serve has necessitated more flexibility of composition. Appointments to the territorial courts of appeal are made from among the judges of the supreme courts of the territories and from the judges of the courts of appeal of various provinces. The Court Martial Appeal Court presents a similar challenge: its membership is made up of "designated judges" from among the judges of the Federal Court of Appeal, Federal Court and from superior courts of criminal jurisdiction. An appeal could therefore be heard by a judge of the Federal Court of Appeal alongside a judge of the Federal Court and a judge of the Quebec Superior Court. It could be said of these courts that *ad hoc* sittings by trial judges on appeals are a permanent feature of the way they function. We would however distinguish between appointment to a court of appeal on what is effectively a part-time basis, as

occurs in the above examples, and full-time appointment to a provincial court of appeal. In both of the above examples, the salaries of the judges sitting on territorial appeal courts and on the Court Martial Appeal Court (including that of its Chief Justice) are determined with reference to their primary appointments; this should continue to be the case following the implementation of a differential in favour of full-time appellate judges. Should the nature of appointments to any of these courts change in the future, so that appointment to either a territorial court of appeal or to the Court Martial Appeal Court could be said to be a judge's primary appointment, it would be necessary for the scope of application of the salary differential in favour of appellate judges to be adjusted accordingly.

The Cultural Impact of a Salary Differential

167. A large number of trial judges have expressed the concern that the implementation of a salary differential between trial judges and appellate judges would be divisive. Even before a differential was seriously considered, the Scott Commission had warned that "the cultural impact on the system" of the introduction of a differential would have to be very carefully weighed.[141] We are alive to this concern and wish to underline that in recommending the adoption of a differential we do not in any way wish to undermine or diminish the value of the important work undertaken by trial judges across the country. We agree with the analogy offered with the awarding of a differential to judges of the Supreme Court of Canada: just as that differential should not be taken to diminish the value of the work done by judges on courts of appeal, this differential must not be taken to diminish the contribution of the judges of our trial courts.

168. Although we gave careful consideration to the objections raised by judges of trial courts across the country, we have concluded that the implementation of a differential is required in order to ensure adequate remuneration for judges of both levels of court, according to their respective roles and responsibilities, as they have evolved over time.

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[141] Scott Report, *supra* note 36 at 30.

169. The strong trend towards the separation of trial courts and courts of appeal has had the impact we have described above on the related functions assigned to judges of each level of court. In some jurisdictions, this is reflected in the express distinction made between trial judges and appeal judges in terms of rank and precedence, further confirmation of the effect the growing institutional and functional separation has had on the individual judges appointed to each court.[142]

170. While judges at all levels may have differing views about the merits of a system that promotes distinctions between trial and appellate courts and judges, we felt obliged, according to the terms of our mandate, to recognize that such distinctions now firmly exist and that they warrant recognition within the context of judicial remuneration.

Recommendation Concerning Salary Differential in Favour of Appellate Judges

171. As discussed above, those judges who support a salary differential propose a differential equal to 6.7% of the salary paid to trial court judges. This amount was proposed on the basis that it constitutes roughly one third of the difference between the current salary of a *puisne* judge and that of the judges of the Supreme Court of Canada. The Government opposes the payment of any salary differential, and the Association and Council maintain a position of neutrality on the matter. Because the submissions of the Government and of the Association and Council did not include a detailed discussion of the question of quantum, we invited the parties to provide additional comments on this issue, particularly in relation to the proposal of a 6.7 % differential. The Government's response to this request focussed on the impact that such a differential would have on existing differentials (a question we deal with separately below) but did not provide assistance in terms of how an adequate differential might be calculated. In the absence of a full discussion by the parties regarding the appropriate differential to ensure an adequate salary for judges appointed to courts of appeal, we have attempted to strike an appropriate balance by recognizing the role and responsibility of judges appointed to

[142] See *e.g.*, Nova Scotia's *Judicature Act*, R.S.N.S. 1989,c. 240, s.22; see also British Columbia's *Court of Appeal Act*, R.S.B.C. 1996, c.77, ss.4(3), which provides that "the justices of the Court of Appeal have rank and precedence, after the Chief Justice of the British Columbia, the Chief Justice of the Supreme Court and the Associate Chief Justice of the Supreme Court, over all other judges of the courts of British Columbia and have rank and precedence among themselves according to the seniority of their appointment."

courts of appeal without diminishing the value and importance of work of judges appointed to trial courts. We therefore recommend that the differential for *puisne* judges appointed to courts of appeal should be an amount equal to 3 % of the salary paid to *puisne* judges of trial courts, an amount which we believe will ensure the adequacy of the remuneration of judges serving on both courts.

Recommendation 3

The Commission recommends that:

> **A salary differential should be paid to *puisne* judges appointed to provincial courts of appeal and to the Federal Court of Appeal, and that the salary of *puisne* judges appointed to these courts should be set at $272,200 effective April 1, 2008, inclusive of statutory indexing effective that date.**

4) Salary Levels of Other Judges

172. The Association and Council propose that "the salary differentials between *puisne* judges, chief justices and associate chief justices, justices of the Supreme Court of Canada, and the Chief Justice of Canada be maintained in the same proportion as currently exists".[143]

173. The Government does not take issue with this proposal.

174. For many years a relatively constant differential has been maintained between the salaries of *puisne* judges and chief justices, associate chief justices and justices of the Supreme Court of Canada. We agree that there should be a differential. It is our view that the additional responsibilities of these judges, which in the case of associate chief justices and chief justices include administrative responsibilities, are objective criteria that are relevant to our inquiry into the adequacy of judicial salaries, in accordance with

[143] A&C Submission, *supra* note 47 at para. 148.

section 26(1.1)(d) of the *Judges Act*. To ensure the continuing adequacy of these salaries, we believe that the differentials should be maintained in the same proportion as in the past. However, further to our recommendation that a salary differential should be paid to *puisne* judges of courts of appeal, it is necessary to determine on which salaries these other differentials should now be based.

175. The salary of associate chief justices and chief justices of trial courts should continue to be established in relation to the salary of *puisne* judges appointed to those courts. In the case of associate chief justices and chief justices of courts of appeal, the salary should now be established in relation to the salary of *puisne* judges appointed to those courts.

176. With regard to the Supreme Court of Canada, it is our view, as expressed above, that this court occupies a unique position within the Canadian judicial system. We strongly believe that in order for compensation for members of this Court to remain adequate, it should be established in relation to the appeal courts. Therefore, the salary of the Justices of the Supreme Court of Canada and the Chief Justice of Canada should be established in relation to the salaries of *puisne* judges of the courts of appeal.

Recommendation 4

The Commission recommends that:

> **Salary differentials should continue to be paid to the Chief Justice of Canada, the justices of the Supreme Court of Canada, the chief justices and associate chief justices of the trial courts and courts of appeal;**
>
> **The salary differential for the chief justices and associate chief justices of the trial courts should be established in relation to the salary of the *puisne* judges appointed to the trial courts;**
>
> **The salary differential for the chief justices and associate chief justices of the courts of appeal should be established in relation to the salary of the *puisne* judges appointed to the courts of appeal;**
>
> **The salary differential of the Chief Justice of Canada and the justices of the Supreme Court of Canada should be established in relation to the salaries of *puisne* judges appointed to the courts of appeal; and**

The salaries should be set as of April 1, 2008 inclusive of statutory indexing, at the following levels:

Supreme Court of Canada

Chief Justice of Canada	**$349,800**
Justices	**$323,800**

Federal Court of Appeal and Courts of Appeal

Chief Justices	**$298,300**
Associate Chief Justices	**$298,300**

Federal Court, Tax Court and Trial Courts

Chief Justices	**$289,700**
Associate Chief Justices	**$289,700**

CHAPTER III

JUDICIAL ANNUITIES

Annuity for Senior Judges of the Territorial Courts

177. Section 43(1) of the *Judges Act* allows a chief justice to relinquish the office of chief justice and elect supernumerary status. A former chief justice then holds the office of a supernumerary judge and is paid as a *puisne* judge, but on retirement receives an annuity based on the salary of a chief justice. Similarly, section 43(2) of the *Judges Act* allows a chief justice who is not yet entitled to elect supernumerary status to elect to cease to perform his or her duties and to perform only the duties of a *puisne* judge and receive the salary of a *puisne* judge. Again, the retirement annuity of the former chief justice is based on the salary of a chief justice.

178. The senior judges of the territorial courts are not included in sections 43(1) and (2) of the *Judges Act*. The Association and Council are proposing that the senior judges should be included in these sections since they receive the same salary as chief justices and are "in every other respect the same as the chief justices or associate chief justices of the provincial superior courts".[144] The Association and Council have also informed us that the Yukon and the Northwest Territories have created the position of supernumerary judge.[145]

179. The Government acknowledges that "Senior Judges of the territorial superior trial courts should enjoy the benefits conferred in sections 42(1) and 43(2) of the *Judges Act* that currently benefit only chief justices and associate chief justices"[146] but does not support the proposal for the following reasons:

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[144] A&C Submission, *supra* note 52 at para. 155.
[145] Presentation of the Association & Council, Transcript of the March 3, 2008 Quadrennial Commission Public Hearing at 86-87.
[146] Government Reply Submissions, *supra* note 91 at para. 63.

> However, subsections 43(1) and (2) are contingent on not just Federal but also Territorial Government support and legislative action. Currently, the Senior Judge is defined as the judge with the greatest seniority on the Court. Therefore, it is not legally possible for the judge to "step-down" and allow the next junior judge in line to assume those functions. There are also consultations required to ensure that the territories have taken the necessary legislative steps to ensure that there is a position, whether a vacancy or additional office into which the Senior Judge can be appointed.[147]

180. We agree that senior judges should receive the same treatment with regard to their retirement annuities as chief justices. This is required in order to ensure the adequacy of the benefits provided to senior judges by maintaining their equivalency with the benefits provided to chief justices. Since the relevant territorial legislation now provides for supernumerary status, there is no obstacle to amending the *Judges Act* in order to allow for a senior judge who elects supernumerary status to nevertheless receive an annuity based on his or her salary as senior judge. We recognize however that a senior judge wishing to step down from that position but who is not yet eligible to elect supernumerary status is not currently able to do so under relevant territorial legislation. Amendments would be required in each territory to modify the definition of senior judge so that the position was not automatically assigned to the judge with the greatest seniority and to ensure that an additional office of *puisne* judge was 'set aside' for any senior judge wishing to resume the position of *puisne* judge. If such amendments were made by any of the territories, in order to ensure the continuing adequacy of the benefits provided to senior judges, it would be important for the federal government to then amend the *Judges Act* to ensure that the annuity of a former senior judge who elected to continue serving as a *puisne* judge was calculated based on his or her salary as senior judge.

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[147] *Ibid*. at para. 65.

Recommendation 5

The Commission recommends that:

> **The *Judges Act* be amended so that senior judges of the territorial courts who elect supernumerary status receive the same treatment with regard to their retirement annuities as do chief justices who elect supernumerary status.**

Recommendation 6

The Commission recommends that:

> **Should measures be taken by the territorial governments to allow a senior judge, not yet entitled to elect supernumerary status, to elect to cease to perform his or her duties as a senior judge and to perform only the duties of a *puisne* judge and receive the salary of a *puisne* judge, that the *Judges Act* be amended so that the retirement annuity of a former senior judge is based on the salary of a senior judge.**

Annuity for Trial Judges who Previously Served on Courts of Appeal

181. During oral submissions, it was suggested to us that we should consider the impact that the implementation of a salary differential in favour of appellate judges would have on judges of courts of appeal who might decide, at some point in their judicial careers, to leave a court of appeal in order to accept appointment to a trial court.[148] In our view, this situation can be helpfully compared to that of a chief justice who elects to step down from that office in order to resume duties as a *puisne* judge. While that judge ceases to receive the differential accorded to chief justices upon assuming the duties of a *puisne* judge, his or her annuity upon retirement will nevertheless be calculated on the basis of the salary of a chief justice. In our view, the current flexibility which allows a judge of a court of appeal to accept an appointment to a trial court should be supported,

[148] Submission of Justice James K. Hugessen, January 9, 2008 at para. 8.

and we recommend that the *Judges Act* be amended in order to ensure that in such circumstances, a judge's annuity will nevertheless be determined on the basis of the salary she or he received as a judge of a court of appeal.

Recommendation 7

The Commission recommends that:

> **The *Judges Act* be amended so that a judge appointed to a court of appeal who subsequently accepts appointment to a trial court, and receives the salary of a trial court judge, receives a retirement annuity based on the salary of his or her former position as a judge of a court of appeal.**

CHAPTER IV

ALLOWANCES

Relocation Allowance upon Retirement

182. The *Judges Act* provides for the payment of a retirement removal allowance to judges of the Supreme Court, the Federal Courts, the Tax Court and the territorial courts. The Association and Council propose that this allowance be extended to judges of the provincial superior courts and courts of appeal, since:

> …statutes such as the *Court of Appeal Act* and *Court of Queen's Bench Act* in Alberta, the *Queen's Bench Act* in Saskatchewan, the *Court of Queen's Bench Act* in Manitoba, the *Courts of Justice Act* in Quebec, the *Judicature Act* in New Brunswick, and the *Judicature Act* in Nova Scotia all contain residency requirements for superior court judges in those jurisdictions.[149]

183. We were provided with no evidence that the provision of a retirement removal allowance to judges of the provincial superior courts and courts of appeal is necessary for the financial security of the judiciary in ensuring judicial independence or for the attraction of outstanding candidates to the judiciary. Nor was the submission made that the provision of such an allowance was necessary on the basis of any other objective criterion under section 26(1.1)(d). Consequently, we do not support the removal allowance being extended to judges of the provincial superior courts and courts of appeal. We agree with the position of the Government:

> The Removal Allowance provisions for judges of the federally constituted courts reflect the fact that these are national courts whose judges are required to reside in the National Capital Region. The specific removal allowance reflects a desire to ensure that judges are attracted from all regions of the country to these national courts by minimizing the personal cost of such a decision. Similarly, the allowance recognizes that the pool of qualified candidates for the territorial superior courts is made up of lawyers from across Canada who are likely to need to relocate from their community to take up office. The Removal Allowance in effect removes what might otherwise be a financial disincentive for qualified candidates considering an appointment to these courts.[150]

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[149] A&C Submission, *supra* note 47 at para. 152.
[150] Government Reply Submissions, *supra* note 85 at para. 61.

Recommendation 8

The Commission recommends that:

> **A retirement removal allowance should not be paid to judges of the provincial superior courts and courts of appeal.**

Representational Allowance

184. Section 27(6) of the *Judges Act* provides that the judges listed in that section are

> …entitled to be paid, as a representational allowance, reasonable travel and other expenses actually incurred by the judge or the spouse or common-law partner of the judge in discharging the special extra-judicial obligations and responsibilities that devolve on the judge…

185. The allowances were last increased effective April 1, 2000. The Association and Council are of the view that the allowances are no longer adequate and are asking that they be increased by approximately 20%. In addition, the Association and Council are requesting that the representational allowance for Ontario regional senior judges be extended to the senior family law judge.

186. The Government "does not accept that these increases are necessary to ensure adequacy of judicial compensation".[151] However, the Government raises no issue with regard to providing the senior family law judge with a representational allowance.

187. The following chart provides the history of the amounts paid as representational allowances.

[151] *Ibid.* at para. 67.

Representational Allowances - History[152]

	1979 $	1985 $	2000 $	2004 $
Chief Justice – Supreme Court of Canada	5,000	10,000	18,750	
Justices – Supreme Court of Canada	2,500	5,000	10,000	
Chief Justice – Federal Court of Appeal and Chief Justice of a province	3,500	7,000	12,500	
Other Chief or Associate Chief Justices	2,500	5,000	10,000	
Regional Senior Judges in Ontario				5,000

188. The usage rate of the allowances is high, as can be seen from the following chart:

Representational Allowances – Usage [153]

Fiscal Year	% of Judges Who Spent 95% or More of Annual Allocation	% of Judges Who Spent Full Annual Allocation	% of Annual Allocations Spent by All CJs & ACJs
1995-96	62	41	89
1996-97	71	41	84
1997-98	71	42	87
1998-99	59	34	84
1999-00	76	56	86
2000-01	7	2	57
2001-02	41	24	79
2002-03	40	33	85
2003-04	57	40	87
2004-05	60	44	89
2005-06	63	47	88

[152] Information provided by the Office of the Commissioner for Federal Judicial Affairs.
[153] *Ibid*. This chart does not include the justices of the Supreme Court of Canada.

189. There has been no increase in the representational allowances since April 1, 2000. The rise in the Consumer Price Index for the eight-year period between March 2000 and March 2008, using the most current information available, is 18.8 %. Many judges already use the maximum amount available. Therefore, we find that a 20 % increase in the allowances is reasonable when compared to the 100 % increase in the allowances in the six years between 1979 and 1985 and to the near doubling of the allowances in the 15 years between 1985 and 2000.

190. Further to section 26.(1) of the *Judges Act* which states that the Commission shall inquire into "the adequacy of the salaries and other amounts payable under this Act and into the adequacy of judges' benefits generally", we support an increase in the representational allowances to ensure their adequacy.

Recommendation 9

The Commission recommends that:

> **Effective April 1, 2008, representational allowances be increased to $22,500 for the Chief Justice of Canada, $15,000 for the Chief Justice of the Federal Court of Appeal and the chief justices of the provinces, $12,000 for justices of the Supreme Court of Canada, $12,000 for other chief justices and associate chief justices and senior judges, and $6,000 for Ontario regional senior judges.**

Recommendation 10

The Commission recommends that:

> **The senior family law judge in Ontario be paid the same representational allowance as the other regional senior judges in the province.**

CHAPTER V

COSTS FOR THE JUDICIARY TO PARTICIPATE IN THE COMMISSION'S INQUIRY

191. Section 26.3 of the *Judges Act* provides that identified representatives of the judiciary participating in an inquiry of the Commission are entitled to be paid two-thirds of their costs on a solicitor-client basis, as assessed by the Federal Court.

192. The Association and Council urge the Commission to make the following recommendation:

> That the Government should reimburse 100 % of the disbursements and two-thirds of the legal fees of the judiciary.
>
> Alternatively,
>
> That by way of exception to the formula set out in s. 26.3(2) of the *Judges Act*, the fees and expenses of Navigant Consulting, Inc. in connection with the survey of Canadian private-sector lawyers' income be reimbursed in full to the Association.[154]

193. The Association and Council note that the Drouin Commission recommended that the Government pay 80 % of the total representational costs of the Association, but that the Government amended the *Judges Act* to provide for payment of only 50 % of judicial representational costs. The Association and Council further note that the McLennan Commission recommended that the Government pay 100 % of the disbursements and two-thirds of the legal fees incurred by the judiciary. The McLennan Commission reasoned that "[w]e do not believe that the participation of the judiciary should become a financial burden on individual judges".[155] The Government subsequently amended the *Judges Act* to read as it does today.

194. The Government is of the view that "full reimbursement of disbursements would remove a necessary incentive for the judiciary to be prudent in relation to [the] incurring

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[154] A&C Submission, *supra* note 47 at para. 194.
[155] McLennan Report, *supra* note 22 at 88.

of significant expenses for expert witnesses and other disbursements".[156] With regard to the reimbursement of the full cost of the Navigant Survey, the Government reiterates its view that the results of the survey are unreliable and asserts that:

> [T]he Survey was undertaken without consultation with the Government and indeed rejecting the Government's request to contribute to the survey design based on Government officials' earlier experience.[157]

195. The Government, therefore, is of the view that it would not be reasonable for the Commission to recommend the reimbursement of the full cost of the survey.

196. We believe that it is within our jurisdiction to make a recommendation on this matter, since section 26.(1) of the *Judges Act* states that the Commission shall inquire into "the adequacy of the salaries and other amounts payable under this Act and into the adequacy of judges' benefits generally". Since there are no limitations placed on the judiciary with regard to the work it undertakes to prepare submissions for the Commission, we find that reimbursement of two-thirds of the costs is adequate. We believe that the payment of full costs is not essential to the financial security of the judiciary in ensuring judicial independence or to the attraction of outstanding candidates to the judiciary. In our view, this matter could best be dealt with by the Association and Council and the Government working together cooperatively to design, conduct and fund surveys they consider would be of assistance to the Commission. If such studies were done jointly, the Government could fund the entire cost, as appropriate.

Recommendation 11

The Commission recommends that:

> **The provisions in the *Judges Act* relating to the reimbursement of the judiciary's costs for participating in the Quadrennial Commission process remain unchanged.**

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[156] Government Reply Submissions, *supra* note 85 at para. 70.
[157] *Ibid*. at para. 71.

CHAPTER VI

ENHANCING THE EFFICIENCY OF THE COMMISSION PROCESS

197. As indicated earlier, we wish to offer several comments on what could broadly be termed 'process issues', in the sense that they relate to the efficient functioning of the Commission. In doing so, we are mindful of the fact that "[e]ach commission must make its assessment in its own context".[158] The following observations are offered in the spirit of sharing lessons learned with the parties and with future Commissions.

198. Although each new Commission does far more than merely "update" the work of the previous Commission, [159] given the tight timelines in which the Commission operates, and given the fact that each Commission operates knowing that the next Commission will be constituted four years hence, an attempt should be made to avoid 're-inventing the wheel' with every term. This is relevant both to questions of process and to the merits of the Commission's inquiry.

Compensation Expertise

199. This Commission benefited tremendously from the fact that one of the Commissioners had extensive experience in the area of compensation, in this case within the public sector. While the specific area of judicial compensation is *sui generis* and accordingly poses unique challenges, having a 'resident compensation expert' has nevertheless been invaluable. This area of expertise is sufficiently central to the work of the Commission that it may be appropriate for the parties to consider compensation expertise in making their nominations to future Commissions. And, while it may not be reasonable to expect that the Commission will always have such expertise in its midst, it may be appropriate for future Commissions to consider early on in their term whether it is

[158] Bodner, *supra* note 20 at para. 15.
[159] *Ibid,* at para. 14.

an area with which they would like outside expert assistance as provided for under section 26.2 of the *Judges Act*.

Recommendation 12

The Commission recommends that:

> **Should a future Commission not include a member with experience in the area of compensation, the Commission strongly consider engaging external expert assistance in this area.**

Continuity in Staffing Arrangements

200. We have greatly benefited from continuity in the staffing of the Quadrennial Commission. Jeanne Ruest, who joined the Commission as Executive Director during the McLennan Commission, graciously agreed to serve in the same capacity for the current Commission. The fact that the individual at the helm of the Commission brought prior institutional knowledge to the role ensured the smooth running of the various aspects of the Commission process, from the issuing of the original public notice to the finalizing of this report. While such continuity will not always be possible, where a change of staff occurs, it is crucial that the Commission be able to rely on 'already in place' processes to allow for the smooth transfer of institutional knowledge between departing and incoming Commission staff.

Recommendation 13

The Commission recommends that:

> **While continuity of Commission staffing cannot always be ensured, processes be established to allow for the efficient transfer of institutional knowledge between departing and incoming Commission staff.**

Consensus around Particular Issues

201. A review of the reports of the various Triennial Commissions and of the Drouin and McLennan Commissions shows that there has been considerable variety in the nature of the questions raised before Commissions. Some issues however, have been raised repeatedly. Where consensus has emerged around a particular issue during a previous Commission inquiry, such as the relevance of the DM-3 as a comparator, "in the absence of demonstrated change", we suggest that such a consensus be recognized by subsequent Commissions and arguably reflected in the approach taken to the question in the submissions of the parties.

Recommendation 14

The Commission recommends that:

> **Where consensus has emerged around a particular issue during a previous Commission inquiry, in the absence of demonstrated change, such consensus be taken into account by the Commission and reflected in the submissions of the parties.**

Documentation Submitted by the Parties

202. Efficiencies can be introduced in other areas as well. For example, we are not persuaded that the documentation prepared by the parties needs to be as voluminous as that produced before this Commission. For example, it would be helpful if the parties would consider producing a joint statement of facts for future Commissions. In the final analysis, for a variety of reasons, some of the data produced by the parties was of limited assistance to the Commission. We realize that the parties were to some extent responding to requests for additional information voiced by previous Commissions.[160] In the future, if there is to be a data set similar to the one produced in this instance relating to the incomes of lawyers in the private sector, in order to be truly helpful to the Commission in the time allotted, the data set should be produced cooperatively.

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[160] Drouin Report, *supra* note 17 at 116-117; McLennan Report, *supra* note 22 at 91-93.

Recommendation 15

The Commission recommends that:

> **The parties consider ways of streamlining the materials produced for future Commissions and, where production of a data set and accompanying analysis is warranted, that such work be undertaken cooperatively.**

Cooperative Working Relationships

203. This brings us to our last observation, which is that the relationship between the Association and Council and the Government must be one of cooperation. An adversarial relationship is counter-productive and is not appropriate given the nature of the Commission process. In order to yield the best results, there is no question that the Commission process relies on the good faith effort of both principal parties to approach the process in a spirit of cooperation, so that all involved can be said to truly serve the public interest. We recognize that counsel to the principal parties have, to a large extent, approached this work in that spirit. We encourage them to continue to improve this cooperation which is vital to this important process.

204. We thank all counsel and those who made submissions to the Commission for their assistance and their courtesy.

CHAPTER VII

CONCLUSION

205. As we indicated at the outset, the primary responsibility of each Commission is to conduct an inquiry into the adequacy of judicial compensation and benefits and to submit a report containing recommendations on these questions to the Minister of Justice within nine months of the commencement of the Commission's inquiry. The Commission's term extends well beyond that initial deadline however, and does not expire until the end of August, 2011. During the remainder of our term, we remain available should the Minister of Justice decide to exercise his power under section 26(4) of the *Judges Act* to make a reference to us on any of the issues contained in this report or on any other issues relating to the adequacy of judicial compensation and benefits.

206. With the assistance of the parties and of all those who participated in the Commission process, we have conducted what we believe to have been an open and thorough inquiry into the above issues and have made every effort to ensure that this is reflected in the resulting report. We look forward to receiving the Minister of Justice's response to our report in the coming months.

_____

Sheila Block
Chair

_____ _____

Paul Tellier, P.C., C.C., Q.C.
Commissioner

Wayne McCutcheon
Commissioner

LIST OF RECOMMENDATIONS

Recommendation 1

The Commission recommends that:

The salary of *puisne* judges should be set at $264,300 effective April 1, 2008, inclusive of statutory indexing effective that date; and

The salary of *puisne* judges should be increased by statutory indexing effective April 1, 2009, 2010 and 2011 plus an additional 2% effective each of those dates, not compounded (*i.e.*, the previous year's salary should be multiplied by the sum of the statutory indexing and 2%).

Recommendation 2

The Commission recommends that:

Interest should not be paid on retroactive salary adjustments to federally-appointed judges.

Recommendation 3

The Commission recommends that:

A salary differential should be paid to *puisne* judges appointed to provincial courts of appeal and to the Federal Court of Appeal, and that the salary of *puisne* judges appointed to these courts should be set at $272,200 effective April 1, 2008, inclusive of statutory indexing effective that date.

Recommendation 4

The Commission recommends that:

Salary differentials should continue to be paid to Chief Justice of Canada, the Justices of the Supreme Court of Canada, the chief justices and associate chief justices of the trial courts and courts of appeal;

The salary differential for the chief justices and associate chief justices of the trial courts should be established in relation to the salary of the *puisne* judges appointed to the trial courts;

The salary differential for the chief justices and associate chief justices of the courts of appeal should be established in relation to the salary of the *puisne* judges appointed to the courts of appeal;

The salary differentials of the Chief Justice of Canada and the Justices of the Supreme Court of Canada and the should be established in relation to the salaries of *puisne* judges appointed to the courts of appeal; and

The salaries should be set as of April 1, 2008 inclusive of statutory indexing, at the following levels:

Supreme Court of Canada

Chief Justice of Canada	$349,800
Justices	$323,800

Federal Court of Appeal and Courts of Appeal

Chief Justices	$298,300
Associate Chief Justices	$298,300

Federal Court, Tax Court and Trial Courts

Chief Justices	$289,700
Associate Chief Justices	$289,700

Recommendation 5

The Commission recommends that:

The *Judges Act* be amended so that senior judges of the territorial courts who elect supernumerary status receive the same treatment with regard to their retirement annuities as do chief justices who elect supernumerary status.

Recommendation 6

The Commission recommends that:

Should measures be taken by the territorial governments to allow a senior judge, not yet entitled to elect supernumerary status, to elect to cease to perform his or her duties as a senior judge and to perform only the duties of a *puisne* judge and receive the salary of a *puisne* judge, that the *Judges Act* be amended so that the retirement annuity of a former senior judge is based on the salary of a senior judge.

Recommendation 7

The Commission recommends that:

The *Judges Act* be amended so that a judge appointed to a court of appeal who subsequently accepts appointment to a trial court, and receives the salary of a trial court judge, receives a retirement annuity based on the salary of his or her former position as a judge of a court of appeal.

Recommendation 8

The Commission recommends that:

A retirement removal allowance should not be paid to judges of the provincial superior courts and courts of appeal.

Recommendation 9

The Commission recommends that:

Effective April 1, 2008, representational allowances be increased to $22,500 for the Chief Justice of Canada, $15,000 for the Chief Justice of the Federal Court of Appeal and the chief justices of the provinces, $12,000 for *puisne* judges of the Supreme Court of Canada, $12,000 for other chief justices and associate chief justices and senior judges, and $6,000 for Ontario regional senior judges.

Recommendation 10

The Commission recommends that:

The senior family law judge in Ontario be paid the same representational allowance as the other regional senior judges in the province.

Recommendation 11

The Commission recommends that:

The provisions in the *Judges Act* relating to the reimbursement of the judiciary's costs for participating in the Quadrennial Commission process remain unchanged.

Recommendation 12

The Commission recommends that:

Should a future Commission not include a member with experience in the area of compensation, the Commission strongly consider engaging external expert assistance in this area.

Recommendation 13

The Commission recommends that:

While continuity of Commission staffing cannot always be ensured, processes be established to allow for the efficient transfer of institutional knowledge between departing and incoming Commission staff.

Recommendation 14

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Where consensus has emerged around a particular issue during a previous Commission inquiry, in the absence of demonstrated change, such Consensus be taken into account by the Commission and reflected in the submissions of the parties.

Recommendation 15

The Commission recommends that:

The parties consider ways of streamlining the materials produced for future Commissions and, where production of a data set and accompanying analysis is warranted, that such work be undertaken cooperatively.

Appendix A

JUDICIAL COMPENSATION AND BENEFITS COMMISSION APPOINTMENTS

OTTAWA, October 12, 2007 - Minister of Justice and Attorney General of Canada, the Honourable Rob Nicholson, P.C., Q.C., M.P. for Niagara Falls, today announced the appointments of Sheila R. Block, Paul M. Tellier, P.C., C.C., Q.C., and Wayne McCutcheon to the Judicial Compensation and Benefits Commission. All appointments are effective until August 31, 2011.

Sheila R. Block of Toronto is appointed Chairperson.

Ms. Block graduated in law from the University of Ottawa and was admitted to the Ontario Bar in 1974.

Ms. Block is currently a partner at the law firm of Torys and is chair of Torys' Toronto litigation practice. She has appeared as counsel at all levels of court in Ontario; before the Federal Court and the Supreme Court of Canada; and before arbitration and other tribunals.

Paul M. Tellier, P.C., C.C., Q.C., of Montreal is appointed a member as recommended by the judiciary.

Mr. Tellier graduated from the universities of Ottawa and Oxford, England and was admitted to the Quebec Bar in 1963.

Mr. Tellier is a Director of several companies, is Strategic Advisor to Société Générale, a global bank, and is co-chair of the Prime Minister's Advisory Committee on the Public Service. He has served as the Clerk of the Privy Council, President and Chief Executive Officer of the Canadian National Railway Company and of Bombardier Inc.

Wayne McCutcheon of Ottawa is appointed a member as recommended by the Minister of Justice of Canada.

Mr. McCutcheon obtained his B.A., B. Ed. and M.A. from the University of Saskatchewan.

Mr. McCutcheon worked as a public servant for 32 years in various positions at the National Archives and National Library, the Treasury Board Secretariat, and the Privy Council Office. At the time of his retirement from the public service in 2005, he was serving as Deputy Secretary to the Cabinet, Senior Personnel and Special Projects at the Privy Council Office.

Sheila Block

Ms. Block is currently a partner at the law firm of Torys, where she is a senior trial and appellate counsel with a broad civil litigation practice and is the chair of Torys' Toronto litigation practice. She has appeared as counsel at all levels of court in Ontario, before the Federal Court and the Supreme Court of Canada, and before arbitration and other tribunals. Ms. Block is a former chair of Torys' Executive Committee.

Ms. Block's recognitions include the 2008 Advocates' Society Medal, the 2006 Law Society Medal awarded by the Law Society of Upper Canada and the 2006 Award for Excellence in Civil Litigation from the Ontario Bar Association.

Ms. Block has spoken and written extensively on advocacy and civil litigation. She has also taught advocacy for the National Institute for Trial Advocacy in Canada, the United States, England, Scotland, New Zealand and El Salvador, as well as for the UN War Crimes Tribunal in Rwanda and the Special Court in Sierra Leone. Ms. Block has taught an intensive advocacy course at the University of Toronto Law School and has taught in the LL.M program in litigation offered by the Osgoode Hall Law School.

Ms. Block holds directorships in the Harold G. Fox Education Fund, the Children's Aid Foundation, and the Touching Tiny Lives Foundation. She is a former director of the Canadian Civil Liberties Association and The Trillium Foundation.

Ms. Block graduated in law from the University of Ottawa and was admitted to the Ontario Bar in 1974.

Wayne McCutcheon

Mr. McCutcheon was Deputy Secretary to the Cabinet, Senior Personnel and Special Projects, Privy Council Office – a leadership position in human resources management for the Public Service of Canada, with particular responsibilities for human resource management policies and services for Governor in Council appointees. These appointees include deputy ministers, chief executive officers and directors of Crown corporations, and heads and members of agencies, boards and commissions.

Mr. McCutcheon joined the Public Service in 1973 as an Administrative Trainee with the Public Service Commission and pursued a career in human resources management. He spent the early part of his career with the National Archives and National Library, leaving in 1986 as Assistant Director of Human Resources to accept a position in the Personnel Policy Branch of the Treasury Board Secretariat. He joined the Privy Council Office in 1991 as a Senior Compensation and Classification Advisor with what was then the Senior Personnel Secretariat. Within this Secretariat, he subsequently served as Assistant Director of Appointments, Recruitment and Succession Planning, Director of Appointments and Compensation, Director General of Senior Personnel, Assistant Secretary to the Cabinet and Deputy Secretary to the Cabinet.

Mr. McCutcheon obtained his B.A., B. Ed. and M.A. from the University of Saskatchewan.

Paul Tellier, P.C., C.C., Q.C.

Paul M. Tellier was President and Chief Executive Officer and Director of Bombardier Inc. in 2003 and 2004. Prior to this, Mr. Tellier was President and Chief Executive Officer and a Director of the Canadian National Railway Company (CN), a position he held for 10 years.

From August 1985 until he took up his post at CN in 1992, Mr. Tellier was Clerk of the Privy Council and Secretary to the Cabinet of the Government of Canada, the top public servant in the country. In addition to that position, Mr. Tellier also served in many positions in the public sector, including as Deputy Minister of Indian Affairs and Northern Development in 1979 and as Deputy Minister of Energy, Mines and Resources in 1982.

He is a graduate of the universities of Ottawa and Oxford, England, and was admitted to the Québec Bar in 1963.

Mr. Tellier is a director of several corporations including Alcan, Bell Canada Enterprises (BCE), Bell Canada and Telesat Canada, GM Canada and McCain Foods Ltd. He is Chairman of Global Container Terminals Inc. (GCT). He is also Strategic Advisor to Société Générale, a global bank headquartered in France.

In 1995, he co-chaired the United Way Campaign of Greater Montreal. He was appointed Companion of the Order of Canada in 1993. Throughout his career, Mr. Tellier received many awards including Canada's Outstanding CEO of the Year in 1998, and Canada's Most Respected CEO, according to a KPMG/Ipsos-Reid survey in 2003. He joined the McGill Desautels Faculty Management Advisory Board in September 2006.

Recently, Mr. Tellier was appointed a member of the Independent Panel on Canada's Future Role in Afghanistan. The Panel's report and recommendations were transmitted to the Prime Minister in January 2008.

Appendix B

Initial Letters and Submissions Sent to the 2007-2008 Quadrennial Commission

1. Submission from the Government of Canada represented by the Department of Justice of Canada
2. Combined submission from the Canadian Superior Courts Judges Association and the Canadian Judicial Council
3. Submission from a Group of Appellate Judges in favour of a salary differential for judges of Courts of Appeal
4. Letter from the Honourable Donald G. H. Bowman, Chief Justice, Tax Court of Canada
5. Letter from the Honourable Donald I. Brenner, Chief Justice, Supreme Court of British Columbia
6. Letter from the Honourable J. Derek Green, Chief Justice, Supreme Court of Newfoundland and Labrador, Trial Division
7. Letter from the Honourable Gordon L. Campbell, Supreme Court of Prince Edward Island, Trial Division
8. Submission from the Canadian Bar Association
9. Letter from Mr. Lawrence Pierce, Pierce Law Group
10. Letter from Mr. Ian Bailey
11. Letter from Ms. Kirsten Connor
12. Letter from Mr. Gary Crozier
13. Brief from Mr. Harold Geltman

Reply Briefs and Letters to the Initial Submissions

Reply Submission from the Government of Canada, represented by Justice Canada, and a

Supplementary Reply Submission from the Government of Canada, represented by Justice Canada

Combined Reply Submission from the Canadian Superior Courts Judges Association and the Canadian Judicial Council, and a

Supplementary Reply Submission from the Canadian Superior Courts Judges Association and the Canadian Judicial Council

Comments with Respect to Documents Received by the Commission Regarding the Submission for a Salary Differential for Judges of Courts of Appeal

Comments from the Ontario Superior Court Judges' Association

Various letters sent to the Commission on the subject of a salary differential for appellate court judges:

Chief Justices:

- the Honourable Joseph P. Kennedy, Supreme Court of Nova Scotia
- the Honourable Jacqueline Matheson, Supreme Court of Prince Edward Island, Trial Division
- the Honourable David D. Smith, Court of Queen's Bench of New Brunswick
- the Honourable François Rolland, Superior Court of Quebec
- the Honourable Heather Forster Smith, Superior Court of Justice of Ontario
- the Honourable Robert D. Laing, Court of Queen's Bench of Saskatchewan
- the Honourable Allan H. Wachowich, Court of Queen's Bench of Alberta

Other judges:

- the Honourable James K. Hugessen, Federal Court of Canada
- the Honourable James P. Adams, Supreme Court of Newfoundland and Labrador, Trial Division
- the Honourable Gordon L. Campbell, Supreme Court of Prince Edward Island, Trial Division
- the Honourable Walter R. E. Goodfellow, Supreme Court of Nova Scotia
- the Honourable Jules Allard, Superior Court of Quebec

- the Honourable Douglas Rutherford, Superior Court of Justice of Ontario
- the Honourable Ronald L. Berger, Court of Appeal of Alberta
- the Honourable Ronald S. Veale, Supreme Court of the Yukon Territory

Letter from Ms. Yiu Kwun Wai

Appendix C

Judicial Compensation and Benefits Commission

Public Hearings - March 3, 2008
List of Participants

Representing the Judicial Compensation and Benefits Commission

- Ms. Sheila Block
  Chair of the Commission

- Mr. Paul Tellier
  Commissioner

- Mr. Wayne McCutcheon
  Commissioner

- Ms. Jeanne Ruest
  Executive Director

Representing the Government of Canada

- Mr. Neil Finkelstein
  Counsel
  Blake, Cassels & Graydon LLP

- Ms. Cathy Beagan Flood
  Counsel
  Blake, Cassels & Graydon LLP

- Ms. Judith Bellis
  General Counsel
  Judicial Affairs, Courts and Tribunal Policy
  Justice Canada
  Observer

- Ms. Karen Cuddy
  Counsel
  Judicial Affairs, Courts and Tribunal Policy
  Justice Canada
  Observer

Representing the Canadian Superior Courts Judges Association and the Canadian Judicial Council:

- Mr. Yves Fortier
  Counsel
  Ogilvy Renault

- Mr. Pierre Bienvenu
  Counsel
  Ogilvy Renault

- Mr. Azim Hussain
  Counsel
  Ogilvy Renault
  Observer

- The Honourable J. Michael MacDonald
  Chief Justice of the Province of Nova Scotia
  Chair, Judicial Salaries and Benefits Committee
  Canadian Judicial Council
  Observer

- The Honourable Pierre Dalphond
  Quebec Court of Appeal
  Vice-President, Canadian Superior Courts Judges Association
  Observer

- The Honourable Stephen Goudge
  Court of Appeal of Ontario
  Chair, Compensation Committee
  Canadian Superior Courts Judges Association
  Observer

- The Honourable Ted C. Zarzecnzy
  Court of Queen's Bench for Saskatchewan
  Vice-Chair, Compensation Committee
  Canadian Superior Courts Judges Association
  Observer

- Mr. Frank McArdle
  Executive Director
  Canadian Superior Courts Judges Association
  Observer

Representing the Canadian Bar Association

- Mr. J. Guy Joubert
  First Vice-President
  Canadian Bar Association

- Ms. Tamara Thomson
  Director
  Legislation and Law Reform
  Canadian Bar Association

Judicial Compensation and Benefits Commission

Public Hearings - March 13, 2008
List of Participants

Representing the Judicial Compensation and Benefits Commission

- Ms. Sheila Block
  Chair of the Commission

- Mr. Paul Tellier
  Commissioner

- Mr. Wayne McCutcheon
  Commissioner

- Ms. Jeanne Ruest
  Executive Director

Representing the Government of Canada

- Mr. Neil Finkelstein
  Counsel
  Blake, Cassels & Graydon LLP

- Ms. Cathy Beagan Flood
  Counsel
  Blake, Cassels & Graydon LLP

- Ms. Judith Bellis
  General Counsel
  Judicial Affairs, Courts and Tribunal Policy
  Justice Canada
  Observer

Representing judges in favour of a salary differential for judges of Courts of Appeal

- The Honourable Joseph R. Nuss
  Québec Court of Appeal
  Submission Coordinator

- Maître Roger Tassé
  Counsel
  Gowling Lafleur Henderson LLP

Judges opposing a salary differential for judges of Courts of Appeal

- The Honourable James K. Hugessen
  Federal Court of Canada

- The Honourable Gordon L. Campbell
  Supreme Court of Prince Edward Island
  Trial Division

Representing the Canadian Superior Courts Judges Association and the Canadian Judicial Council

- Maître Pierre Bienvenu
  Counsel
  Ogilvy Renault

- The Honourable David H. Jenkins
  Chief Justice of the Province of Prince Edward Island
  President, Canadian Superior Courts Judges Association
  Observer

- The Honourable Stephen Goudge
  Court of Appeal of Ontario
  Chair, Compensation Committee
  Canadian Superior Courts Judges Association
  Observer

- Mr. Frank McArdle
  Executive Director
  Canadian Superior Courts Judges Association
  Observer

Response of the Government of Canada to the Report of the 2007 Judicial Compensation and Benefits Commission

The Constitutional Framework of Judicial Compensation and Benefits

The establishment of judicial compensation is governed by constitutional principles designed to ensure public confidence in the independence and impartiality of the judiciary. At the federal level, s. 100 of the Constitution provides that Parliament establishes judicial salaries and benefits. In addition to the protections of s. 100, the Supreme Court of Canada has established a constitutional requirement for an "independent, objective and effective" commission whose purpose is to depoliticize the process of judicial remuneration and thereby preserve judicial independence.[1]

In 1998, the *Judges Act* was amended to provide for a Judicial Compensation and Benefits Commission to be established every four years to inquire into the adequacy of judicial compensation and benefits.[2] The *Judges Act* establishes express criteria which govern the Commission's consideration as well as that of Government and Parliament in determining "adequacy" of compensation:

- the prevailing economic conditions in Canada, including the cost of living, and the overall economic and financial position of the federal government;
- the role of financial security of the judiciary in ensuring judicial independence;
- the need to attract outstanding candidates to the judiciary; and
- any other objective criteria that the Commission considers relevant.

The 2007 Judicial Compensation and Benefits Commission delivered its Report to the Minister of Justice as statutorily required on May 30, 2008. Its key recommendations include:[3]

- The salary of *puisne* judges should be set at $264,300 effective April 1, 2008 (inclusive of statutory indexing effective that date), with an additional 2% increase above statutory indexing effective April 1, 2009, 2010 and 2011.
- Salaries of judges appointed to provincial courts of appeal and to the Federal Court of Appeal should be increased an additional 3% (to $272,200 effective April 1, 2008) to establish a salary differential for appellate court judges.
- There should be a corresponding 3% increase in the salaries of the Chief Justice of Canada, the Justices of the Supreme Court of Canada, and the chief justices and associate chief justices of the courts of appeal to maintain existing salary differentials for those positions.

This Government's Response has been delayed to allow the Government to consider the Commission's Report in light of significant changes to a key criterion in relation to which the Commission developed its recommendations: *the prevailing economic conditions in Canada, including the cost of living, and the overall economic and financial position of the federal government*.

The Government has determined that in view of the significant deterioration in economic conditions in Canada and the financial position of the Government, it would be unreasonable to implement the Commission's recommendations. This Response provides the constitutionally mandated public explanation and justification for this decision, in light of the standard established by the Supreme Court of Canada in *Bodner v. Alberta.*[4]

Changed Economic Conditions

The global economic situation and the financial position of the Government deteriorated significantly after the Commission concluded its inquiry and submitted its recommendations to the Minister of Justice on May 30, 2008. The deterioration of the economic outlook, its implications for Government revenues, and the need for the Government to take extraordinary action to respond to the immediate economic threat while securing Canada's long-term growth and prosperity are outlined in *Budget 2009 – Canada's Economic Action Plan*, announced on January 27, 2009.

Budget 2009 - Canada's Economic Action Plan announced measures to stimulate the economy, protect Canadians during the global recession, and invest in long-term growth. It also outlined measures to manage expenditures, including actions to limit discretionary spending by federal departments and agencies, and the introduction of legislation to ensure the predictability of federal public sector compensation during this difficult economic period. Legislation has now been introduced to put in place annual wage increases for the federal public administration (including senior members of the public service, public office holders and Members of Parliament) of 2.3 per cent in 2007-08 and 1.5 per cent for the following three years.

In the Government's view, the public would reasonably expect that judges should be subject to similar restraint measures. The Supreme Court of Canada has established that it is to ensure continued public confidence in the judiciary that judicial remuneration should be subject to measures affecting the salaries of all others paid from the public purse. In *Reference re Remuneration of Judges of the Provincial Court (P.E.I.),* Chief Justice Lamer observed that equality of treatment "helps to sustain the perception of judicial independence precisely because judges are not being singled out for preferential treatment".[5] He explained:[6]

In my opinion, the risk of political interference through economic manipulation is clearly greater when judges are treated differently from other persons paid from the public purse. This is why we focussed on discriminatory measures in Beauregard. As Professor Renke, supra, has stated in the context of current appeals (at p. 19):

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

The Government accepts that judicial compensation is subject to certain unique requirements that do not apply with respect to others paid from the public purse. In particular, it is necessary to ensure that judicial compensation does not fall below the "minimum" required to protect financial security, including through erosion of compensation levels over time. The purpose of this minimum is to avoid the perception that judges might be susceptible to political pressure through economic manipulation as

witnessed in many other countries.[7] Superior court judges in Canada are protected against erosion of compensation levels by annual statutory indexing, which will be maintained, as well as the quadrennial review of judicial compensation.

The Government is mindful of the unique quadrennial nature of the judicial compensation process which limits the possibility of interim adjustments during the quadrennial period. However, in the event that the current economic circumstances improve before the next Judicial Compensation and Benefits Commission is established so as to justify salary enhancements, such circumstance could be taken into account by the Commission.

ANNEX A

Recommendations of the Third Judicial Compensation and Benefits Commission

- **Recommendation 1**
  - **The Commission recommends that:**

The salary of *puisne* judges should be set at $264,300 effective April 1, 2008, inclusive of statutory indexing effective that date; and

The salary of *puisne* judges should be increased by statutory indexing effective April 1, 2009, 2010 and 2011 plus additional 2% effective each of those dates, not compounded (*i.e.*, the previous year's salary should be multiplied by the sum of the statutory indexing and 2%).

- **Recommendation 2**
  - **The Commission recommends that:**

Interest should not be paid on retroactive salary adjustments to federally-appointed judges.

- **Recommendation 3**
  - **The Commission recommends that:**

A salary differential should be paid to *puisne* judges appointed to provincial courts of appeal and to the Federal Court of Appeal, and that the salary of *puisne* judges appointed to these courts should be set at $272,200 effective April 1, 2008, inclusive of statutory indexing effective that date.

- **Recommendation 4**
  - **The Commission recommends that:**

Salary differentials should continue to be paid to the associate chief justices and chief justices of the trial courts and courts of appeal, and to the Justices of the Supreme Court of Canada and the Chief Justice of Canada;

The salary differential for the associate chief justices and chief justices of the trial courts should be established in relation to the salary of the *puisne* judges appointed to the trial courts;

The salary differential for the associate chief justices and chief justices of the courts of appeal should be established in relation to the salary of the *puisne* judges appointed to the courts of appeal;

The salary differentials of the Justices of the Supreme Court of Canada and the Chief Justice of Canada should be established in relation to the salaries of *puisne* judges appointed to the courts appeal; and

The salaries should be set as of April 1, 2008 inclusive of statutory indexing, at the following levels:

Supreme Court of Canada

Chief Justice of Canada	$ 349,800
Justices	$ 323,800

Federal Court of Appeal and Courts of Appeal

Chief Justices	$ 298,300
Associate Chief Justices	$ 298,300

Federal Court, Tax Court and Trial Courts

Chief Justices	$ 289,700
Associate Chief Justices	$ 289,700

- **Recommendation 5**

o **The Commission recommends that:**

The *Judges Act* be amended so that senior judges of the territorial courts who elect supernumerary status receive the same treatment with regard to their retirement annuities as do chief justices who elect supernumerary status.

- **Recommendation 6**

o **The Commission recommends that:**

Should measures be taken by the territorial governments to allow a senior judge, not yet entitled to elect supernumerary status, to elect to cease to perform his or her duties as a senior judge and to perform only the duties of a *puisne* judge and receive the salary of a *puisne* judge, that the *Judges Act* be amended so that the retirement annuity of a former senior judge is based on the salary of senior judge.

- **Recommendation 7**

o **The Commission recommends that:**

The *Judges Act* be amended so that a judge appointed to a court of appeal who subsequently accepts appointment to a trial court, and receives the salary of a trial court judge, receives a retirement annuity based on the salary of his or her former position as a judge of a court of appeal.

- **Recommendation 8**

o **The Commission recommends that:**

A retirement removal allowance should not be paid to judges of the provincial superior courts and courts of appeal.

- **Recommendation 9**

o **The Commission recommends that:**

Effective April 1, 2008, representational allowances be increased to $22,500 for the Chief Justice of Canada, $15,000 for the Chief Justice of the Federal Court of Appeal and the chief justices of the provinces, $12,000 for *puisne* judges of the Supreme Court of Canada, $12,000 for other chief justices and associate chief justices and senior judges, and $6,000 for Ontario regional senior judges.

- **Recommendation 10**

o **The Commission recommends that:**

The senior family law judge in Ontario be paid the same representational allowance as the other regional senior judges in the province.

- **Recommendation 11**

o **The Commission recommends that:**

The provisions in the *Judges Act* relating to the reimbursement of the judiciary's costs for participating in the Quadrennial Commission process remain unchanged.

- **Recommendation 12**

o **The Commission recommends that:**

Should a future Commission not include a member with experience in the area of compensation, the Commission strongly consider engaging external expert assistance in this area.

- **Recommendation 13**

o **The Commission recommends that:**

While continuity of Commission staffing cannot always be ensured, processes be established to allow for the efficient transfer of institutional knowledge between departing and incoming Commission staff.

- **Recommendation 14**

o **The Commission recommends that:**

Where consensus has emerged around a particular issue during a previous Commission inquiry, in the absence of demonstrated change, such Consensus be taken into account by the Commission and reflected in the submissions of the parties.

- **Recommendation 15**

o **The Commission recommends that:**

The parties consider ways of streamlining the materials produced for future Commissions and, where production of a data set and accompanying analysis is warranted, that such work be undertaken cooperatively.

- [1] *Reference re Remuneration of Judges of the Provincial Court (P.E.I.*), [1997] 3 S.C.R. 3, para. 131. (*PEI Judge*s)
- [2] *Judges Act*, R.S. 1985, c. J-1, as amended (the *"Judges Act"),* s. 26 (1).
- [3] The Commission's recommendations are reproduced in Annex A.
- [4] [2005] 2 S.C.R. 286. Acknowledging that decisions about the allocation of public resources belong to legislatures and to governments, the Court held that Commission recommendations may be rejected or modified provided:
    1. They have articulated a legitimate reason for doing so.
    2. The government's reasons rely upon a reasonable factual foundation.
    3. It can be shown that, viewed globally and with deference to the government's opinion, the commission process has been respected and the purposes of the commission – namely, preserving judicial independence and depoliticizing the setting of judicial remuneration – have been achieved.
- [5] *PEI Judges,* para 156.
- [6] *Ibid.,* para. 158.
- [7] *Ibid.,* para. 135.

Judicial Compensation
and Benefits Commission

REPORT AND RECOMMENDATIONS

SUBMITTED TO
the Minister of Justice of Canada

May 15, 2012

Judicial Compensation and Benefits Commission

Commission d'examen de la rémunération des juges

Chairperson/Président
Brian M. Levitt

Members/Membres
Paul Tellier, P.C., C.C., Q.C./c.r.
Mark L. Siegel

Executive Director/Directrice exécutive
Suzanne Labbé

Tel./Tél. : 613-995-5300
e-mail/courriel : info@quadcom.gc.ca

May 15, 2012

The Honourable Robert Douglas Nicholson
Minister of Justice and Attorney General of Canada
284 Wellington Street
Ottawa, Ontario
K1A 0H8

Dear Minister:

Pursuant to Subsection 26(2) of the *Judges Act,* I am pleased to submit the report of the fourth Judicial Compensation and Benefits Commission.

Yours truly,

Brian M. Levitt
Chair

Encl.

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LIST OF APPENDICIES

CHAPTER 1 - INTRODUCTION

1. The appointment of the fourth Quadrennial Judicial Compensation and Benefits Commission (the "Commission") was announced by the Honourable Rob Nicholson, P.C., Q.C., M.P. in December 2011.[1] The members are: Chair, Brian M. Levitt, and Commissioners Paul M. Tellier, P.C., C.C., Q.C., and Mark L. Siegel. The Commission is established under the *Judges Act*[2] to inquire into the adequacy of salaries and benefits payable to federally appointed judges. Its term spans a four-year period ending August 31, 2015 (the "Quadrennial Period").

2. The Commission is charged by the *Judges Act* to prepare a report for submission to the Minister of Justice within nine months from the commencement of its inquiry.[3] This is the Commission's report.

Background and Context

3. The *Constitution Act, 1867* provides the Parliament of Canada with the authority to set compensation for the judiciary. Section 100 states that:

> The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the time being paid by Salary, shall be fixed and provided by the Parliament of Canada.[4]

Section 101 provides the Government with the authority to create the Supreme Court of Canada, Federal Court, and Tax Court of Canada, and to fix the remuneration of the judges of these courts.

4. Prior to the current Quadrennial Commission process, the *Judges Act* provided for the establishment of Triennial Commissions to make recommendations to Parliament regarding judicial compensation. Over time, the judiciary lost

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[1] A copy of the Department of Justice's News Release as well as the resumés of the Chair and Commissioners can be found at Appendix A.
[2] *Judges Act*, RSC, 1985 c J-1 ("*Judges Act*").
[3] *Ibid* at s 26(2).
[4] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 100, reprinted in RSC 1958, App II, No 5.

confidence in the Triennial Commission process due to the failure of successive governments to act on the recommendations of the Triennial Commissions. The report of the first Quadrennial Commission (the "Drouin Report") provides an overview of this history.[5]

5. In 1998 the *Judges Act* was amended[6] to establish the Quadrennial Judicial Compensation and Benefits Commission process following the Supreme Court of Canada's decision in *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island* ("PEI Reference Case").[7]

6. The constitutional guarantee of judicial independence is a cornerstone of the integrity of the Canadian judicial system. The three elements of judicial independence enunciated by the Supreme Court of Canada in the PEI Reference Case are security of tenure, administrative independence, and financial security.[8]

7. Chief Justice Lamer, speaking for the Court, held that in order to preserve judicial independence, an independent, effective and objective commission should be interposed

> between the judiciary and the other branches of government. The constitutional function of this body [would be] to depoliticize the process of determining changes or freezes to judicial remuneration.[9]

The Supreme Court of Canada went on to set forth the legal and constitutional requirements for a process to deal with the compensation of the judiciary without compromising its independence. This framework was summarized by the Drouin Commission as follows:

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[5] Report of the Judicial Compensation and Benefits Commission, submitted to the Minister of Justice of Canada, May 31, 2000 at 1 ("Drouin Report").
[6] Bill C-37, *An Act to Amend the Judges Act and Make Consequential Changes to Other Acts*, 1st Sess, 36th Parl, 1998 (assented to 18 November 1998).
[7] *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3 *("PEI Reference Case*").
[8] *Ibid* at para 115.
[9] *Ibid* at para 166.

> Members of compensation commissions must have some kind of security of tenure, which may vary in length;
>
> The appointments to compensation commissions must not be entirely controlled by any one branch of government;
>
> A commission's recommendations concerning judges' compensation must be made by reference to objective criteria, not political expediencies;
>
> It is preferable that the enabling legislation creating the commission stipulate a non-exhaustive list of relevant factors to guide the commission's deliberations;
>
> The process of compensation commissions must be employed before implementation of any changes or freezes to judicial compensation;
>
> To guard against the possibilities that government inaction might lead to a reduction of judges' real salaries because of inflation, compensation commissions must convene at least every three to five years to ensure the adequacy of judges' salaries and benefits over time;
>
> The reports of the compensation commissions must have a "meaningful effect on the determination of judicial salaries". Thus, while the report of a compensation commission need not be binding, at a minimum the responsible legislative or executive authority must formally respond to the report within a specified time; and
>
> Finally, the executive or the legislature, as applicable, must be prepared to justify any decision rejecting one or more of the recommendations in a compensation commission's report, if necessary, in a court of law.[10]

Mandate and Analytical Approach

8. The *Judges Act* establishes the Commission and mandates it to "inquire into the adequacy of the salaries and other amounts payable under [the] Act and into the adequacy of judges' benefits generally."[11]

9. In conducting its inquiry, the Commission must consider:

> (*a*) the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government;

[10] Drouin Report, *supra* note 5 at 5.
[11] *Judges Act*, *supra* note 2 s 26(1).

> (*b*) the role of financial security of the judiciary in ensuring judicial independence;
>
> (*c*) the need to attract outstanding candidates to the judiciary; and
>
> (*d*) any other objective criteria that the Commission considers relevant.[12]

10. The Commission has carefully considered the evidence placed before it, and arrived at its recommendations by reference to the above-noted criteria.

11. The submissions of the parties are replete with calculations expressing results in precise terms. While the Commission does not quarrel with the mathematics, in the valuation of the judicial annuity and the analysis of comparative data on public and private sector compensation, the results of the analysis are extremely sensitive to the assumptions used. While these calculations aided the Commission in making its recommendations, the judgments underlying the recommendations were arrived at bearing this sensitivity in mind.

12. In arriving at its recommendations, the Commission built on the record of its predecessors as authorized so to do by the Supreme Court of Canada in *Bodner v Alberta* ("*Bodner*")[13]*.* The Commission will have more to say about process issues in Chapter 5. A chronology of Commission activities appears in Appendix B.

13. With the exception of Recommendation 1, this report, unlike the reports of previous Commissions, makes recommendations only where the Commission concluded that a change to the current judicial remuneration arrangements is necessary to maintain the adequacy of judicial compensation and benefits in terms of the applicable statutory criteria.

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[12] *Ibid* at s 26(1.1).

[13] *Provincial Court Judges' Assn of New Brunswick v New Brunswick (Minister of Justice); Ontario Judges' Assn v Ontario (Management Board); Bodner v Alberta; Conférence des juges du Québec v Quebec (Attorney General); Minc v Quebec (Attorney General),* 2005 SCC 44, [2005] 2 SCR *286* ("*Bodner*").

14. The Commission wishes to thank all those who made written and oral submissions. Their involvement in bringing important issues and viewpoints to the attention of the Commission aided its deliberations and reinforced the importance of this process. A list of those persons and groups who made submissions to the Commission is found at Appendix C. The Commission wishes to thank the Canadian Bar Association (the “CBA”) and the Barreau du Québec (the “Barreau”) for their thoughtful and informative submissions regarding procedural issues and the importance of the Commission process.

15. The Commission also wishes to thank those who so efficiently supported its work. Mme. Suzanne Labbé, our very able Executive Director, handled all administrative arrangements and provided valuable research and editorial input. Ms. Lacey Miller assisted with the writing and editing of this report. M. André Sauvé provided invaluable professional advice in relation to the Commission’s consideration of the judicial annuity and its public and private sector counterparts. Finally, the Commission had the good fortune to have the advice of Professor Martin Friedland with respect to judicial independence and the process issues discussed in Chapter 5.

CHAPTER 2 - JUDICIAL SALARIES

16. The remuneration of judges is set in a very particular context. Although their salaries are set by the federal Government, judges cannot negotiate their remuneration, and they are precluded from seeking alternative employment or business opportunities outside of their judicial duties.[14]

17. As the Drouin Report stated, bonuses or other forms of merit pay cannot be used as they are in other public service contexts when fashioning a compensation scheme for the judiciary. Moreover, the judicial annuity is a unique retirement scheme tailored to the judicial career path.[15]

Positions of the Government and Association and Council

18. As of April 1, 2011, judicial salaries were as follows:[16]

Supreme Court of Canada

Chief Justice	$361,300
Puisne Justices	$334,500

Federal, Tax, Appeal, Superior, Supreme and Queen's Bench Courts

Chief Justice or Senior Judge	$308,200
Puisne Judges	$281,100

Pursuant to s. 25(2) of the *Judges Act*, these salaries are adjusted upwards annually by either the percentage change in the industrial aggregate index ("IAI"), determined by Canada's Chief Actuary (the "IAI Adjustment")[17], or seven percent,

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[14] *Judges Act*, *supra* note 2 at s 55.
[15] Drouin Report, *supra* note 5 at 18.
[16] Office of the Commissioner for Federal Judicial Affairs, *Remuneration*, online: http://www.fja.gc.ca/appointments-nominations/considerations-eng.html#Remuneration.
[17] *Judges Act*, *supra* note 2 at s 25(2).

whichever is lower. In addition to this base salary, certain judges are entitled to receive allowances.

19. The Government proposed that judicial salaries be maintained at their current level. It also proposed that the IAI Adjustment be limited to an annual 1.5% increase for the Quadrennial Period.[18] Given that the 2012 IAI Adjustment was to take effect on April 1, 2012 and was estimated in the Government submission to exceed 1.5%, the Government in effect proposed that whatever that excess turned out to be should be clawed back over the balance of the Quadrennial Period, so as to limit the cumulative impact of the IAI Adjustment to a net increase of 6.1% over the Quadrennial Period.[19]

20. The Canadian Superior Courts Judges Association and the Canadian Judicial Council (the ”Association and Council”) proposed that this Commission endorse and adopt, prospectively commencing in the first year of the Quadrennial Period, all of the recommendations made by the Block Commission in its report (the “Block Report”).[20] With respect to salary, the Block Commission recommended that, in addition to statutory indexation increases, as of April 1, 2008, judicial salaries should be increased by 1.7%, and that for each of 2009, 2010 and 2011, a 2% increase should be implemented.[21] Translated into figures presently applicable, the Association and Council recommended an increase of 4.9% inclusive of statutory indexation as of April 1, 2012.[22]

21. Salary is one element of judicial compensation. The other major component is the judicial annuity. These two elements are common to all judges and constitute the bulk of total compensation for the judiciary. The Commission took the view that it is the total compensation of judges which is to be measured against the criteria set out in section 26(1.1) of the *Judges Act*. The Commission

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[18] Submission of the Government of Canada, December 23, 2011, at para 8 (“Government Submission**”)**.
[19] *Ibid* at footnote 10.
[20] Submission of the Association and Council, December 20, 2011, at para 3 (“A&C Submission”). See also Report of the Judicial Compensation and Benefits Commission, submitted to the Minister of Justice of Canada, May 30, 2008 (“Block Report”).
[21] Block Report, *ibid* at para 120. See also A&C Submission, *ibid* at para 83.
[22] A&C Submission, *supra* note 20 at para 169.

focussed first on these elements separately, and then on the aggregate, in arriving at its recommendations with respect to salary.

Comparators

22. Like all of its predecessors, the Commission selected appropriate public and private sector comparator groups as a basis for its analysis.

(a) Public Sector Comparator Group

23. In seeking out relevant comparators, the Commission took notice of the work of previous Commissions as well as the submissions of the Government and the Association and Council.

24. The Government submitted that, if the Commission felt the need to have a public sector comparator group, it should not be the highly-ranked deputy minister ("DM-3") group but rather all persons paid from the public purse or, if that submission was not accepted, all deputy ministers.[23]

25. The Government also took the position that, because variable compensation is not a tool which can be used in a judicial compensation scheme, when comparing the compensation of judges and public servants the Commission should ignore the variable portion of senior public service compensation.[24] In other words, the Government took the position that it would be appropriate to compare the salary of a judge with the salary of a deputy minister and yet ignore the substantial performance and merit pay opportunity afforded to deputy ministers as part of their total cash compensation. The Commission found this position to be inconsistent with the approach adopted by past Commissions, with customary compensation practice, and with common sense.

26. The Government also made submissions that focussed on job content – a form of task analysis. This type of analysis may be of some use in pay equity or other similar contexts but it was of no assistance to the Commission in arriving at a

[23] Government Submission, *supra* note 18 at paras 127, 110-121.
[24] *Ibid* at paras 122-129.

view as to "what the marketplace expects to pay individuals of outstanding character and ability, which are attributes shared by deputy ministers and judges"[25] -- words first penned by the Courtois Triennial Commission, which have been cited with approval by all preceding Quadrennial Commissions. The Commission took the view that the Government's analysis failed to give sufficient weight to the constitutional status and role of the judiciary and also the importance of its appearance and image to the effective performance of that role. The Commission found this submission to be a semantic exercise completely detached from workplace reality and, accordingly, of no relevance to the Commission's enquiry.

27. Like its predecessors, the Commission determined that the scope of the chosen public sector comparator group is a matter of judgment to be made by reference to the objective of the Commission's enquiry as first framed by the Courtois Commission. While the Commission recognizes that the choice of the DM-3 group may not be regarded as ideal due to its small sample size and other comparability issues such as tenure in position,[26] this Commission, like the Drouin and Block Commissions, focussed on the purpose of the analysis as articulated above and concluded that the seniority of the group and the functions its members discharge make it the best choice as a public sector comparator group for the judiciary. This choice has the additional advantage of eliminating outliers both above and below the DM-3 category.

28. Like the Block Commission, this Commission focussed its analysis on the midpoint of the DM-3 salary range, rather than the average. This choice provides a benchmark which provides comparability over time because the midpoint is:

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[25] Report and Recommendations of the 1989 Commission on Judges' Salaries and Benefits, chaired by E. Jacques Courtois, Q.C., March 5, 1990 at 10, cited with approval in the Block Report, *supra* note 20 at para 103.

[26] There are currently only 13 DM-3 positions. Regarding tenure of position, DM-3s hold office at the pleasure of the Governor-in-Council, whereas judges hold office on good behaviour. Often, the tenure of DM-3s is significantly shorter than that of judges. See Government Submission, *supra* note 18 at para 114.

> an objective, consistent measure of year over year changes in DM-3 compensation policy. Average salary and performance pay may be used to demonstrate that judges' salaries do retain a relationship to actual compensation of DM-3s. However, average salary and performance pay are not particularly helpful in establishing trends in the relativity of judges' salaries to the cash compensation of DM-3s. They do not provide a consistent reflection of year over year changes in compensation. The DM-3 population is very small, varying between eight and ten people over the past few years, and average salaries and performance pay fluctuate from year to year. A person who has been promoted recently has a lower salary than one who has been in a position for many years. Turnover could cause significant changes in the averages over time. Similarly, a few high performers or low performers in a year could significantly affect the average performance pay.[27]

29. All previous Commissions have factored variable compensation into the public sector comparative analysis, notwithstanding substantially the same arguments as were made by the Government to this Commission on this point.[28] As noted above, the Commission has concluded that all compensation elements of comparator groups need to be considered. Accordingly, the quantum of bonus or other forms of variable pay must be factored into the analysis -- albeit by translating it into the judicial context through the use of judgment. This Commission has arrived at the same conclusion in this regard as did the Block Commission and for the same reasons. Accordingly, in its public sector comparative analysis, the Commission has determined that half of the performance pay opportunity is the appropriate inclusion for comparator purposes, because it is an objective reference point and reflects a static measure, remaining unvaried over time. Such a characterization could not be made if the Commission was to use the average performance pay of DM-3s in its comparison.[29]

30. The Government took exception to the Commission's position with respect to recommendation 14 of the Block Commission as applied to the selection of the public sector comparator group. Recommendation 14 stated that

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[27] Block Report, *supra* note 21 at para 106.
[28] See Drouin Report, *supra* note 5 at 26–27; Block Report, *supra* note 20 at para 108; Report of the second Quadrennial Commission, submitted to the Minister of Justice of Canada, May 21, 2004 ("McLennan Report") at 27.
[29] Block Report, *supra* note 20 at para 111.

> [w]here consensus has emerged around a particular issue during a previous Commission inquiry, in the absence of demonstrated change, such consensus be taken into account by the Commission and reflected in the submissions of the parties.[30]

While the Commission reached its conclusion based on its own work, it also concluded that the Government's position in this regard is counterproductive to the attainment of one of the objectives for judicial compensation mandated by the *Judges Act*, namely the attraction of outstanding candidates to the judiciary. The more certainty about the conditions of employment that can be provided to a candidate contemplating a mid-life career change to the judiciary, the lower will be the barriers to attracting the most successful candidates. By introducing an unnecessary degree of uncertainty about future remuneration, the Government's position that the comparator group is to be re-litigated anew every four years sacrifices efficacy on the altar of process.

31. It is the Commission's position that, while the appropriate public sector comparator group is a proper subject for submissions to a Quadrennial Commission, the onus of establishing the need for change lies with the party seeking it. The Commission believes that this approach strikes an appropriate balance between certainty, on the one hand, and flexibility to respond to changing circumstances, on the other. In this instance, the Government has failed to discharge that onus in regards to its argument that the DM-3 comparator be displaced by a broader comparator group, or no comparator at all.

32. Using the Commission's selected public sector comparator group, the Association and Council pointed out that there is currently a gap of $22,149, or 7.3%, between the salary of a *puisne* judge and the DM-3 comparator.[31] The information provided to the Commission by the Government did not allow for a similar comparison.

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[30] *Ibid* at para 201.
[31] See Table 3 in A&C Submission, *supra* note 20 at para 134.

33. The pension arrangements for deputy ministers are structured very differently from the judicial annuity. The evidence before the Commission established that the tenure and career path of deputy ministers and judges are quite different. The average age of judges upon appointment to the bench is 52 years, while the average age of deputy ministers generally is 53.9.[32] The median tenure of DM-3s and those ranked higher was 4.4 years, with the maximum tenure topping out at less than 12 years. In contrast, of the judges who retired between the years 2000 and 2011, the median tenure was 21.6 years, with a maximum of nearly 38 years.[33] In addition, under the public service pension arrangements, deputy ministers accrue credited service for years prior to their appointment to the comparator group and, in some cases, can accrue more than one year's credited service per year of employment.

34. The Commission's expert advised that the differences in tenure and career path between judges and deputy ministers make it difficult to undertake a comparative evaluation of their respective pension arrangements which would be useful to the Commission's deliberations. He also advised that the retirement benefits provided by their respective pension arrangements are likely to be substantial and adequate in their respective circumstances. Accordingly, in assessing total compensation for the purposes of comparison with the public sector comparator group, the Commission determined that the total cash compensation[34] should be considered an appropriate proxy for total compensation. As a result, the Commission's deliberations proceeded on the basis that the total compensation of a *puisne* judge is 7.3% below the total compensation of the selected public sector comparator.

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[32] Data provided by the Privy Council Office as of October 21, 2011, as cited in Government Submission, *supra* note 18 at para 111.
[33] Judicial Personnel System database of the Office of the Commissioner for Federal Judicial Affairs ("FJA") as of April 13, 2011, as cited in the Government Submission, *supra* note 18 at para 115.
[34] As mid-point salary plus one half of maximum performance pay.

(b) Private Practitioner Comparator

35. While the parties agreed that the remuneration of private sector lawyers is a relevant consideration for the Commission, they differed considerably as to the appropriate parameters for the analysis of the Canada Revenue Agency ("CRA") data available for private sector lawyers.

36. The Association and Council suggested that the appropriate parameters include: the 75th percentile income of self-employed lawyers aged 44 to 56, with an annual net professional income of at least $60,000.[35] Using these factors, the data yields, for 2010, an average income of $395,274 for private sector lawyers in Canada as a whole, and $468,261 if the analysis is confined to the top ten Canadian Metropolitan Areas ("CMA").[36]

37. Further, the Association and Council submitted that the growth rate of cash compensation for judges has in recent years lagged behind the rate at which incomes of private practitioners have grown.

38. The Government suggested that the appropriate CRA sample is that of the 65th percentile of all lawyers in Canada[37], although it presented data based on the 75th percentile. The Government's position was that the 65th percentile is the appropriate standard for "exceptional individuals" while the 75th percentile is the appropriate standard for "truly exceptional individuals".[38] No evidence was presented to the Commission indicating on what basis such a distinction might be made or that it is practical to do so.

39. The Government disputed the use of the $60,000 exclusion with respect to the CRA data. The parameters used by the Government in its analysis include the 75th percentile income of lawyers of all ages and all levels of income.[39] Based on these parameters, the data provided by the Government yields, for 2010, an

[35] A&C Submission, *supra* note 20 at para 150.
[36] See Table 4 in A&C Submission, *ibid* at para 152.
[37] Government Submission, *supra* note 18 at para 68.
[38] *Ibid* at para 66.
[39] They did not exclude those with incomes below $60,000 per annum from the data, as was done by the Association and Council.

average income of $278,526 for private sector lawyers. The Government did not provide information pertaining to the average income for private sector lawyers within the top ten CMAs.[40]

40. The Government presented evidence to the effect that, on average, the incomes of lawyers in private practice decline as they progress through their fifties.[41] The Government also noted that there is no evidence of difficulty in attracting qualified candidates from the private sector, given that

> [t]he percentage of judges appointed from the private sector in 2007-11 was 71%, which is consistent with past appointment data (73% from January 1, 1997 to March 21, 2007).[42]

In this regard, the Government took the position that a backlog of qualified candidates is evidence that its salary proposal meets the adequacy test to be applied by the Commission in relation to the attraction of candidates to the judiciary,[43] this being one of the four statutory criteria which the Commission is mandated to address.

41. The valuations of the judicial annuity, using accepted actuarial and accounting assumptions and methodology presented by the parties' experts, indicated values of 24%, by one reckoning, and 27%, by the other, of the judicial salary. The Commission's expert pointed out that these calculations are extremely sensitive to the interest-rate assumptions used and that, when a rate more reflective of current market expectations for interest rates is used, the same calculations would yield a percentage of the judicial salary which is substantially higher, well into the 40%-50% range. In the Commission's view, this is relevant to the impact of judicial compensation on the attraction of qualified candidates to the judiciary because efficacy in this regard is to be assessed by reference to

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[40] Government Submission, *supra* note 18 at paras 92, 97.
[41] *Ibid* at para 89.
[42] Data provided from the Commission for Federal Judicial Affairs, as cited in the Government Submission, *supra* note 18 at para 94.
[43] *Ibid* at paras 97, 100.

the perception of the typical candidate, not that of an actuary or accountant.[44] Moreover, the fact that the judicial annuity is a federal government obligation fully protected from inflation and based on a final earnings calculation makes it qualitatively more attractive to a private sector lawyer (particularly one who is self-employed) than the actuarially estimated value suggests.

42. In addition to the qualitative attractions of the bench -- namely, public service, freedom from the necessity to generate business, security of tenure, interesting work, and collegial colleagues -- the superiority of the judicial annuity to the capital accumulation alternatives available to private sector lawyers to provide retirement income must be taken into consideration in order to arrive at a comparison of judicial and private sector lawyer total compensation which is useful to the Commission's deliberations.

43. When the salary of a *puisne* judge is added to the amount that the Commission's expert determined a private practitioner would have to save annually in order to accumulate a sum sufficient to match the judicial annuity,[45] the total is in the same range as the income of a 52-year-old private practitioner, determined on the basis of the Association and Council's suggested approach to the CRA data for the ten largest CMAs. Obviously, if the same calculation is performed on the basis of the Government's approach to the CRA data, the sum would exceed the private practitioner's income benchmark. The age of 52 was selected by the Commission as the basis for this comparison because 52 is the average age at which judges were appointed between 1997 and 2011. While the comparison would be more favourable for older appointees, and less favourable for younger appointees, these variations do not affect the Commission's conclusions when the qualitative differences between the judicial annuity and the private savings alternative are taken into account.

[44] Information based upon research contained in letter from the Commission's expert, André Sauvé, dated February 14, 2012.
[45] Information based on research contained in letter from André Sauvé dated February 23,2012.

Purpose of the IAI Adjustment

44. The IAI Adjustment scheme was first added to the *Judges Act* in 1981. The debates that took place in both the House of Commons and Senate indicated that the IAI Adjustment was intended to deal with the constant salary confrontation between the judiciary and the government.[46] The Drouin Commission characterised the legislative purpose as being "...[i]n part to offset the prohibition on negotiation, and the politicization that would otherwise result with respect to judicial compensation."[47]

45. On its second reading in the House of Commons, The Right Honourable Jean Chrétien, then the Minister of Justice, stated that the measures in the *Judges Act* regarding the IAI Adjustment make "provision for future remuneration which should avoid further difficulties flowing from the dependence of judges on salary adjustments by statute."[48] Once the Bill reached the Senate, the Hon. Royce Frith stated that the adjustment mechanism was a very important element in the administration of judicial affairs, "the concept of which is intended to enhance the independence of the judiciary by removing judicial compensation from the give-and-take of the political process."[49]

46. The Government submissions characterized the IAI Adjustment as inflation protection without making any mention of its legislative history. In light of this history, the Drouin Commission made it clear that the IAI "is intended to, and in many years does, encompass more than changes in the cost of living as reflected in the consumer price index".[50] In the Commission's view the legislative history indicates that the IAI Adjustment was intended to be a key element in the architecture of the legislative scheme for fixing judicial remuneration without compromising the independence of the judiciary and, as such, should not lightly be tampered with.

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[46] Friedland, Martin. *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Canadian Judicial Council, 1995) at 57 ("Friedland").
[47] Drouin Report, *supra* note 5 at 16.
[48] House of Commons Debates (December 1, 1980) at 5206 as cited in Friedland, *supra* note 46 at 58.
[49] Senate Debates (March 11, 1981) at 1993 as cited in Friedland, *ibid* at 58.
[50] Drouin Report, *supra* note 5 at footnote 7.

Review Concerning Salary for *Puisne* Judges

47. The foregoing analysis of the principal elements of judicial compensation and benefits and those of appropriate public and private sector comparators leads the Commission to the conclusion that the *puisne* judge's salary and benefits place his or her total compensation

    a) at least on a par with the total compensation of the private sector comparator group advocated for by the Association and Council, and well above the total compensation of the private sector comparator group advocated for by the Government; and

    b) somewhat behind the total compensation of the appropriate public sector comparator group.

48. In arriving at its judgment about the weight to be accorded to a discrepancy between judges` salaries and the total cash compensation of the public sector comparator group when formulating its recommendation as to *puisne* judges` salaries, the Drouin Commission cited with approval a submission made by the Government to the 1993 Triennial Commission to the effect that judicial salaries should be dealt with on the basis "that there should be a rough equivalence to the DM-3 midpoint".[51] The Drouin Commission also observed that the salaries of judges "should not be permitted to lag materially behind the remuneration available to senior individuals within the Government"[52], and that "[t]his concept of rough equivalence expressly recognizes that while the DM-3s and judges do not perform the same work, there is a basis for approximate remuneration parity"[53] The McLennan Commission found no basis in the *Judges Act* for employing the concept of rough equivalence with a comparator group.[54] The Block Commission framed its recommendation as to salary in terms of a "rough

[51] Drouin Report, *supra* note 5 at 28 and footnote 22.
[52] *Ibid* at 32.
[53] *Ibid* at 29
[54] McLennan Report, *supra* note 28 at 49

equivalent".[55] After considering the evidence in light of its mandate, the Commission agrees with the conclusion of the Drouin and Block Commissions that the "rough equivalence" standard is a useful tool in arriving at a judgment as to the adequacy of judicial remuneration, because this concept reflects the judgmental (rather than mathematical) and multi-faceted nature of the enquiry.

49. The Commission considered whether the 7.3% gap between the selected public sector comparator group's total compensation and that of the judges identified in the evidence is sufficiently large that the two cannot be regarded as "roughly equivalent", and results in the judges' total compensation "lagging materially behind" that of the selected public sector comparator group. In this connection, the Commission also considered the Government's position that the IAI Adjustment should be capped for the Quadrennial Period.

50. The Commission noted that the evidence before the Drouin and Block Commissions established gaps of respectively 4.8%[56] and 8.9%,[57] while the McLennan Commission did not articulate a corresponding figure. The Commission also noted that the Block Commission recommendations would have reduced the gap to 4.5% and also that the effect of the IAI Adjustment alone over the last Quadrennial Period has been to narrow the gap to 7.3%.

51. The Commission did not accept the Government's submission that the IAI Adjustment should be altered for the Quadrennial Period in light of:

    a) the legislative history of the IAI Adjustment, which clearly indicates that it was intended to be a key element of the architecture of the process for determining judicial remuneration without affecting judicial independence and, as such, not to be lightly tampered with; and

[55] Block Report, *supra* note 20 at para 118.
[56] Drouin Report, *supra* note 5 at 29-30.
[57] Block Report, *supra* note 20 at para 119.

b) the marginal incremental cost to the public purse of maintaining the IAI Adjustment as opposed to capping it at 1.5%, based on figures supplied by the Government.

52. While in the Commission's view the 7.3% gap tests the limits of rough equivalence, the Commission concluded that, provided that the IAI adjustment is maintained in its current form for the Quadrennial Period, the salary of *puisne* trial court judges does not require adjustment in order to maintain the adequacy of judicial compensation and benefits in light of the statutory criteria, for the reasons set out below.

Section 26(1.1) Analysis

53. The following represents the Commission's consideration of the s. 26(1.1) criteria viewed in light of the evidence before it.

(a) Prevailing economic conditions; cost of living; overall financial position of the federal government

54. The evidence before the Commission established that there is currently economic uncertainty both within Canada and worldwide, and that the Government is facing spending constraints as it unwinds the fiscal stimulus measures taken during the recession.[58] Data provided by the Government indicated that, following the release of the Block Report, both Canadian and world economies deteriorated rapidly.[59] It further indicated that, although the Canadian economy has since rebounded, progress has been slow. Specifically, it noted that Canada's gross domestic product is projected to grow only very modestly over the next year. Additionally, the Government has frozen the operating budgets of departments at their 2010-2011 levels for an additional two years.[60]

[58] Government Submission, *supra* note 18 at paras 41-44. See also A&C Submission, *supra* note 20 at para 90.
[59] Government Submission, *supra* note 18 at paras 30, 39.
[60] *Ibid* at paras 43-44.

55. In its submissions, the Association and Council acknowledged the post-Block Report global economic downturn.[61] Further, it admitted that in 2011 the global economy once again slowed, financial market volatility was on the rise and the Bank of Canada reduced its short-term growth outlook for Canada.[62] The Association and Council noted, however, that Canada has a strong fiscal position, both in its maintenance of low debt levels and in its projection of a balanced budget by 2016.[63] Further, Canada's longer-term economic outlook paints a more positive picture.[64]

56. The Commission understands the importance of being fiscally responsible, especially in these times of economic restraint. The Commission's analysis has been guided by the above information, as well as the words of the Supreme Court of Canada:

> [n]othing would be more damaging to the reputation of the judiciary and the administration of justice than a perception that judges were not shouldering their share of the burden in difficult economic times.[65]

57. The Commission took note of the uncertain economic outlook and the Government's budgetary constraints. The Commission also noted that judicial compensation and benefits constitute a relatively small outlay in the context of total federal government expenditures, being less than $452 million in the 2010-2011 fiscal year, constituting less than 0.17% of federal expenditures or 1.4% of the federal deficit for that year, and that the IAI Adjustment is but a tiny fraction of even that relatively small sum. The Commission further noted the importance of the constitutional role of the judiciary, of public perception of its quality and independence, and of the legislative history of the IAI Adjustment. Bearing in mind all of the foregoing, the Commission concluded that the Government had not made out the case for modification of the IAI Adjustment for the Quadrennial

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[61] A&C Submission, *supra* note 20 at para 86.
[62] *Ibid* at para 90.
[63] *Ibid* at para 96.
[64] Reply Submission of the Association and Council, January 30, 2012 at para 4 ("A&C Reply Submission").
[65] *PEI Reference Case*, *supra* note 7 at para 196.

Period based on the evidence presented with respect to the prevailing economic conditions and the overall financial position of the federal government.[66]

(b) The role of financial security in maintaining judicial independence

58. Both parties noted the important correlation between financial security and judicial independence; however, neither submitted that the current level of compensation puts the objective of judicial independence in jeopardy.[67] Given that the Commission is recommending the maintenance of the current judicial salary and of the IAI Adjustment, the Commission believes that its recommendation meets this objective.

(c) The need to attract outstanding candidates to the judiciary

59. Canada has an outstanding judiciary. The Government's submissions, the evidence of the Commission's expert with respect to the value of the judicial annuity, and the non-monetary distinctions between the judiciary and private practice all led the Commission to conclude that its recommendations will not result in a level of judicial compensation which deters outstanding candidates from seeking judicial appointment.

(d) Other Objective Criteria

60. The Commission has declined to accept the Government's submission that respect for the judiciary and belief in its independence will be undermined if, as the Government submits, over the Quadrennial Period the IAI Adjustment marginally exceeds increases in the salary package afforded to the appropriate comparator group of persons paid from the public purse (which increases are not now known or knowable).[68] Even accepting at face value the Government's forecast of future IAI Adjustments and public service salary-scale progression, the narrowing of the gap between the *puisne* judge's total compensation and

[66] Figures provided by the Government at the Commission's request by letter from its counsel dated March 27, 2012.
[67] Government Submission, *supra* note 18 at paras 49-53. See also A&C Submission, *supra* note 20 at paras 98-102.
[68] Transcript, Vol 1 at 121-122. Also at Government Submission, *supra* note 18 at paras 46-47.

that of the selected public sector comparator group over the Quadrennial Period would be modest.

61. More importantly, the Government's proposal, by its own admission, was expected to result in a reduction in individual judicial salaries in real terms.[69] The Commission believes that the prevailing economic conditions in Canada and the current financial position of the Government are not such as to justify amendment of the *Judges Act* to save a relatively inconsequential amount of public funds. The Commission believes that if the Government were to take this step in the current circumstances, there is a real risk that it would be perceived as a negative statement by the Government on the performance or value of the judiciary. This could have long-lasting detrimental effects not only on the attraction of the best candidates but also on the morale of the current judiciary, and its performance could suffer as a result. The Commission is not saying that the case for a reduction of judicial compensation in real terms can never be made out, but rather that the Government has not done so in the course of this process.

Recommendation 1

The Commission recommends that:

Effective April 1, 2012, the salary of federally appointed *puisne* judges sitting in all Canadian trial courts should be set, inclusive of statutory indexation, at $288,100.[70]

The statutory indexation pursuant to s. 25 of the *Judges Act* should be applied to the judicial salaries for each subsequent year of the Quadrennial Period.

[69] Government Submission, *supra* note 18 at footnote 10.
[70] As confirmed by the Office of the Commissioner for Federal Judicial Affairs, based on the IAI Adjustment of 2.5%.

Salary Differentials between Trial and Appellate Judges

62. Submissions have been made to all Quadrennial Commissions regarding the institution of a salary differential between the *puisne* judges of the trial and appellate courts.

63. Both the Drouin and McLennan Commissions commented favourably on submissions in favour of such a salary differential. The Drouin Commission declined to act on the basis that the matter required further review and evaluation, which it offered to undertake.[71] While the McLennan Commission declined to act on the submissions because it considered that such a recommendation was beyond its jurisdiction, it went on to state that, if the Commission had determined that it was empowered to do so, it would be "entirely probable" that it would favour such a differential.[72] The Block Commission recommended that such a differential be instituted based on a detailed history of the evolution of the court system in Canada which focussed on the evolution of the appellate courts and their distinct function.[73]

64. Appellate judges must not only state the law, they must also correct legal errors made in courts of first instance. Moreover, appellate decisions have a greater sense of finality than those of trial decisions. These decisions can be overturned only by the Supreme Court of Canada, a court which in recent years has heard fewer than 100 cases annually.[74] Furthermore, appellate court decisions are consistently applied by lower courts and are considered to be more persuasive jurisprudence than trial court judgments.

65. The Commission has concluded that the time has come to deal with the question of salary differentials for appellate court judges. Accordingly, the Commission determined to recommend a 3% salary differential for *puisne*

[71] Drouin Report, *supra* note 5 at 52.
[72] McLennan Report, *supra* note 28 at 55.
[73] Block Report, *supra* note 20 at paras 138-145.
[74] Supreme Court of Canada, summary of statistics 2001 to 2011, Online: http:scc-csc.gc.ca/stat/pdf/doc-eng.pdf. It should be noted that for that period, an average of 15 of the cases the Supreme Court of Canada heard were "as of right", meaning that the total number of cases the Court chooses to hear is, effectively, even smaller than indicated.

judges of the appellate courts (and the maintenance of the differential between those judges and the Chief and Associate Chief Justices of those courts) in light of:[75]

a) the fact that no recommendation is being made for a salary increase for the judiciary as a whole notwithstanding the fact that, while roughly equivalent, the total compensation of *puisne* judges is below that of the selected public sector comparator group;

b) the importance which a majority of Provincial appellate court judges have attached to this issue and the consistent, neutral position of the Association and Council in this regard throughout the Quadrennial processes;

c) the relatively small amount of money involved, based on figures supplied by the Government;[76] and

d) the Government's admission that, while economic uncertainty remains, the outlook has improved significantly from the situation which the Government faced at the time of its response to the Block Report.[77]

66. The Block Commission recommended that the salary differential between the judges of the Supreme Court of Canada and the balance of the federal judiciary be preserved by maintaining the differential then in place and fixing the salaries of the Supreme Court of Canada judges by reference to the newly increased salaries of the *puisne* judges of the other appellate courts. The Commission has not made such a recommendation because it could not see in the proceedings of the Block Commission or the submissions made to this Commission a record on the basis of which it could do so. The Commission would be pleased to

[75] Block Report, *supra* note 20 at paras 146–171.
[76] A salary differential of 3% for the current number of appellate judges as applied to the 2010-2011 salaries of trial court judges would have an aggregate cost of $1.2 million as compared to a total cost of judicial compensation and benefits for the same period of $452 million.
[77] Reply of the Government of Canada, January 30, 2012 at para 16 ("Government Reply").

further consider this matter if a reference is made by the Government pursuant to the *Judges Act* during our mandate.

67. The Commission considered, but did not agree with, the reservations as to jurisdiction which troubled the McLennan Commission. In the Commission's view, the differential recommended goes to the question of the adequacy of judicial remuneration because the recommended differential reflects a judgement made by the Commission as to a difference in the impact on the administration of justice of the work of the appellate court judges as compared to that of the work of judges of the trial courts. The Commission noted that neither the Drouin nor the Block Commissions were concerned about jurisdiction in regard to this issue.

68. Concerning the Commission's use of the Block Report with respect to salary differentials, the Government stated that "[t]his Commission must make its recommendations on an objective basis. The mere fact that a prior commission recommended a salary differential is insufficient."[78] The Commission has carefully considered all submissions made before it and reviewed a summary of the Block Commission transcript. In oral argument, counsel for the Government agreed that such a review would satisfy the Government's procedural concern.

Recommendation 2

The Commission recommends that:

> ***Puisne* judges sitting on provincial and federal appellate courts should be given a salary differential of 3% above *puisne* judges sitting on provincial and federal trial courts.**
>
> **Effective April 1, 2012, their salaries should be set, inclusive of statutory indexation, at $296,700.**

[78] *Ibid* at para 48.

Recommendation 3

The Commission recommends that:

Salary differentials should continue to be paid to the Chief Justice of Canada, the Justices of the Supreme Court of Canada and the chief justices and associate chief justices of the trial and appellate courts;

The salary differential for the chief justices and associate chief justices of the trial courts should be established in relation to the salary of the *puisne* judges appointed to the trial courts;

The salary differential for the chief justices and associate chief justices of the appellate courts should be established in relation to the salary of the *puisne* judges appointed to the appellate courts;

The salary differentials of the Chief Justice of Canada and the Justices of the Supreme Court of Canada should be established in relation to the salaries of *puisne* judges appointed to trial courts; and

Effective April 1, 2012, the salaries should be set, inclusive of statutory indexation, at the following levels:

<u>Supreme Court of Canada</u>

Chief Justice of Canada $370,300
Justices $342,800

<u>Federal Court of Appeal and Provincial Courts of Appeal</u>

Chief Justices $325,300
Associate Chief Justices $325,300

<u>Federal Court, Tax Court and Trial Courts</u>

Chief Justices $315,900
Associate Chief Justices $315,900

CHAPTER 3 – JUDICIAL ANNUITY

Annuity for Senior Judges of the Territorial Courts

69. The Block Commission recommended that the *Judges Act* be amended in order for senior judges of the territorial courts to receive the same treatment with respect to their retirement annuities as chief justices of trial and appellate courts.[79]

70. In the past, territorial legislation failed to provide for supernumerary status; however, this status has now been recognized by applicable legislation and, as such, there are no bars to amending sections 43(1) and 43(2) of the *Judges Act* in order to confer the benefits currently provided only to chief justices and associate chief justices upon senior judges of the territorial courts.

71. Additionally, the *Judges Act* should be amended so that the retirement annuity of a former senior judge, who elected to continue serving as a *puisne* judge, is calculated based on the salary he or she received as a senior judge.

72. Like the Block Commission, the Commission believes that the adequacy of judicial remuneration requires similar treatment for similarly placed judges on the various courts. The only possible objection to making changes to give effect to this principle with respect to the territorial court judges would be based on the Government`s financial position. In view of the *de minimus* sums involved, the Commission concluded that the equitable considerations outweigh that objection. The Commission therefore makes the following recommendations relating to judicial annuities.

Recommendation 4

The Commission recommends that:

> **The *Judges Act* should be amended so that senior judges of the territorial courts who elect supernumerary status receive the same treatment with regard to their retirement annuities as chief justices of both trial and appellate courts who elect supernumerary status.**

[79] Block Report, *supra* note 20 at para 180.

Recommendation 5

The Commission recommends that:

> **The *Judges Act* should be amended so that the retirement annuity of a senior judge of a territorial court who ceases to perform the duties of a senior judge and performs only the duties of a *puisne* judge, receiving the salary of a *puisne* judge, be granted a retiremen annuity based on the salary of a senior judge.**

Annuity for Trial Judges Who Previously Served on Courts of Appeal

73. The *Judges Act* provides that chief justices who elect to resume the duties of a *puisne* judge are subject to the removal of the salary differential afforded to chief justices and associate chief justices, but that their annuities continue to be calculated based on their salary as a chief justice or associate chief justice.[80]

74. The institution of a salary differential for appellate court judges in accordance with Recommendation 2 would mean that the same issue with respect to the basis for the judicial annuity would arise if an appellate court *puisne* judge accepted appointment to a trial court, thereby foregoing the appellate court salary differential. To support flexibility in the management of judicial resources in the courts and for the same reasons cited in support of Recommendations 4 and 5, the Commission has concluded that the *Judges Act* should be amended to provide that, in these circumstances, the judicial annuity should be based on the appellate court salary.

Recommendation 6

The Commission recommends that:

> **The *Judges Act* should be amended so that a *puisne* judge of an appellate court who accepts an appointment to a trial court, receiving the salary of a trial court judge, be granted a retirement annuity based on the salary of his or her former position as an appellate court judge.**

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[80] *Judges Act*, *supra* note 2 at s 43(2).

Submission of the Hon. Roger G. Conant, Q.C.

75. The Honourable Roger G. Conant, Q.C., filed a written submission dated January 16, 2012 and appeared before the Commission accompanied by able counsel at the public hearing in Montréal on February 27, 2012. Justice Conant requested that the Commission make a recommendation to the Government to repeal section 44(4) of the *Judges Act*, which provides that:

> [n]o annuity shall be granted under this section to the survivor of a judge if the survivor became the spouse or began to cohabit with the judge in a conjugal relationship after the judge ceased to hold office.[81]

76. Justice Conant`s position was that section 44(4) contravenes his rights under the *Canadian Charter of Rights and Freedoms* in that, after his death, there would be no survivor annuity paid to his spouse, with whom he began a relationship after his retirement from the judiciary. He argued that his contributions, totalling 6% of his salary during 19 years, were made with the anticipation that his spouse would receive a survivor annuity and that such contributions would be lost to him if no survivor annuity is paid.[82]

77. Justice Conant submitted that it would be unfair for him to be required to elect to receive a reduced annuity in exchange for a survivor annuity in these circumstances, as contemplated by the *Judges Act*. His position was that he had already contributed to the judicial annuity plan and his contributions should be returned to him if they are not used to provide his spouse with a survivor annuity.[83]

78. There is no basis for Justice Conant's argument that his annuity contributions created an expectation that a survivor annuity will be paid in circumstances other than those contemplated by the *Judges Act*. There are a variety of possible outcomes. Some judges will not be survived by an eligible survivor either because their spouse predeceased them or because they never had a

[81] *Ibid* at s 44(4).
[82] Submissions of Roger G. Conant, Q.C., January 16, 2012, at 3 ("Conant Submission").
[83] *Ibid* at 3.

spouse. In these cases, section 51(3) of the *Judges Act* provides for payment of a death benefit equal to the amount by which his or her contributions, together with interest thereon, exceed annuity payments made to or in respect of the judge. This section also provides judges with the assurance that they will always receive benefits at least equal to the value of their contributions, together with interest thereon. Accordingly, a judge cannot lose any of his or her contributions even if no survivor annuity is paid.

79. Subject to the regulations, section 44.2 of the *Judges Act* provides retired judges with spouses who do not qualify as eligible survivors with the option to obtain a survivor annuity for their spouse in exchange for a reduction in their judicial annuity on an actuarially equivalent basis. In theory, this means that the survivor pension is entirely paid for by the retired judge, at no cost to the Government. In practice, however, the Commission's expert advised that the value of the survivor pension to the judge's survivor is probably underestimated by actuarial calculations as it amounts to life insurance coverage granted to an older individual with no proof of insurability. The only safeguard is that the election of a survivor annuity under section 44.2 is not effective if the retired judge should die less than one year after making the election.

80. In coming to its decision, the Commission noted that a restriction similar to section 44(4) of the *Judges Act* applies to public sector employees under the *Public Service Superannuation Act*.[84] Also, the Commission understands that few, if any, private sector pension plans provide a survivor pension if the survivor became the spouse of the plan member after his or her retirement.

81. Finally, in terms of the statutory criteria which guide the Commission`s enquiry, the Commission concluded that it could not recommend the repeal of section 44(4) because to do so could have a significant impact on Government costs, for example should a retired judge marry a much younger spouse**.**

[84] *Public Service Superannuation Act*, RSC, 1985, c P-36 at s 26.

CHAPTER 4 – ALLOWANCES

Representational Allowances

82. Although the Block Report recommended that the representational allowances given to judges be increased,[85] this subject received only passing mention in the written and oral submissions of the parties.

83. The Commission decided not to recommend any change in these allowances. The Commission concluded in light of the evidence with regard to prevailing economic conditions in Canada and the tenor of the Government`s approach to deficit reduction that an increase in these allowances at this time was not essential to maintain the adequacy of judicial compensation and benefits in terms of the applicable statutory criteria.

84. The weighing of equity and cost which led the Commission to make Recommendations 4 and 5 also led the Commission to conclude that the adequacy of judicial remuneration requires that the senior family law judge in Ontario be paid the same representational allowance as other regional senior judges in the province.

Recommendation 7

The Commission recommends that:

> **All regional senior judges in Ontario, including the senior family law judge, should be paid the same representational allowance.**

[85] See Recommendation 9 in Block Report, *supra* note 20 at para 190.

CHAPTER 5 - PROCESS ISSUES

85. Aside from judicial remuneration, the proceedings of the Commission touched on matters of principle relating to the governance of the Commission process. The Commission believes that these procedural issues go to the very heart of the effectiveness of the mechanisms contemplated by the Supreme Court of Canada in its judgments relating to the establishment of judicial compensation and the maintenance of judicial independence. In order for the Quadrennial Commission process to achieve its stated objective, the process must not only be independent, objective and effective, but it must also be seen as such by the stakeholders, which in this case include the judiciary, the Government and the general public.

86. All processes must evolve in order to develop, improve and continue to meet their objectives in a changing environment. The Quadrennial Commission process is no different. The governance mechanism for such evolution is not specified in legislation. The question is: how should the process evolve?

87. At the public hearings, the Government spoke to the question of the Commission's jurisdiction to address procedural issues. The Government took the position, in effect, that the Commission's mandate is limited to a black-letter reading of section 26 of the *Judges Act* and, accordingly, that any matter falling outside such a reading should be regarded as being beyond the jurisdiction of the Commission.[86]

88. This position is at variance with the conclusion of all prior Commissions and with the view of this Commission.[87] Each Quadrennial Commission has an important role to play in overseeing the evolution of the Quadrennial Commission process and, in so doing, actively safeguarding the constitutional requirements. This imperative was aptly explained in the Block Report as follows:

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[86] Transcript, Vol 1 at 108 - 110.

[87] See Drouin Report, *supra* note 5 at 115-116. See also McLennan Report, *supra* note 28 at 89-93. See also Block Report, *supra* note 20 at paras 32-34.

> The parties [to the Commission process] require access to a forum where concerns related to process can legitimately be raised. It is our view that Quadrennial Commissions, by virtue of their independence and objectivity, are well-placed to serve as that forum and to offer constructive comments on process issues as they arise. While the structure and mandate of the Commission are outlined in statute, any question of process that affects the independence, objectivity or effectiveness of the Commission is properly within its mandate. It is entirely appropriate and arguably imperative that the Commission serve as a guardian of the Quadrennial Commission process and actively safeguard these Constitutional requirements.[88]

89. While the Government stated in its submission that it agreed with the Association and Council on the undesirability of litigation relating to Commission reports and Government responses thereto,[89] the Government limited its submissions on process governance only to what the Commission could not do, rather than making detailed and constructive suggestions as to what it could do.[90]

90. In contrast to the Government's position, the Association and Council stated that it was of utmost importance that the Commission address process issues.[91]

91. The importance of the Commission, as well as its process, was eloquently stated by the Barreau as follows:

> [T]he Judicial Compensation and Benefits Commission is not a mere advisory committee, but rather a constitutional body. Its recommendations are of public importance and therefore cannot be set aside by the government without compelling reasons.[92] [Translation]

92. It was evident to the Commission, both from the submissions of the Association and Council and from the reaction of the judges across Canada who attended the public hearings, that there is a growing concern that the Commission process is losing credibility with a key stakeholder group, namely the judiciary, and, accordingly, that the Quadrennial process is in grave danger of ending up where

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[88] Block Report, *supra* note 20 at para 37.
[89] Post-Hearing Submission of the Government, March 5, 2012 at 3 ("Government Post-Hearing Submission").
[90] *Ibid*.
[91] A&C Submission, *supra* note 20 at para 79.
[92] Transcript, Vol 2 at 237.

the Triennial process did. The Association and Council asked that the Commission:

> [a]ccept the judiciary's urging to issue a recommendation reiterating the importance of strict adherence by all parties to the Commission process in order to preserve confidence and maintain the effectiveness of this constitutional process.[93]

93. This Commission agrees that all parties should adhere to the Commission process "in order to preserve confidence and maintain the effectiveness of the constitutional process."[94]

94. Section 26(7) of the *Judges Act* clearly states that a government response to the Commission's report is required within six months after receiving the report.[95] The Government took the position that "the timing and substance of the Government's 2009 response is not a subject of this inquiry…[the Commission's] mandate is prospective."[96]

95. The Association and Council, however, invited the Commission to comment on the fact that the Government did not respond within the required time to the reports of the last two Quadrennial Commissions.[97]

96. The Commission has decided not to do so because, in this case, it felt it would be more constructive to focus on the future than the past. In doing so, the Commission does not accede to the Government's position that the Commission would have exceeded its mandate if it had chosen to look at past conduct. The Commission should add, however, that it felt that the Association and Council's position on the timing of the response was more extreme than warranted. But the Commission, rather than discounting their position for this reason, interpreted its intensity as a proxy for the judiciary's general and growing dissatisfaction with the Quadrennial Commission process.

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[93] A&C Reply Submission, *supra* note 64 at para 91.
[94] *Ibid*.
[95] *Judges Act*, *supra* note 2 at s 26(7).
[96] Letter of the Government of Canada, December 13, 2011 at 2.
[97] A&C Reply Submission, *supra* note 64 at para 88.

Adequacy of the Government's Response

97. Satisfaction has two components – expectations and performance. In the course of its process, the Commission came to believe that better definition of the performance required from the Government in response to a Commission report would contribute to more focussed expectations on the part of the judiciary as to the basis on which they should evaluate the success of the process. The Commission was so concerned with this issue that it sought the views of the parties through a request for supplemental submissions in this regard. Specifically, the Commission requested that the parties describe what "success" of the Commission process would look like to them.[98]

98. The Government's submission defined success only by reference to "the perspective of a reasonable, informed member of the public",[99] a test used by the courts to determine whether a judge is biased, and adopted by the Supreme Court of Canada in the *PEI Reference Case* to determine whether a court has judicial independence within the meaning of section 11(d) of the *Canadian Charter of Rights and Freedoms*. While valid for the cited purpose, the test as so narrowly formulated is in the Commission's view of correspondingly limited use in assessing the constitutional adequacy of a Government response -- and, accordingly, the success of this process -- because it ignores the perspective of a key stakeholder, namely a reasonable, informed member of the judiciary.

99. The Commission does not believe that the constitutional objectives of this process can be met if the Government does not feel a need to be concerned that a reasonable, informed judge be satisfied that throughout the process the Government participated in good faith and in a respectful and non-adversarial manner that reflects the public interest nature of the proceedings. The judiciary constitutes a stakeholder in this process with a weighty interest. This process can be successful only if both the Government and the judiciary, acting reasonably, believe it is effective. Additionally, in omitting any focus on the judiciary, the

[98] Transcript, Vol 1 at 45-46. Transcript, Vol 2, at 242, 244.
[99] Government Post-Hearing Submission, *supra* note 89 at 2.

Government's submission betrays what the Commission believes is at the root of the judiciary's growing dissatisfaction with the process.

Recommendation 8

The Commission recommends that:

In formulating its response to this Report, the Government give weight to the importance of the perspective of reasonable, informed members of both the public and the judiciary.

Bodner: Effectiveness of the Commission Process

100. To highlight how a Government should constitutionally respond to a Commission report, the Commission sets out here some quotes from *Bodner*, the most recent Supreme Court of Canada decision on point. The Court's unanimous 2005 decision provides guidance to the Government on how it should approach its task. The Supreme Court's 1997 *PEI Reference* Case was meant to depoliticize the process. It did not do so. Provincial court judges in a number of provinces challenged the provincial governments' responses to provincial commission reports. Instead of reducing the friction present between judges and governments, the Court in *Bodner* stated that:

> the result has been to exacerbate it. Direct negotiations no longer take place but have been replaced by litigation...[T]he principles of the compensation commission process elaborated in the [PEI] *Reference* must be clarified.[100]

101. The Court in *Bodner* further noted that "the commission's work must have a 'meaningful effect' on the process of determining judicial remuneration."

> "Meaningful effect" does not mean binding effect. A commission's report is consultative...[T]he government retains the power to depart from the commission's recommendations as long as it justifies its decision with rational reason. These rational reasons

[100] *Bodner*, *supra* note 13 at para 12.

> must be included in the government's response to the commission's recommendations.[101]

102. The *PEI Reference Case* set forth a two-stage process for determining the rationality of a government's response: "(1) Has the government articulated a legitimate reason for departing from the commission's recommendations?" and "(2) Do the government's reasons rely upon a reasonable factual foundation?"[102] The *Bodner* court added a third stage:

> 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?[103]

103. The Government cannot simply dismiss the Commission's recommendations. The Court in *Bodner* mandated that the Commission's recommendations be given weight, specifically stating that the Commission's recommendations must

> 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.[104]

104. The Court went on to state that the Government must deal with the issues before it in good faith. It must provide a legitimate response tailored to the Commission's recommendations, which is what the law, fair dealing and respect for the process require.

105. The Government, if it chooses to depart from the recommendations, must give legitimate reasons for departing therefrom. The Court noted:

> 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*

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[101] *Ibid* at paras 20-21.
[102] *PEI Reference Case, supra* note 7 at para 183.
[103] *Bodner, supra* note 13 at para 31.
[104] *Ibid* at para 23.

> *reasons should reveal a consideration of the judicial office and an intention to deal with it appropriately*...[A] mere assertion that judges' current salaries are "adequate", would be insufficient. [Emphasis Added].[105]

106. The Commission assumes that the Government will approach the recommendations in this Report in the spirit set forth by the Supreme Court of Canada in *Bodner*. The Commission expects that the Government's response, as stated above, will "reveal a consideration of the judicial office and an intention to deal with it appropriately."[106] If failure to do so were to lead to a court challenge, even though the judicial review would be a "deferential review which acknowledges both the government's unique position and accumulated expertise and its constitutional responsibility for management of [the government's] financial affairs,"[107] the fact that the parties once again felt the need to resort to litigation would mean that the Quadrennial process had failed. The stakes in such litigation would be very high. In the words of the Supreme Court of Canada: "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."[108]

Recommendation 9

The Commission recommends that:

> **The Government give careful consideration to the third stage for assessing the rationality of a government response introduced by the Supreme Court of Canada's decision in *Bodner*: "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?"**

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[105] *Ibid* at paras 25 and 39.
[106] *Ibid* at para 97.
[107] *Ibid* at para 30.
[108] *Ibid* at para 40. Note also para 44 which states that "the appropriate remedy will generally be to return the matter to the government for reconsideration" or, if problems can be traced to the commission, then to return to the commission. This paragraph will tend to discourage litigation by the judiciary.

Recommendations of Prior Commissions

107. One procedural issue that the Commission dealt with is the ability of a Quadrennial Commission to rely on a recommendation of a prior Commission.

108. At the public hearings, in response to a question from the Commission, the Government took the position that this Commission could not adopt as its own the recommendation made by a prior Commission simply by relying on a reading of the report of that Commission. The Government took the position that proceeding in this manner would not meet the procedural requirement for objectivity because the Commission would not have been privy to the evidence adduced, and arguments made, before the prior Commission.[109]

109. In the view of the Commission, the Government's position is at variance with the Supreme Court of Canada's pronouncement set forth in *Bodner***,** in which the Court stated:

> The reports of previous commissions and their outcomes form part of the background and context that a new compensation commission 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.[110]

110. In response to a request from the Commission for clarification, the Government took the position that the Commission could meet the objectivity standard by reviewing summaries of the hearing transcripts of prior Commissions in lieu of reading the actual transcripts.[111] Out of an abundance of caution, the commissioners followed the suggested legalistic approach and reviewed a summary of the hearing transcripts of the Block Commission. This added cost to the Commission proceedings but no value.

111. This Commission believes that, in arriving at its recommendations, it is entitled to take into account recommendations made by a previous commission, in the

[109] Transcript Vol 1 at 188 -92
[110] *Bodner*, *supra* note 13 at para 15.
[111] Transcript, Vol 1 at 192.

absence of a demonstrated change, where consensus has emerged around a particular issue during a previous commission inquiry.

Recommendation 10

The Commission recommends that:

Where consensus has emerged around a particular issue during a previous Commission inquiry, in the absence of demonstrated change, such consensus should be taken into account by the Commission, and reflected in the submissions of the parties.

Adversarial Nature of the Proceedings

112. The Commission now turns to a troubling aspect of the present process – its adversarial nature.

113. The process appears to have developed in a way which encourages the parties to take extreme positions which in some cases lack credibility, leaving the Commission to guess at the real intent of the party. Some would say that this is simply the adversarial process. But there is a crucial difference between the Commission process and a regular court case. Most litigation – civil and criminal – is settled by the parties with the assistance of their counsel. But this does not take place in the Commission process because no negotiation is permitted between the Government and the judiciary.

114. Chief Justice Lamer stated in the *PEI Reference Case* that "under no circumstances is it permissible for the judiciary – not only collectively through representative organizations, but also as individuals – to engage in negotiations over remuneration with the executive or representatives of the legislature. Any such negotiations would be fundamentally at odds with judicial independence".[112] The *Bodner* court refers, with apparent approval, to

[112] *PEI Reference Case*, *supra* note *7* at para 134.

the *PEI Reference Case*, and states that "[n]o negotiations are permitted between the judiciary and the government."[113]

115. There are other major differences from ordinary litigation which tend to exacerbate the litigious nature of the proceedings. Commissioners normally do not have expertise in issues of judicial independence and may or may not be experienced in the process of fixing compensation, so the parties involved in the process are tempted to bombard the Commissioners with statistics and arguments in an attempt to win them over. Further, there is usually no accumulated knowledge transferred from Commission to Commission. Each Triennial and Quadrennial Commission has had a new chair. Each Commission starts almost from scratch. While the Commission is provided with an adequate operating budget, the operation of Government procurement rules in the context of the compressed time-frame within which the Commission operates presents a real obstacle to the Commission's access to expert assistance, with the result that it must deal with some of the submissions of the parties largely at face value. There is no awarding of costs at the end of the proceedings, which in civil cases can act to moderate the behaviour of litigants. Additionally, the public purse pays the entirety of the Government`s costs and two-thirds of the costs of the representatives of the judiciary.[114] Generally, successful parties in civil cases receive only party and party costs, which account for substantially less than their financial investment in the litigation.

116. This Commission cannot solve the foregoing problems regarding its process. It did not ask the parties to address this issue. It can, however, recommend that the issue be discussed by the Government and by the judiciary well in advance of the next Quadrennial Commission process. The *PEI Reference Case* did not prohibit such discussions. Indeed, it contemplated that such

[113] *Bodner*, *supra* note 13 at para 8.
[114] *Judges Act*, *supra* note 2 at s 26.3.

discussions might take place when commissions across the country were being introduced. Chief Justice Lamer stated:

> I do not wish to dictate the exact shape and powers of the independent commission here. These questions of detailed institutional design are better left to the executive and the legislature, although it would be helpful if they consulted the provincial judiciary prior to creating these bodies.[115]

117. An examination of the issues could include looking at the process for setting judicial salaries in other common-law jurisdictions. In the United Kingdom, for example, there has been since 1971 a permanent commission, which periodically makes recommendations on judicial salaries and other top salaries of persons paid from public funds.[116]

118. Such an examination should also review techniques for lessening the adversarial nature of the Commission process, such as prehearing discussions, joint submissions, greater use of Commission-appointed experts, and less use of oral proceedings.[117]

Recommendation 11

The Commission recommends that:

The Government and the judiciary examine methods whereby the Commission process can be made less adversarial and more effective.

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[115] *PEI Reference Case*, *supra* note 7 at para 167.

[116] See Report No. 77 of the United Kingdom Review Body on Senior Salaries, 2011. Chapter 4 of Report No. 77 deals with the judiciary.

[117] Sterling, Lori and Hanley, Sean, "The Case for Dialogue in the Judicial Remuneration Process" in Adam Dodek and Lorne Sossin, eds, *Judicial Independence in Context* (Toronto: Irwin Law, 2011).

CHAPTER 6 - CONCLUSION

119. The members of the Commission have applied themselves diligently to a task which they consider an honour to have been asked to undertake. Our recommendations represent our considered and unanimous view of what best serves the public interest with respect to judicial compensation and benefits for the Quadrennial Period in the context of the statutory criteria which frame the Commission's mandate under the *Judges Act*.

120. The Government provided extensive evidence with regard to general economic conditions and the tenor of its overall approach to deficit reduction, and urged the Commission to bear in mind when formulating its recommendations the Supreme Court`s concern for the reputation of the judiciary, should a perception arise that judges are not shouldering their share of the burden in difficult economic times. In formulating its recommendations, the Commission gave weight to these submissions, recommending only those changes which the Commission concluded are essential to maintain the adequacy of judicial compensation and benefits in terms of the applicable statutory criteria. The Commission urges the Government to formulate its response to the Commission`s report by considering the Commission`s recommendations as a whole, bearing in mind the submissions made by the Association and Council which were not accepted by the Commission.

121. In closing, the Commission wishes to reiterate its concern for the current health and future of the Quadrennial process. The Commission believes that a robust and timely response by the Government to this Report is essential to maintain the confidence of the judiciary in the process. The Commission also believes that a joint "lessons learned" exercise based on the four Commission processes which have taken place over the past twelve years would be both timely and legal. The Commission hopes and expects that such an exercise would result in both the Government and the judiciary "recommitting" to the

Quadrennial process, and believes it likely that the exercise would result in a more efficient process and a greater satisfaction of all stakeholders with the outcome of future Quadrennial Commission processes.

Brian M. Levitt
Chair

Paul Tellier, P.C., C.C., Q.C.
Commissioner

Mark L. Siegel
Commissioner

CHAPTER 7 – LIST OF RECOMMENDATIONS

Recommendation 1

The Commission recommends that:

Effective April 1, 2012, the salary of federally appointed *puisne* judges sitting in all Canadian trial courts should be set, inclusive of statutory indexation, at $288,100.

The statutory indexation pursuant to s. 25 of the *Judges Act* should be applied to the judicial salaries for each subsequent year of the Quadrennial Period.

Recommendation 2

The Commission recommends that:

***Puisne* judges sitting on provincial and federal appellate courts should be given a salary differential of 3% above *puisne* judges sitting on provincial and federal trial courts.**

Effective April 1, 2012, their salaries should be set, inclusive of statutory indexation, at $296,700.

Recommendation 3

The Commission recommends that:

Salary differentials should continue to be paid to the Chief Justice of Canada, the Justices of the Supreme Court of Canada, the chief justices and associate chief justices of the trial and appellate courts;

The salary differential for the chief justices and associate chief justices of the trial courts should be established in relation to the salary of the *puisne* judges appointed to the trial courts;

The salary differential for the chief justices and associate chief justices of the appellate courts should be established in relation to the salary of the *puisne* judges appointed to the appellate courts;

The salary differentials of the Chief Justice of Canada and the Justices of the Supreme Court of Canada should be established in relation to the salaries of *puisne* judges appointed to trial courts; and

Effective April 1, 2012, the salaries should be set, inclusive of statutory indexation, at the following levels:

Supreme Court of Canada

Chief Justice of Canada $370,300
Justices $342,800

Federal Court of Appeal and Provincial Courts of Appeal

Chief Justices $325,300
Associate Chief Justices $325,300

Federal Court, Tax Court and Trial Courts

Chief Justices $315,900
Associate Chief Justices $315,900

Recommendation 4

The Commission recommends that:

The *Judges Act* should be amended so that senior judges of the territorial courts who elect supernumerary status receive the same treatment with regard to their retirement annuities as chief justices of both trial and appellate courts who elect supernumerary status.

Recommendation 5

The Commission recommends that:

The *Judges Act* should be amended so that the retirement annuity of a senior judge of a territorial court who ceases to perform the duties of a senior judge and performs only the duties of a *puisne* judge, receiving the salary of a *puisne* judge, be granted a retirement annuity based on the salary of a senior judge.

Recommendation 6

The Commission recommends that:

> **The *Judges Act* should be amended so that a *puisne* judge of an appellate court who accepts an appointment to a trial court, receiving the salary of a trial court judge, be granted a retirement annuity based on the salary of his or her former position as an appellate court judge.**

Recommendation 7

The Commission recommends that:

> **All regional senior judges in Ontario, including the senior family law judge, should be paid the same representational allowance.**

Recommendation 8

The Commission recommends that:

> **In formulating its response to this Report, the Government give weight to the importance of the perspective of reasonable, informed members of both the public and the judiciary.**

Recommendation 9

The Commission recommends that:

> **The Government give careful consideration to the third stage for assessing the rationality of a government response introduced by the Supreme Court's decision in *Bodner*: "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?"**

Recommendation 10

The Commission recommends that:

> **Where consensus has emerged around a particular issue during a previous Commission inquiry, in the absence of demonstrated change, such consensus should be taken into account by the Commission, and reflected in the submissions of the parties.**[118]

Recommendation 11

The Commission recommends that:

> **The Government and the judiciary examine methods whereby the Commission process can be made less adversarial and more effective.**

[118] This is Recommendation 14 of the Block Report.

Appendix A

Department of Justice

News Release

JUDICIAL COMPENSATION AND BENEFITS COMMISSION APPOINTMENTS

OTTAWA, December 2, 2011 – The Honourable Rob Nicholson, P.C., Q.C., M.P. for Niagara Falls, Minister of Justice and Attorney General of Canada, today announced the appointments of Paul M. Tellier, P.C., C.C., Q.C., Mark L. Siegel and Brian M. Levitt to the Judicial Compensation and Benefits Commission. These appointments are effective until August 31, 2015.

Paul M. Tellier, P.C., C.C., Q.C., of Montréal, is re-appointed a member as recommended by the judiciary. Mr. Tellier obtained a BA and an LLL from the University of Ottawa; he also graduated with a BLitt from the University of Oxford, England. Mr. Tellier was admitted to the Quebec Bar in 1963.

Mr. Tellier was President, CEO and Director of Bombardier Inc. in 2003-2004, and prior to that he served as President, CEO and Director of the Canadian National Railway Company (CN), from 1992 to 2002. Mr. Tellier served as the Clerk of the Privy Council and Secretary to the Cabinet of the Government of Canada from 1985 to 1992. He also served as Deputy Minister of Indian Affairs and Northern Development in 1979 and as Deputy Minister of Energy, Mines and Resources in 1982.

Mark L. Siegel, of Ottawa, is appointed a member as recommended by the Minister of Justice and Attorney General of Canada.

Mr. Siegel obtained his LLB from Osgoode Hall Law School in 1978 and was admitted to the Bar in 1980.

Mr. Siegel is a partner in Gowlings' Ottawa office, practising in all areas of taxation and wealth management, and has extensive involvement with community foundations and charitable organizations. Prior to his career at Gowlings, Mr. Siegel spent the first two years of his practice focusing on individual tax planning. He then joined the Rulings Division of Revenue Canada where he gained extensive experience in the areas of personal taxation, scientific research taxation and tax issues relating to leasing, financing and charities.

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Brian M. Levitt, of Westmount, is appointed Chair as nominated by the other two members of the Judicial Compensation and Benefits Commission.

Mr. Levitt obtained a BASc in 1969 and an LLB in 1973, both from the University of Toronto. He was admitted to the Ontario Bar in 1975 and the Quebec Bar in 2001.
Mr. Levitt serves as corporate counsel at Osler, Hoskin & Harcourt LLP. He first joined Osler in 1976. In 1991, he became President, and subsequently CEO, of Imasco Limited, a Canadian consumer products and services company. Imasco was sold in 2000 and he returned to Osler in 2001. Mr. Levitt is currently the Chair of the Board of Directors of the Toronto-Dominion Bank. He is also a director of Domtar Corporation.

The Judicial Compensation and Benefits Commission is established under the *Judges Act* to inquire at least every four years into the adequacy of the salaries and benefits of the federally appointed judiciary. The Commission consists of three members: one is nominated by the judiciary and another by the federal Minister of Justice, and these two then nominate a Chairperson.

Additional information on the Judicial Compensation and Benefits Commission can be found at http://www.quadcom.gc.ca/.

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Ref.:

Julie Di Mambro
Press Secretary
Office of the Minister of Justice
613-992-4621

Media Relations
Department of Justice
613-957-4207

(Version française disponible)
Internet: www.canada.justice.gc.ca

Brian Levitt, LL.B, B.A.Sc.

Brian Levitt is Counsel to the firm Osler, Hoskin & Harcourt LLP. He is recognized as one of the leading corporate governance and M & A advisors in Canada. Mr. Levitt first joined Osler's Toronto office in 1976 and became a partner in 1979.

In 1991 Mr. Levitt became President and, subsequently, CEO of Imasco Limited, a Canadian consumer products and services company, which traded on the Toronto Stock Exchange and was, at the time, one of the larger public companies in Canada measured by market capitalization. Imasco was sold in 2000 and Mr. Levitt returned to Osler in 2001.

Mr. Levitt is Chairman of the board of directors of the Toronto-Dominion Bank. He is also currently a director of Domtar Corporation. He served as Board Chair of Domtar until its merger with the white paper business of Weyerhauser in 2007. He has served as a director of various substantial public companies over the past 20 years.

Mr. Levitt is very active in public life and community organizations. He currently serves as Chair of the Board of Trustees of the Montreal Museum of Fine Arts and Vice-Chair of the board of the C.D. Howe Institute. In 2007, he was appointed to the five-person Competition Policy Review Panel created by the Government of Canada to review key elements of Canada's competition and foreign direct investment policies.

He is a graduate of the University of Toronto and was admitted to the Ontario Bar in 1975 and the Québec Bar in 2001.

Mark L. Siegel

Mark Siegel is a partner in the Ottawa office of Gowlings Lafleur Henderson LLP, practicing in all areas of taxation and wealth management, and has extensive involvement with community foundations and charitable organizations, in terms of their organization, registering with CRA and ongoing operations. Mr. Siegel is also experienced in the area of foreign corporate tax planning.

Prior to joining Gowlings, he spent the first two years of his practice focusing on individual tax planning. He then joined the Rulings Division of Revenue Canada where he gained extensive experience in the areas of personal taxation, scientific research taxation and tax issues relating to leasing, financing and charities.

Following that, Mr. Siegel practiced in the Appeals Branch of Revenue Canada where he developed considerable experience in determining whether files should proceed to trial.

He is a graduate of the Osgoode Hall Law School and was admitted to the Ontario Bar in 1980.

Paul Tellier, P.C., C.C., Q.C.

Paul Tellier is a Director of the following companies: Rio Tinto plc and Rio Tinto Ltd.; GM Canada; McCain Foods Ltd; Chairman, Global Container Terminals Inc. (GCT); and Trustee, International Accounting Standards Foundation, London, United Kingdom.

Mr. Tellier is also Strategic Advisor to Société Générale, a global bank headquartered in France. He is co-Chair of the Prime Minister's Advisory Committee on the Public Service, and was a member of the Independent Advisory Panel on Canada's Future Role in Afghanistan.

Mr. Tellier was President and Chief Executive Officer and a Director of Bombardier Inc. in 2003 and 2004. Prior to this he was President and Chief Executive Officer and a Director of the Canadian National Railway Company (CN), a position he held for 10 years.

From August 1985 until he took up his post at CN in 1992, Mr. Tellier was Clerk of the Privy Council and Secretary to the Cabinet of the Government of Canada, the top public servant in the country. He has served in many positions in the public sector, including as Deputy Minister of Indian Affairs and Northern Development in 1979 and as Deputy Minister of Energy, Mines and Resources in 1982.

He is a graduate of the Universities of Ottawa and Oxford, and was admitted to the Québec Bar in 1963.

Appendix **B**

Commission's Process Chronology

On December 2, 2011 the Department of Justice issued a news release setting out the Commission appointments.

The Commission published a notice and posted it on the Commission website, www.quadcom.gc.ca, on December 7, 2011, inviting interested parties "[w]ishing to comment on matters within the Commission's mandate (judicial salaries, allowances, annuities, perquisites, etc.) to submit their written submissions to the Commission by January 16, 2012."[119]

In the same notice, requests to appear at the public hearings were sought from those who provided written submissions. By January 30, 2012, all requests by those seeking to be present at the public hearings had been made. Public hearings were held on February 20, 2012, in Ottawa, Ontario, and on February 27, 2012, in Montréal, Québec.

Contact information was readily available on the Commission's website to those who wished to communicate with the Commission. Communications from the Commission, and written submissions and responses to the Commission, were published on the website.

On December 8, 2011, the Commission issued a notice setting forth its views on certain of the recommendations contained in the Block Report.[120] It also sought submissions with respect to its process in relation to the timeliness and substance of the Government's response to the Block Report.

Both the Government and the Association and Council made submissions to the Commission regarding the issues raised by the notice. We have addressed these procedural issues in this report.

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[119] Found at http://www.quadcom.gc.ca/

[120] Report of the Judicial Compensation and Benefits Commission, submitted to the Minister of Justice of Canada, May 30, 2008 [Block Report].

Appendix C

List of Submissions, Letters and Replies received by the Commission[121]

1. Submission from the Government of Canada represented by the Department of Justice of Canada

2. Government response to the Commission's request for additional information

3. Joint submission from the Canadian Superior Courts Judges Association and the Canadian Judicial Council

4. Joint book of documents from the Government of Canada and the Canadian Superior Courts Judges Association and the Canadian Judicial Council

5. Submission from the Canadian Bar Association

6. Submission from le Barreau du Québec

7. Letter from the Honourable Roger G. Conant

8. Letter from Mr. Robert Michon

9. Letter from Ms. Connie Brauer and Mr. Victor Harris

10. Reply submission from the Government of Canada

11. Joint Reply Submission from the Canadian Superior Courts Judges Association and the Canadian Judicial Council

12. Letters from Mr. André Sauvé, Compensation Expert, concerning the valuation of judicial annuity and lawyers retirement income comparable

13. Response letter from Mr. B. FitzGerald to Mr. Sauvé's letters

14. Letter from the Privy Council Office, concerning the DM-3 Comparator

15. Letter from McDowall Associates in reply to Annex A of the Government of Canada Submission

[121] See http://www.quadcom.gc.ca/

Appendix D

Public Hearings - List of Participants

February 20, 2012

Representing the Judicial Compensation and Benefits Commission

- Brian M. Levitt
  Chair of the Commission

- Mark L. Siegel
  Commissioner

- Paul M. Tellier
  Commissioner

- Suzanne Labbé
  Executive Director

Representing the Government of Canada

- Cathy Beagan Flood
  Counsel
  Blake, Cassels & Graydon LLP

- Judith Bellis
  General Counsel
  Judicial Affairs, Courts and Tribunal Policy
  Justice Canada
  Observer

- Druscilla F. Flemming
  Deputy Director,
  Compensation Policy and Operations
  Senior Personnel, Privy Council Office
  Observer

- Patrick Xavier
  Counsel
  Judicial Affairs, Courts and Tribunal Policy
  Justice Canada
  Observer

Public Hearings - List of Participants

Representing the Canadian Superior Courts Judges Association and the Canadian Judicial Council

- Pierre Bienvenu
  Counsel
  Norton Rose Canada, LLP

- Azim Hussain, Partner
  Counsel
  Norton Rose Canada

- Me L. Yves Fortier
  Counsel
  Norton Rose Canada

- Jamie Macdonald
  Associate Lawyer
  Norton Rose Canada
  Observer

- The Hon. Madam Justice Mary T. Moreau
  President, Canadian Superior Courts Judges Association
  Observer

- The Hon. Mr. Justice James Adams
  Vice-President, Canadian Superior Courts Judges Association
  Observer

- The Hon. Mr. Justice Ted C. Zarzeczny
  Chair, Compensation Committee, Canadian Superior Courts Judges Association
  Observer

- The Hon. Mr. Justice T. Mark McEwan
  Vice-Chair, Compensation Committee, Canadian Superior Courts Judges Association
  Observer

- The Hon. Madam Justice Lynne Leitch
  Past President, Canadian Superior Courts Judges Association
  Observer

- The Hon. Chief Justice Warren Winkler
  Chair, Judicial Salaries and Benefits Commission
  Canadian Judicial Council
  Observer

Public Hearings - List of Participants

Representing the Canadian Bar Association

- Trinda Ernst
  President
  Canadian Bar Association

- Judy Hunter
  Counsel
  Canadian Bar Association

- Peter Browne
  Chair of the Canadian Bar Association's Judicial Compensation and Benefits Commission

Representing the Public (via conference call)

- Ms. Connie Brauer

- Mr. Victor Harris

Public Hearings - List of Participants

February 27, 2012

Representing the Judicial Compensation and Benefits Commission

- Brian M. Levitt
  Chair of the Commission

- Mark L. Siegel
  Commissioner

- Paul M. Tellier
  Commissioner

- Suzanne Labbé
  Executive Director

Representing the Government of Canada

- Cathy Beagan Flood
  Counsel
  Blake, Cassels & Graydon LLP

- Judith Bellis
  General Counsel
  Judicial Affairs, Courts and Tribunal Policy
  Justice Canada
  Observer

- Druscilla F. Flemming
  Deputy Director,
  Compensation Policy and Operations
  Senior Personnel, Privy Council Office
  Observer

- Patrick Xavier
  Counsel
  Judicial Affairs, Courts and Tribunal Policy
  Justice Canada
  Observer

Public Hearings - List of Participants

Representing the Canadian Superior Courts Judges Association and the Canadian Judicial Council

- Pierre Bienvenu
  Counsel
  Norton Rose, LLP

- Azim Hussain, Partner
  Counsel
  Norton Rose Canada

- The Honourable Madam Justice Mary T. Moreau
  President, Canadian Superior Courts Judges Association
  Observer

- The Hon. James Adams
  Vice-President, Canadian Superior Courts Judges Association
  Observer

- The Hon. Mr. Justice Ted C. Zarzeczny
  Chair, Compensation Committee, Canadian Superior Courts Judges Association
  Observer

- The Hon. Mr. Justice T. Mark McEwan
  Vice-Chair, Compensation Committee, Canadian Superior Courts Judges Association
  Observer

- The Hon. Mr. Justice Denis Jacques
  Treasurer, Canadian Superior Courts Judges Association
  Observer

Public Hearings - List of Participants

Representing the Barreau du Québec

- Louis Masson
  Bâtonnier du Québec

- Nicolas Plourde
  Vice président

- Marc Sauvé
  Directeur du Service de recherche et législation

Representing the Public

- David Morin
  Counsel

- The Hon. Roger G. Conant

Government of Canada / Gouvernement du Canada

GOVERNMENT RESPONSE TO THE 2011 JUDICIAL COMPENSATION AND BENEFITS COMMISSION

Canada

RESPONSE OF THE GOVERNMENT OF CANADA TO THE REPORT OF THE 2011 JUDICIAL COMPENSATION AND BENEFITS COMMISSION

This is the Response of the Government of Canada to the Report of the fourth Judicial Compensation and Benefits Commission, dated May 15, 2012. It is issued pursuant to s. 26(7) of the *Judges Act*.

The Government wishes to thank the Commission members for their commitment to this important public interest process, and for addressing the issues raised before them in a timely manner.

I. Background

The establishment of judicial compensation is governed by constitutional provisions and principles designed to ensure public confidence in the independence and impartiality of the judiciary. At the federal level, s. 100 of the *Constitution Act, 1867* requires that Parliament, rather than the Executive, fix judicial compensation and benefits. Judicial compensation and benefits are established by the *Judges Act.* However, in *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 S.C.R. 3, the Supreme Court of Canada held that before any changes are made to judicial compensation, the adequacy of judicial compensation must be considered by an "independent, objective and effective" commission.

Section 26(1) of the *Judges Act* provides for the establishment of the Judicial Compensation and Benefits Commission every four years. The Commission's mandate is to inquire into and make recommendations regarding the "adequacy" of judicial compensation and benefits of federally appointed judges.

Section 26(1.1) of the *Judges Act* provides that the adequacy of judicial compensation and benefits is to be considered in light of the following criteria:

(a) the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government;
(b) the role of financial security of the judiciary in ensuring judicial independence;
(c) the need to attract outstanding candidates to the judiciary; and
(d) any other objective criteria that the Commission considers relevant.

The Commission must report to the Minister of Justice within nine months and the Government must respond publicly to the Commission's report and recommendations within six months of receipt of the Report (s.26(7)). Although Commission recommendations are not binding, the Supreme Court of Canada held in *Bodner v. Alberta*, [2005] 2 S.C.R. 286 that a government that proposes to reject or modify a Commission's recommendations must provide a rational justification for so doing, based on the following three-stage test:

(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?

The current Commission (the "Levitt Commission") was convened on September 1, 2011 and is composed of Brian Levitt (Chair, appointed by the other two nominees), Paul Tellier (Judicial nominee) and Mark Siegel (Government nominee). The Levitt Commission delivered its Report to the Minister of Justice on May 15, 2012 and the Report was tabled in Parliament on May 17, 2012. A list of the Commission's recommendations follows the Response.

By way of summary, the Commission made the following salary and benefits recommendations:

(a) Recommendation 1 and part of Recommendation 3: no salary increases for the judiciary above statutory indexing for the Quadrennial Period (April 1, 2012 to March 31, 2016). (Pursuant to s. 25 of the *Judges Act*, judicial salaries are automatically indexed every April 1 based on the Industrial Aggregate Index ("IAI").).
(b) Recommendations 2 and 6, and part of Recommendation 3: the judges of appellate courts receive a salary differential of 3% above the current judicial salary in order to reflect the importance of their role and functions, and receive a judicial annuity based on that salary, including if the judge later accepts appointment to a trial court.
(c) Recommendations 4 and 5: all retirement benefits currently enjoyed by chief and associate chief justices be extended to the 3 senior northern judges, who perform the functions of chief justices for the territorial courts.
(d) Recommendation 7: the senior family law judge in Ontario receive the same representational allowance of $5000 as all Ontario senior regional judges.

The Commission also made certain recommendations regarding process (Recommendations 8-11).

II. Government Response

The Government accepts the Levitt Commission Recommendations 1, 4, 5 and 7, and those portions of Recommendation 3 that flow from Recommendation 1. The Government does not accept Recommendations 2 and 6, and those portions of Recommendation 3 that flow from Recommendation 2. In terms of the Commission's Recommendations 8-11, while not legally required to respond to process recommendations, the Government will offer some brief comment.

(a) Commission Recommendations 1, 3 (in part), 4, 5 and 7: Salaries and Benefits

The Commission recommendation that statutory indexing pursuant to s. 25 of the *Judges Act* continue during the current quadrennial period of April 1, 2012 to March 31, 2016 would maintain the status quo. The Government is satisfied that in making these recommendations the Commission has demonstrated that due consideration was given to each of the *Judges Act* criteria. Of particular importance is the careful attention the Commission gave to the economic and fiscal considerations advanced by the Government in rejecting the judiciary's proposals for an increase in salary of over 20% over the four years of the quadrennial period.

The Government accepts the Commission's findings that, despite continuing global uncertainty, current economic conditions in Canada appear less grave than they did at the time of the February 2009 Response to the 2007 Commission, when the Government maintained statutory indexing for the quadrennial period of April 1, 2008 to March 31, 2012. Accordingly, the Government accepts the Commission recommendation that statutory indexing pursuant to s. 25 of the *Judges Act* continue during the current quadrennial period of April 1, 2012 to March 31, 2016.

The Government also accepts the Commission's recommendations to extend retirement benefits currently enjoyed by chief and associate chief justices to the three senior northern judges. These judges perform essentially similar functions to those of chief justices and are currently paid the salary of a chief justice. The Commission's recommendation that Ontario's senior family law judge be paid the same representational allowance as all Ontario regional senior judges is also reasonable, in that it recognizes that the senior family law judge performs functions equivalent to those of regional senior judges.

(b) Commission Recommendations 2, 3 (in part) and 6: Court of Appeal Salary Differential

Having considered the Levitt Commission's reasons for recommending an appellate salary differential, the Government respectfully declines to follow Recommendations 2 and 6 and those
portions of Recommendation 3 that flow from Recommendation 2.

Currently, all superior court judges in Canada, including trial judges and appellate judges, are paid the same salary. This excludes Chief Justices, Associate Chief Justices or Senior Judges who assume additional administrative duties as well as judges of the Supreme Court of Canada.

The question of whether judges of appellate courts should be paid more than judges of trial courts raises difficult issues regarding public perception of the quality of justice received from those courts as well as issues of equity and collegiality within the judiciary. It is an issue that has historically been the subject of considerable controversy within the judiciary. Indeed, in submissions before past commissions, judges of the

Courts of Appeal have been divided on whether receiving a higher salary would be in the public interest

A request for a salary differential for appellate judges was received by the 1996 Scott Commission (the last "triennial" commission). It raised serious concerns about the potential impact of such a change on Canada's court system and stated that:

While some interesting points, in substance, in favour of the concept are advanced, a very persuasive case would have to be made to depart from the present regime which assumes that *the burden of judicial office, while different in nature as between the trial and appellate court levels of our courts, nonetheless requires an equivalent discipline and dedication on the part of the judges at both court levels. The cultural impact on the system in the event of such differentiation would have to be very carefully weighed*. *(*Emphasis added.*)*

All four of the Quadrennial Commissions have also considered the issue of a salary differential for trial and appellate judges. The 1999 Drouin Commission considered that there were merits to the arguments made both for and against a differential. However, it concluded that further review and information would be needed to make a recommendation.

The 2003 McLennan Commission refused to recommend a salary differential, finding:

In short, there is no support for the proposition that the current method of compensating *puisne* judges equally, as they have been, has not been an entirely satisfactory arrangement to the functioning of the courts or the availability of suitable candidates to staff this country's courts of appeal. *There is, on the other hand, some evidence that the creation of such a differential would be harmful*. (Emphasis added.*)*

The McLennan Commission also concluded that a differential would not "have any impact whatsoever" on the role of financial security of the judiciary in ensuring judicial independence (*Judges Act*, s. 26(1.1)(b)), or the need to attract outstanding candidates to the judiciary (s.26(1.1)(c)).

The 2007 Block Commission received a request for a differential on behalf of 99 of the 141 judges of Canadian Courts of Appeal, and 18 submissions opposing the request, including the Ontario Superior Court Judges' Association representing close to 300 superior court judges in Ontario. As had been the case before all previous commissions, the Canadian Judicial Council and the Canadian Superior Court Judges Association remained neutral with respect to the appellate differential issue.

The Block Commission accepted the McLennan Commission's conclusion that a salary differential would have no impact on the financial security of appellate judges nor on the need to attract outstanding candidates to the judiciary (s. 26(1.1)(b) and (c) of the *Judges Act*) and found that the issue was whether another objective criterion could be identified

under s. 26(1.1)(d) of the *Judges Act*. The Block Commission also rejected differences in the workload of trial and appellate judges as a basis for a different salary.

The only criterion that the Block Commission found to support a differential was a conclusion that there is a substantive difference in the role and responsibilities of judges who are appointed to appellate courts, in that their essential functions are: (1) correcting injustices or errors made at first instance; and (2) stating the law. The Block Commission did not make any finding that the role and responsibilities of appellate court judges were more onerous or added a greater value to the Canadian public than the role and responsibilities of trial court judges. Indeed, in response to the concern expressed by a large number of trial judges that a differential would be divisive, the Commission stated that it did "not in any way wish to undermine or diminish the value of the important work undertaken by trial judges across the country."

The Government did not implement any of the recommendations of the Block Commission, due to the significant deterioration in economic conditions in Canada and the financial position of the Government that occurred after the Commission delivered its Report.

Prior to receiving submissions from any party, the Levitt Commission issued a notice indicating that in the absence of a change in facts or circumstances, it intended to make the same recommendations as the Block Commission with respect to, *inter alia*, the appellate differential. While the Canadian Judicial Council and Canadian Superior Court Judges Association had remained neutral in all previous Commissions, they now submitted that the Levitt Commission should adopt the recommendations of the Block Commission including the appellate salary differential. However, apart from relying on the Block Commission's consideration of the issue, they made no substantive submissions supporting the merits of the requested recommendation, and did not file any evidence. Unlike prior commissions, no oral or written submissions were made by any court or judge in support of, or opposing, an appellate differential. The Government submitted that it was not open to the Commission to adopt the Block Commission's recommendations without an independent and objective assessment of all relevant factors, and that the parties representing the judiciary had not presented any substantive submissions or evidence for the Government to respond to.

On the basis of the submissions made "before it" (which did not address the merits of an appellate differential) and a review of a summary of the Block Commission transcript (but apparently not the written submissions to that Commission), the Levitt Commission recommended a 3% salary differential between trial and appellate judges. It appears that the Commission accepted the findings of both the McLennan and Block Commissions that a court of appeal differential would not be necessary either to ensure judicial independence or to attract outstanding candidates to the judiciary as required by subsections 26(1.1)(b) and (c) of the *Judges Act*. Its recommendation appears to be based solely upon s. 26(1.1)(d) "any other objective criteria that the Commission considers relevant." The Commission stated that its jurisdiction to recommend an appellate differential "reflects a judgment made by the Commission as to a difference in the impact

on the administration of justice of the work of the appellate court judges as compared to that of the work of judges of the trial courts."

With respect, the Government does not accept that recommendation. The roles of trial and appellate judges are different in nature, but not in importance. Judges of courts of appeal make final decisions on questions of law, subject to appeal to the Supreme Court of Canada. Trial judges have the primary role in determining questions of fact, and while their determinations of law are subject to appeal, in the vast majority of cases they are not appealed. Trial judges have a much greater role in interacting directly with litigants, including non-represented litigants and have the difficult task of assessing the credibility of witnesses. While the Levitt Commission is correct that appellate decisions have a greater sense of finality and are consistently applied by lower courts, the doctrine of *stare decisis* does not make the salaries of appellate court judges inadequate**.** There is a hierarchy of judicial decisions and courts but the responsibilities of individual judges, whether trial or appellate, are equivalent in terms of their obligation to fairly, impartially and independently decide each case. As the Scott Commission found, "the burden of judicial office ... requires an equivalent discipline and dedication on the part of the judges at both court levels." The submission of certain appellate court judges to the Block Commission stated that it would be unseemly to justify salary differentials on the basis that different courts work harder or accomplish tasks of greater value than others. Many of the other submissions from judges indicated that the work of both trial and appellate courts is important, challenging and demanding, and raised concerns about public perception of any diminished valuation of trial judges. The Government is of the view that the work of judges of the trial courts is, and should be perceived by the public to be, of equal importance to that of appellate court judges. While the Commission has highlighted a number of significant functions carried out by appellate court judges, its analysis does not demonstrate a corresponding consideration of the key responsibilities and contributions of trial court judges.

The Block Commission noted that in some jurisdictions status distinctions as between trial judges and court of appeal judges have been indicated by order of rank and precedence. To the extent that the Commission's recommendations for an appellate differential are premised on hierarchical considerations involving status distinctions, regardless of differences in the value of the work undertaken, in the Government's view status alone bears no relation to the "adequacy of judicial compensation and benefits". They are accordingly beyond the Commission's jurisdiction as established by section 26 of the *Judges Act*.

Moreover, apart from economic considerations, the Levitt Commission did not refer to any of the other reasons not to implement a salary differential for appellate court judges. These include:

- the lack of consensus among the 1103 superior court judges including appellate judges;
- the real risk of negatively affecting the goodwill and collegiality among trial and appellate judges;

- trial courts or trial judges at times perform appellate functions;
- trial judges at times sit on courts of appeal;
- some of the work done by courts of appeal in one province may be done by trial courts in another (e.g. the Ontario Divisional Court);
- trial judges bear sole responsibility for their decisions, whereas appellate court judges sit in panels, and thus share workload and responsibility;
- a differential would create an incentive for judges whose skills are better-suited to trial work to seek an appellate appointment;
- a differential could deter an appellate court judge from transferring to a trial court when such a transfer contributes to the better administration of justice; and
- a new differential would affect the equities of current salary differentials.

The Government considers that these are legitimate concerns that further support its conclusion that the current salaries of all superior court judges including appellate court judges (as increased in part II (a) above) are adequate, and an appellate differential would not advance the proper administration of justice or the broader public interest.

Finally, the Government does not accept the Levitt Commission's reasoning in terms of criterion 26(1.1)(a) (the prevailing economic conditions in Canada, including the cost of living, and the overall economic and financial position of the federal government). The Commission justified the additional cost of the court of appeal salary differential on the basis that it would involve "minimal costs in relation to overall government expenditures". However, this statement fails to take into account that deficits are tackled and budgets balanced as a result of a large number of decisions regarding amounts of money that may in themselves appear minimal when compared to total government expenditures. The Supreme Court has recognized in the *Bodner* decision that while governments and legislatures must respect and protect judicial independence, they also have the constitutional responsibility of deciding how public resources are to be allocated. The Government is of the view that Recommendations 2 and 6, which would involve an additional public expenditure of about $6 million over the quadrennial period, cannot be justified at a time when fiscal restraint has required reduction of a wide range of other government program expenditures.

(c) Commission Recommendations 8-11: Process

The Commission dedicated Chapter 5 to a discussion of process issues and made certain recommendations for improvements to its effectiveness. The Government agrees with the Commission that the process for setting judicial remuneration is intended to be non-adversarial and effective, and agrees with the Commission's Recommendation 11 that the Government and judiciary should examine methods whereby the Commission process can be made less adversarial and more effective. Moreover, the Government agrees with the Commission that building confidence in the Commission process requires a constructive focus on the future, rather than the past, and requires that all of the stakeholders in the process approach it with reasonable expectations and with respect for each other's reasonable concerns and perspectives.

Consistent with that focus on the future, the Government will refrain from responding in detail to Chapter 5 of the Commission's Report with which it disagrees. However, it is necessary to observe that the Government remains bound by the Supreme Court's directions in the *PEI Judges Reference* and *Bodner* decisions and the provisions of the *Judges Act*. In particular, with respect to Recommendation 8, while the perspective of a reasonable, informed member of the judiciary is important, it is clear from the Supreme Court's guidance that the test for judicial independence, including the sufficiency of a Government response, is assessed from the perspective of the ultimate beneficiaries of that independence – the litigants and members of the general public who depend upon a fair and impartial system of justice.

With respect to Recommendation 10 of the Commission's Report, the Government continues to be of the view that as a matter of law, to meet the constitutional requirements of independence, objectivity and effectiveness, each commission must turn its mind to the evidence and submissions before it and cannot simply adopt unimplemented recommendations of a prior commission without conducting its own independent and objective analysis. Moreover, there is only a "consensus" on an issue if all parties before the Commission have agreed on that issue. The joint goal of both the Government and the judiciary to achieve a less adversarial and more effective process is not advanced by compounding a disagreement on a particular issue with an additional disagreement about whether there was a consensus about that issue in the past. Rather, a less adversarial and more efficient process can be achieved by seeking and building upon genuine consensus, and the Government agrees with the Commission that the parties should explore additional methods for doing so.

In preparing this Response, the Government has considered the three stages of the test set out by the Supreme Court in *Bodner*, including the third stage, as noted in the Commission's Recommendation 9. The Government is of the view that, overall, the 2011 Quadrennial Commission process has succeeded in achieving the objectives established by the Supreme Court of Canada in the *PEI Judges Reference* and *Bodner*. That said, the Government will propose certain amendments to the *Judges Act* that will improve both the timeliness and effectiveness of the process, by reducing the time for the Government Response from six months to four months and by establishing an express obligation to introduce implementing legislation in a timely manner. In addition, the Government remains open to exploring with the judiciary approaches that would make the process less adversarial and thereby improve its overall effectiveness.

III. Conclusion

The Government is mindful of the importance of publicly demonstrating its commitment to the timeliness and effectiveness of the Quadrennial Commission process. The Government moved quickly to table the Commission's Report in Parliament within two days of receipt, and has now issued this Response well in advance of the statutory deadline of November 15, 2012. In addition, the Government is prepared to take steps to ensure early implementation of the Commission's recommendations by introducing the necessary amendments to the *Judges Act* at the earliest opportunity. These steps will

ensure continued public confidence in the Quadrennial Commission process and through it the independence of the federally appointed judiciary in Canada.

LIST OF THE RECOMMENDATIONS OF THE 2011 JUDICIAL COMPENSATION AND BENEFITS COMMISSION

Recommendation 1

The Commission recommends that: Effective April 1, 2012, the salary of federally appointed *puisne* judges sitting in all Canadian trial courts should be set, inclusive of statutory indexation, at $288,100. The statutory indexation pursuant to s. 25 of the *Judges Act* should be applied to the judicial salaries for each subsequent year of the Quadrennial Period.

Recommendation 2

The Commission recommends that: *Puisne* judges sitting on provincial and federal appellate courts should be given a salary differential of 3% above *puisne* judges sitting on provincial and federal trial courts. Effective April 1, 2012, their salaries should be set, inclusive of statutory indexation, at $296,700.

Recommendation 3

The Commission recommends that: Salary differentials should continue to be paid to the Chief Justice of Canada, the Justices of the Supreme Court of Canada, the chief justices and associate chief justices of the trial and appellate courts;

> The salary differential for the chief justices and associate chief justices of the trial courts should be established in relation to the salary of the *puisne* judges appointed to the trial courts;
>
> The salary differential for the chief justices and associate chief justices of the appellate courts should be established in relation to the salary of the *puisne* judges appointed to the appellate courts;
>
> The salary differentials of the Chief Justice of Canada and the Justices of the Supreme Court of Canada should be established in relation to the salaries of *puisne* judges appointed to trial courts;

and Effective April 1, 2012, the salaries should be set, inclusive of statutory indexation, at the following levels:

<u>Supreme Court of Canada</u>
Chief Justice of Canada $370,300
Justices $342,800

<u>Federal Court of Appeal and Provincial Courts of Appeal</u>
Chief Justices $325,300
Associate Chief Justices $325,300

Federal Court, Tax Court and Trial Courts

Chief Justices $315,900

Associate Chief Justices $315,900

Recommendation 4

The Commission recommends that: The *Judges Act* should be amended so that senior judges of the territorial courts who elect supernumerary status receive the same treatment with regard to their retirement annuities as chief justices of both trial and appellate courts who elect supernumerary status.

Recommendation 5

The Commission recommends that: The *Judges Act* should be amended so that the retirement annuity of a senior judge of a territorial court who ceases to perform the duties of a senior judge and performs only the duties of a *puisne* judge, receiving the salary of a *puisne* judge, be granted a retirement annuity based on the salary of a senior judge.

Recommendation 6

The Commission recommends that: The *Judges Act* should be amended so that a *puisne* judge of an appellate court who accepts an appointment to a trial court, receiving the salary of a trial court judge, be granted a retirement annuity based on the salary of his or her former position as an appellate court judge.

Recommendation 7

The Commission recommends that: All regional senior judges in Ontario, including the senior family law judge, should be paid the same representational allowance.

Recommendation 8

The Commission recommends that: In formulating its response to this Report, the Government give weight to the importance of the perspective of reasonable, informed members of both the public and the judiciary.

Recommendation 9

The Commission recommends that: The Government give careful consideration to the third stage for assessing the rationality of a government response introduced by the Supreme Court of
Canada's decision in *Bodner*: "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?"

Recommendation 10

The Commission recommends that: Where consensus has emerged around a particular issue during a previous Commission inquiry, in the absence of demonstrated change, such consensus should be taken into account by the Commission, and reflected in the submissions of the parties.

Recommendation 11

The Commission recommends that: The Government and the judiciary examine methods whereby the Commission process can be made less adversarial and more effective.

Judicial Compensation and Benefits Commission

Commission d'examen de la rémunération des juges

REPORT AND RECOMMENDATIONS

SUBMITTED TO
the Minister of Justice of Canada

June 30, 2016

Judicial Compensation and Benefits Commission

Commission d'examen de la rémunération des juges

99 Metcalfe Street
Ottawa, Ontario K1A 1E3

Chairperson/Président
Gil Rémillard

Members/Membres
Margaret Bloodworth
Peter Griffin

Executive Director/Directrice exécutive
Louise Meagher

Tel./Tél. : 613-995-5300
e-mail/courriel : info@quadcom.gc.ca

June 30, 2016

The Honourable Jody Wilson-Raybould
Minister of Justice and Attorney General of Canada
284 Wellington Street
Ottawa, Ontario
K1A 0H8

Dear Minister:

Pursuant to Subsection 26(2) of the *Judges Act,* I am pleased to submit the report of the fifth Judicial Compensation and Benefits Commission.

Yours truly,

Gil Rémillard
Chair

Encl.

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CHAPTER 1 – INTRODUCTION

THE COMMISSION'S HISTORY

1. This is the Report of the fifth Quadrennial Judicial Compensation and Benefits Commission ("Quadrennial Commission" or "Commission") established under section 26 of the *Judges Act*[1] to inquire into the adequacy of salaries and benefits payable to federally-appointed judges.

2. This Commission was established by Order in Council and its appointment announced on December 18, 2015, by the Honourable Jody Wilson-Raybould, Minister of Justice and Attorney General of Canada.[2] The Commissioners are Chairperson Gil Rémillard, Margaret Bloodworth, and Peter Griffin. The term of this Commission runs for four years, ending September 30, 2019.

3. This Report is delivered to the Minister of Justice within the nine-month period specified in section 26(2) of the *Judges Act*. [3]

4. In accordance with section 26(7) of the *Judges Act*, the Minister of Justice must respond to the Commission's report within four months after receiving it and thereafter, where applicable, initiate any legislation to implement the response. [4]

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[1] RSC 1985, c J-1.
[2] Department of Justice, "Judicial Compensation and Benefits Commission Appointments" (18 December 2015), Appendix A to this Report.
[3] *Supra* note 1
[4] *Ibid*

THE COMMISSION'S MANDATE

5. Section 100 of the *Constitution Act, 1867* authorizes Parliament to set compensation for the judiciary.[5]

6. Section 101 authorizes Parliament to establish the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court of Canada, and the Tax Court of Canada and to fix the remuneration of the judges of these Courts.[6] The Quadrennial Commission process was initiated by amendments to the *Judges Act* in 1998 after the Supreme Court of Canada's decision in *Re Remuneration of Judges of the Provincial Court of Prince Edward Island.*[7]

7. That case and the subsequent jurisprudence emphasize that the constitutional guarantee of judicial independence is a cornerstone of the integrity of our judicial system.[8] These cases affirm the three elements of judicial independence as: security of tenure, administrative independence, and financial security.[9] They establish the requirements of a process to address the compensation of the judiciary while preserving its independence.[10]

8. In examining judicial compensation, section 26(1.1) of the *Judges Act* requires Quadrennial Commissions to consider the following factors:

(a) the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government;

(b) the role of financial security of the judiciary in ensuring judicial independence;

(c) the need to attract outstanding candidates to the judiciary; and

(d) any other objective criteria that the Commission considers relevant.[11]

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[5] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.
[6] *Ibid.*
[7] *Ref re Remuneration of Judges of the Prov Court of PEI; Ref re Independence and Impartiality of Judges of the Prov Court of PEI*, [1997] 3 SCR 3 [*PEI Reference*].
[8] *Ibid* at 190, citing *R v Lippé*, [1991] 2 SCR 114 at 139.
[9] *PEI Reference*, *supra* note 7 at 80-81; and see *Provincial Court Judges' Assn of New Brunswick v New Brunswick (Minister of Justice); Ontario Judges' Assn v Ontario (Management Board); Bodner v Alberta; Conférence des juges du Québec v Quebec (Attorney General); Minc v Quebec (Attorney General)*, 2005 SCC 44 at para 7, [2005] 2 SCR 286 [*Bodner*].
[10] *PEI Reference*, *supra* note 7 at 88-89, 94, 102-112; *Bodner*, *ibid*, at paras 13-21.
[11] *Supra* note 1.

9. The Quadrennial Commission process has resulted in four previous reports:

(a) the Drouin Commission Report (2000)[12;]

(b) the McLennan Commission Report (2004)[13];

(c) the Block Commission Report (2008)[14]; and,

(d) the Levitt Commission Report (2012)[15.]

10. The compensation-setting process of the Quadrennial Commissions applies to all judges appointed pursuant to section 96 of the *Constitution Act, 1867*.[16] These are the judges of: the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court of Canada, the Tax Court of Canada, the courts of appeal of each province and territory, and the superior courts of each province and territory.

11. Prothonotaries are judicial officers of the Federal Court of Canada. Their office attracts a constitutional guarantee of judicial independence. Prothonotaries' compensation was added to the Quadrennial Commission's scope of review in 2014 by amendments to the *Judges Act* that extended the definition of "Judiciary" to include these officers.[17]

12. Prior to this amendment, Special Advisor George Adams conducted the first independent review process of prothonotaries' salaries and benefits, leading to a report dated May 30, 2008 that set out comprehensive recommendations.[18]

13. This report was followed by the July 31, 2013 report of Special Advisor Douglas Cunningham**,** who made similar recommendations.[19] These recommendations led to various

[12] Joint Book of Documents, Tab 28.
[13] *Ibid*, Tab 29.
[14] *Ibid*, Tab 30
[15] *Ibid*, Tab 31.
[16] *Supra* note 5.
[17] *Supra* note 1, s 26.4.
[18] Report of the Honourable George W Adams QC, Joint Book of Documents, Tab 32 at 54-66 ["Adams Report"].
[19] Report and Recommendations of the Honourable J Douglas Cunningham QC, Joint Book of Documents, Tab 33 at 29-34 ["Cunningham Report"].

compensation improvements for prothonotaries and to the amendment to the *Judges Act* bringing prothonotaries into the Quadrennial Commission process.

THE COMMISSION'S PROCEEDINGS

14. We dealt with several preliminary matters:

(a) We held procedural conference calls with representatives of the Government, the Association and Council[20], and the Prothonotaries on December 23, 2015 and January 11, 2016.

(b) We issued and posted a Procedural Notice on January 21, 2016, followed by a News Release, issued on January 25, 2016.[21]

(c) We heard a conference call motion on February 8, 2016 to consider two preliminary issues:

(i) The Government's request that the Commission undertake a study on the pre-appointment income of sitting judges appointed between the years 2004 and 2014 ("Pre-Appointment Income Study"); and

(ii) The Prothonotaries' request that the Commission immediately recommend full funding for their representational costs in the Commission process.

(d) We issued our Ruling with Reasons denying both requests on February 18, 2016.[22]

(e) On February 9, 2016, the Government requested that we strike certain paragraphs and Exhibit B of the Association and Council's main submission. The paragraphs and Exhibit surrounded the Government's proposed nominee to the Commission

[20] Throughout this Report, we refer to the "Association and Council" when referring to submissions made by representatives of that party, and not to "the Judiciary". This is consistent with the practice of the Levitt Commission. We use the term "the judiciary" to refer to that branch of government in a general sense. Note also that, when capitalized, the term "Prothonotaries" refers to the party before this Commission; we use the lower case to refer to this group of officers in the more general sense, although we appreciate that given the group's numbers, the party and the more general group may be considered one in the same. Lower case terms such as "judge" and "superior court" denote a position, non-specific institution, or general usage, whereas upper case usage, such as the "Chief Justice of the Federal Court", refers to a specific person or institution. The term "Government" refers to counsel for that party.

[21] "Notice" (undated), Appendix B to this Report; **"**Quadrennial Judicial Compensation and Benefits Commission Begins Inquiry" (25 January 2016), Appendix C to this Report.

[22] "Ruling Respecting Preliminary Issues: Pre-Appointment Income Study and Representational Costs of Prothonotaries" (18 February 2016), Appendix D to this Report.

and the Association and Council's objection to that appointment. We received written submissions on the motion and issued our Ruling with Reasons denying the request on March 22, 2016.[23]

(f) We convened a conference call with the parties on March 29, 2016 to receive oral submissions on the Government's request to adjourn public hearings scheduled for April 5 and 6, 2016, due to unexpected circumstances affecting its counsel.

(g) On March 31, 2016, we issued a Notice adjourning the hearings until April 28 and 29, 2016.[24]

15. Public hearings, with transcription and simultaneous interpretation, were held in Ottawa on April 28 and 29, 2016. We received oral and written submissions, although some parties preferred to rely solely on their written submissions. A list of hearing participants is set out in Appendix G to this Report and a list of documents received is set out in Appendix H.

16. This Commission benefitted from the filing of expert evidence by both the Government and the Association and Council on the key issues of comparators, judicial annuity value, and indices.

17. In light of the nature of the expert evidence received, we did not consider it necessary to engage our own compensation expert to conclude the deliberations.

THE COMMISSION'S APPROACH

18. We actively solicited input from any interested party by widely distributing our initial Notice as a news release, and through email and Twitter. Our website was updated regularly with all submissions received.

[23] "Ruling Respecting Preliminary Issue: Objection to Paragraphs 46-49 and Exhibit B of the Judiciary's Principal Submissions" (22 March 2016), Appendix E to this Report .
[24] "Notice" (31 March 2016), Appendix F to this Report.

19. We benefitted, over two days of hearings, from the thorough and well-prepared written submissions and comprehensive oral submissions from counsel and participants knowledgeable and experienced in the Quadrennial Commission process.

20. In addition to written and oral submissions, we had the benefit of studying the reports of the five previous Triennial Commissions and four previous Quadrennial Commissions and the reports of the two Special Advisors on prothonotaries' salaries and benefits.[25]

21. The differing positions on the contested issues were thoroughly canvassed.

22. We have carefully considered the role that prior Quadrennial Commissions' determinations and recommendations play in our deliberations.

23. In the *Bodner* decision, the Supreme Court of Canada identified the starting point for a judicial compensation commission as the date of the previous commission's report.[26] Each commission must make its own assessment in its own context. However, this does not mean that each new compensation commission operates in a void, disregarding the work and recommendations of its predecessors.

24. A new Quadrennial Commission may very well decide that, in the circumstances, its predecessors conducted a thorough review of judicial compensation and, in the absence of demonstrated change, that 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 its predecessor and, after a careful review, make its own recommendations.

25. The Government, the Association and Council, and the Appellate Court Judges approached this direction by the Supreme Court of Canada somewhat differently.

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[25] See Book of Exhibits and Documents of the Canadian Superior Courts Judges Association and the Canadian Judicial Council, Tabs 24 to 28 and the Joint Book of Documents, Tabs 28 to 33.
[26] *Supra* note 9 at para 14.

(a) The Government: To suggest that consensus exists in the face of the contrary view of one of the principal parties is paradoxical. Each Commission must turn its mind to the evidence in the submissions before it. It cannot simply adopt unimplemented recommendations of a prior Commission without conducting its own independent and objective analysis.[27]

(b) The Association and Council: The idea that each Quadrennial Commission should build on the work of previous Commissions is so unassailable, rooted as it is in common sense, that it should no longer be debated. The parties should not re-litigate issues that have been the subject of consensus before past Commissions.[28]

(c) The Appellate Court Judges: The Government cannot simply repeat what it said before previous Commissions. It must produce compelling evidence to cause this Commission to depart from the unimplemented recommendations of its predecessors.[29]

26. We approached matters decided by previous Commissions and Special Advisors in light of the evidence and arguments made before us. We adopted a common sense approach: careful consideration has been given to the reasoning of previous Commissions as well as to the evidence brought before us. Valid reasons were required – such as a change in current circumstances or additional new evidence – to depart from the conclusions of a previous Commission.

27. In adopting this approach, we are confident that we have fulfilled the direction of the Supreme Court of Canada in *Bodner*:

[27] Reply Submission of the Government of Canada at para 8 ["Government Reply Submission"].
[28] Main Submission of the Canadian Superior Courts Judges Association and the Canadian Judicial Council at para 41 ["Association and Council Submission"].
[29] See e.g. Submission on behalf of the Canadian Appellate Judges at para 16 ["Appellate Judges' Submission"].

> 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.[30]

ACKNOWLEDGMENTS

28. We are pleased to have been able to participate in this important constitutional process. This Commission's processes could not have been completed without the participation of all of those who made written and oral submissions, to whom we owe our thanks. A full and fair consideration of the issues at hand would not have been possible without the light shone on them by these submissions. The Commissioners would also like to thank Louise Meagher, our talented and efficient Executive Director, her assistant Jacqueline Thibodeau, Marie-Ève Lamy who worked closely with the president of the Commission and Melanie Mallet, who assisted with editing this Report.

THE REPORT'S STRUCTURE

29. This Report will address the issues before the Commission in the following order:

[30] *Supra* note 9 at para 17.

CHAPTER 2 – JUDGES' SALARIES

30. Pursuant to section 100 of the *Constitution Act, 1867*, Parliament establishes and provides for salaries and benefits for all superior court judges.[31] Sections 25 and 26 of the *Judges Act* set out the process for regular review and revision of judicial compensation.[32] This process is carried out within the context of constitutional protection of judicial independence, explained by the Supreme Court of Canada in the *PEI Reference*.[33]

31. Pursuant to section 25(2)(b) of the *Judges Act*, judges' salaries are adjusted annually by the percentage change in the Industrial Aggregate Index (IAI), or by 7%, whichever is lower. In addition to statutory indexation, the Commission inquires every four years into "the adequacy of the salaries and other amounts" payable under the *Judges Act* and the "adequacy of judges' benefits generally".[34]

32. In considering the adequacy of judicial salaries, we had the benefit of submissions from the Government, the Association and Council, and the Canadian Bar Association (CBA). We also had the benefit of expert evidence regarding the value of the judicial annuity, an important component of judicial compensation, as well as expert evidence on the use of comparators and indexation. A group of 64 appellate court judges, the Ontario Superior Court judges Association, Justice Gordon Campbell and the Superior Court Chief Justices Trial Forum presented submissions regarding a salary differential between the puisne judges of the trial and appellate courts.

33. The Government submitted that the current remuneration of superior court judges is entirely adequate to ensure that Canada continues to enjoy an independent judiciary and that

[31] *Supra* note 5.
[32] *Supra* note 1.
[33] *Supra* note 7.
[34] *Supra* note 1.

outstanding candidates continue to be attracted to judicial office.[35] Canada's economic position and the overall state of the Government's finances militate against increasing judicial salaries any more than the cost of living.[36] Moreover, the appropriate measure for indexing salaries is the Consumer Price Index (CPI), not the currently mandated IAI.[37] Finally, the Government argued that continued comparison to the "Deputy Minister-3" (DM-3) group has no logical or legal basis.[38]

34. The Association and Council submitted that superior court judges' salaries should be increased by 2% on April 1, 2016 and April 1, 2017, and by 1.5% on April 1, 2018 and April 1, 2019, in addition to the statutory indexing based on the IAI.[39] They submitted that the DM-3 group is an appropriate comparator, used since at least 1987, with half of "at-risk" pay added to the comparator by the Block Commission Report in 2008.[40] The Association and Council advocated a change in the comparator, moving from the "Block Comparator" – the midpoint of the DM-3 salary range, plus half of "at-risk" pay – to total average compensation of the DM-3 group.[41] They further submitted that economic conditions do not prevent us from recommending an increase in judicial salaries that would otherwise be warranted.[42] Private sector lawyers' income remains an appropriate comparator, as lawyers in the private sector are an important source of candidates for the bench.[43]

35. The CBA took no position on the amount of judicial compensation. Rather, it submitted that judicial compensation should be at a level that ensures "that judges do not experience significant economic disparity between pre-appointment and post-appointment compensation levels".[44] Compensation must be set "at a level that attracts the best and most capable candidates… and those who consider as part of their reward the satisfaction of serving society on

[35] Main Submission of the Government of Canada at paras 2, 5, 20, 37-95 ["Government Submission"].
[36] *Ibid* at paras 3, 22-33.
[37] *Ibid* at paras 7, 152-160.
[38] *Ibid* at paras 6, 98-151.
[39] Association and Council Submission, *supra* note 28 at paras 111, 125.
[40] *Ibid* at paras 84-105.
[41] *Ibid* at paras 97-105; see especially paras 103, 105.
[42] *Ibid* at paras 60-71.
[43] *Ibid* at paras 115-123.
[44] Submission of the Canadian Bar Association at 7.

the bench".[45] The CBA urged us to consider forms of compensation other than salaries, such as the judicial annuity.[46]

SECTION 25(2) OF THE *JUDGES ACT*: INDEXATION

36. The Government argued that the appropriate measure for annual indexation of judicial salaries should be the CPI and not the IAI, as the *Judges Act* currently requires.[47] It asserted that the CPI is a "more modern and relevant" measure and that it is more appropriate to maintain purchasing power, the intent of indexation.[48]

37. Indexation in accordance with the IAI has been a part of establishing judicial salaries since 1981 and was intended to address an ongoing confrontation between the judiciary and the government on the issue of judges' salaries.[49] (A maximum for the adjustment is set in the statute as 7%, but as the IAI has been lower than this, the lower figure has been used rather than the maximum 7%).

38. We agree with the Levitt Commission that the IAI adjustment was intended to be a key element in the legislative architecture governing judges' salaries and should not be lightly tampered with.[50]

39. As Professor Hyatt, the expert retained by the Association and Council, said, "Changes in the IAI reflect changes in weekly wages, including both the cost of living and the real wage (the standard of living)".[51] The IAI ensures that the "annual earnings of judges" keep pace with the "annual earnings of the average Canadian".[52]

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[45] *Ibid.*
[46] *Ibid.*
[47] Government Submission, *supra* note 35 at paras 7, 152-160.
[48] *Ibid* at para 152.
[49] Levitt Commission Report, *supra* note 15 at para 44.
[50] *Ibid* at para 46.
[51] Report of Professor Douglas E Hyatt, page 1 of Appendix D in Reply Submission of the Canadian Superior Courts Judges Association and the Canadian Judicial Council ["Association and Council Reply Submission"].
[52] *Ibid*.

40. We find that the CPI is not more relevant than the IAI for the purpose of indexing judges' salaries. The Commission accepts the evidence of Professor Hyatt and finds that it is entirely appropriate to adjust judges' salaries on the basis of the average salary increase of the public that judges serve. Such an adjustment helps to ensure a consistent relationship between judges' salaries and the salaries of other Canadians. Indeed, if the relationship with the salaries of the various comparators does not materially change, then IAI adjustment by itself can ensure that judges' salaries remain adequate.

41. It is important to note that adjustment in accordance with the IAI does more than simply protect judges' salaries against erosion through inflation. It adjusts these salaries in accordance with average wage increases of Canadians working in a wide variety of occupations and professions and thus contains elements beyond a cost of living increase.

42. A further factor supporting continued use of the IAI is the fact that the CPI is used to adjust judges' annuities: once retired, judges' incomes are no longer adjusted in accordance with the average wage increases of working Canadians. A choice was made to adjust salaries in accordance with the measure that reflects changes in the average income of Canadians, not in accordance with the index that measures only changes in the cost of living, as is done for retirement annuities.

RECOMMENDATION 1

The Commission recommends that:

> **Judges' salaries should continue to be adjusted annually on the basis of increases in the Industrial Aggregate Index, in accordance with the current *Judges Act*.**

COMPARATORS

43. In addition to annual indexation in accordance with the average change in Canadians' incomes, Commissions examine judges' salaries every four years to determine whether any additional adjustment in the salary levels is required.[53]

44. In examining the adequacy of judges' salaries, an important consideration is the appropriate comparators to use. There are no entirely accurate comparators, as no job is similar to a judge's. However, previous Commissions have considered two comparators – one from the public sector (the DM-3 comparator) and one from the private sector (self-employed lawyers' income) – in analyzing the adequacy of judges' salaries.[54] We had the benefit of considerable evidence and analysis from both parties on both comparators.

(a) The Public Sector Comparator: the DM-3 Comparator

45. Previous Triennial and Quadrennial Commissions, dating back to 1975, have considered the salaries of deputy ministers in determining the adequacy of judicial salaries. In particular, previous Commissions have considered the salary range of highly-ranked deputy ministers – the DM-3 group – as a reference point. The comparator considered was the mid-point of that salary range, to which the Block Commission added half of at-risk pay after this became a significant component of deputy ministers' compensation. This model is referred to as the "Block Comparator".[55]

46. The Government argued that focusing on the DM-3 comparator is not warranted, as it is not "objective, relevant and justified". A better approach would be to consider trends in public sector compensation generally.[56]

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[53] *Supra* note 1, s 26(1).
[54] See e.g. Levitt Commission Report, *supra* note 15.
[55] Block Commission Report, *supra* note 14 at para 111.
[56] Government Submission, *supra* note 35 at para 98.

47. We agree that the position of a highly-ranked deputy minister is very different in a number of ways than the position of a judge, and that the DM-3 comparator should not be used in a "formulaic benchmarking" fashion.[57] We do not read previous Commission reports as having done that. Rather, the DM-3 comparator has been used as a reference point against which to test whether judges' salaries have been advancing appropriately in relation to other public sector salaries.

48. Indeed, the Levitt Commission agreed with previous Commissions in calling the DM-3 comparator a "rough equivalence".[58] The Levitt Commission found that, while a 7.3% gap "tests the limits of rough equivalence", judicial salaries did not require adjustment in view of this comparator to remain adequate and respect the criteria in the *Judges Act*.[59]

49. The Association and Council raised a further issue in relation to the DM-3 comparator. They argued that the comparator should be changed from the midpoint of the DM-3 salary range, plus half of at-risk pay, to the total average compensation of DM-3s.[60]

50. The difficulty with that proposal is that DM-3s constitute a very small group – currently eight – the compensation of which is subject to considerable variation depending on the exact composition of the group at any given point in time. Previous Commissions have used the DM-3 reference point as "an objective, consistent measure of year over year changes in DM-3 compensation policy".[61] Moving to the total average compensation of a very small group would not meet those criteria. We agree with the Block Commission, which rejected moving to average pay and performance pay because it would not "provide a consistent reflection of year over year changes in compensation".[62]

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[57] See *ibid* at para 123.
[58] *Supra* note 15 at para 48.
[59] *Ibid* at para 52.
[60] Association and Council Submission, *supra* note 28 at paras 103, 105.
[61] Levitt Commission Report, *supra* note 15 at para 28, citing Block Commission Report, *supra* note 14 at para 106.
[62] Block Commission Report, *ibid*.

51. Any merit in comparing total average compensation would come from a comparison with a much larger group that could provide objectivity and consistency, without being inordinately influenced by the individual members of the group at any given time.

52. In summary, we agree that a highly-ranked deputy minister's job is not similar to a judge's job and that the DM-3 group is not a significant source of recruitment for judges. However, we believe the DM-3 comparator remains worthwhile for its long-term use, consistency, and objectivity. It is not to be used – and has not been used in the past – formulaically, but as a useful reference point. The total average compensation of a very small group, the composition of which changes regularly, however, would not be a useful reference point.

53. Both the Government and the Association and Council provided charts indicating the comparison of judges' salaries and the Block Comparator (the midpoint of the DM-3 salary range, plus half of at-risk pay) over time, including projections to the year 2020.[63] The only area of disagreement between the parties in the projected figures in these charts was the projected growth of the Block Comparator. The Government based its projection on an annual growth rate of 1.5 %, based on average growth between 2006 and 2015, while the Association and Council used 1.9%, based on average growth between 2000 and 2014.[64] The results below reflect the rate of 1.9% growth used by the Association and Council.

Date	**Judicial Salary**	**Block Comparator**
Apr 1, 2011	$281,100	$303,250
Apr 1, 2012	$288,100	$307,910
Apr 1, 2013	$295,500	$311,055
Apr 1, 2014	$300,800	$312,628

[63] Letter from the Government to the Commission dated May 2, 2016; letter from the Association and Council to the Commission dated May 6, 2016
[64] *Ibid*

Date	Judicial Salary	Block Comparator
Apr 1, 2015	$308,600	$314,259
Apr 1, 2016	$314,100	$320,230
Apr 1, 2017	$321,000	$326,314
Apr 1,2018	$328,700	$332,514
Apr 1, 2019	$337,200	$338,832
Apr 1, 2020	$346,600	$345,270

54. The Government's numbers would show a slightly lower Block Comparator for the projected years of 2017 to 2020 and would thus show the projected judicial salary exceeding the projected Block Comparator in 2019 rather than 2020, as indicated on the above chart.

55. Both sets of projections demonstrate that the 7.3%, or $22,149, gap between the Block Comparator and judges' salaries that existed at the time of the Levitt Commission has reduced significantly to about 2%, or $5,659, in 2015. And the gap is projected to close completely during this Commission's term.

56. These figures suggest that indexation in accordance with the IAI is serving its intended function.

(b) The Private Sector Comparator: Self-Employed Lawyers

57. Self-employed lawyers' income is an important comparator since the majority of judicial candidates are lawyers in private practice. However, determining the income data with which to make the appropriate salary comparison is challenging. The Canada Revenue Agency (CRA) compiled a database from the 2010 to 2014 tax returns of individuals identified as self-employed lawyers. This database generates statistics, based on certain parameters.

58. However, the information derived from this database poses certain problems:

(a) The database does not capture self-employed lawyers who structure their practices as professional corporations.

(b) The number of self-employed lawyers in the CRA database has decreased between 2010 and 2014.

(c) The parties disagreed on the appropriate way to analyze the available data, or which "filters" to apply to the CRA data. They disagreed on the appropriate age group to consider in the analysis and on whether the salaries of certain lower income lawyers should be excluded from consideration. Finally, they disagreed on the appropriate percentile to use as a comparator.

(d) The parties did not agree as to whether or how to account for private practice lawyers' salaries in the largest urban areas of the country (CMAs).

We discuss these issues and their effects on calculating compensation in the following subsections.

(i) Age Group of Private Sector Lawyers

59. The Association and Council: only the salaries of the 44-56 year age group should be considered since the average age of a judicial appointee is 52 years.[65] Moreover, this is the age group used by previous Commissions.[66]

60. The Government: all age groups' salaries should be considered since judicial appointments are made from all age groups. Excluding those under 44 years and over 56 years means the data does not reflect a wide cross-section of the legal community. Age-weighting reflects the percentage of judges appointed from each age group. Since average salaries for self-

[65] Association and Council Submission, *supra* note 28 at para 117.
[66] *Ibid* at para 118.

employed lawyers are generally lower under age 44 and decline after age 56, excluding these age groups raises the average salary portrayed in the data. [67]

61. We agree that focusing on the age group from which the majority of judges is appointed is a useful starting point. However, using any of the comparators in considering the appropriate judicial salary is not a mathematical exercise. We must apply sound judgment in determining the adequacy of judges' salaries. In doing so, we have considered the fact that 33% of the appointments over the past 17 years have come from those either younger or older than the 44-56 year age group.[68]

(ii) Exclusion of Salary Ranges of Private Sector Lawyers

62. The Association and Council started by excluding all salaries below $60,000, as they had before previous Commissions. Their rationale was that those who earn below a certain threshold are not suitable candidates for the judiciary: low income reflects a lack of success or time commitment incommensurate with the demands of a judicial appointment.[69] The Association and Council then argued that salaries below $80,000 should be excluded, to "account for inflation since the year 2000, the year in the data when the level of $60,000 was first applied".[70]

63. The Government argued against a salary exclusion from the data. The Government's expert, Mr. Haripaul Pannu, stated that "[i]t is not a normal practice to use salary exclusion for compensation benchmark purposes. The percentile information is distorted by the compression of data that excludes salaries below a certain dollar amount and further skews the salary distribution".[71] In other words, choosing the appropriate percentile will necessarily result in examining only relevant salaries. Even if the $60,000 exclusion is accepted as meaningful, there

[67] Government Submission, *supra* note 35 at paras 66-72.
[68] *Ibid* at para 72.
[69] Association and Council Submission, *supra* note 28 at paras 117-119.
[70] *Ibid* at para 120.
[71] Haripaul Pannu, "Report on the Earnings of Self-Employed Lawyers for the Department of Justice Canada in Preparation for the 2015 Judicial Compensation and Benefits Commission", Tab 10 of the Government's Book of Documents at 8 ["Pannu Report"].

is no basis for raising it to $80,000. Inflation as measured by the CPI would only bring the number to $73,000.[72]

64. The Association and Council's expert, Ms. Sandra Haydon, stated that Mr. Pannu's weighted model distorts the data; the better approach is to consider where the vast majority of appointees are drawn from. In her view, compelling arguments justify excluding lower levels of income, and comparison with seasoned legal practitioners is appropriate.[73]

65. Even assuming a basis for excluding lower incomes from the data to be examined, we are not convinced that a case has been made to increase the salary level based on this type of exclusion. The cost of living has not gone up as much as the increase proposed, and the average income of private sector lawyers has decreased over some of the years in question. Further convincing evidence would be required to persuade us to exclude even more from the comparator group.

(iii) **Percentile of Private Lawyers' Salaries**

66. The government's expert, Mr. Pannu, stated that "it is reasonable to assume that judges' salaries should not be based on the median but rather the 65th percentile".[74] Ms. Haydon explained that "the 75th percentile tends to be the bottom target where the goal is the attraction of exceptional or outstanding individuals". It is not uncommon to focus on higher percentiles up to the 90th.[75]

67. The statutory criteria require us to consider the need to attract outstanding candidates to the judiciary.[76] Accordingly, we find that it is more reasonable to look to the 75th percentile. This is also consistent with the position of previous Commissions.

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[72] Government Reply Submission, s*upra* note 27 at para 38.
[73] Sandra Haydon & Associates, "Commentary on the Report on the Earnings of Self-Employed Lawyers for the Department of Justice Canada in Preparation for the 2015 Judicial Compensation Benefits Commission (Pannu Report)" Appendix B to Association and Council Reply Submission, *supra* note 51 at12 ["Haydon Report"].
[74] Pannu Report, *supra* note 71 at 5.
[75] Haydon Report, *supra* note 73 at 7.
[76] *Judges Act*, *supra* note 1, s 26 (1.1).

(iv) **Salaries in the Top Ten Census Metropolitan Areas (CMAs)**

68. In oral arguments, the Association and Council stressed that this factor is not to be used as a filter in analyzing the CRA data on private sector lawyers' income. Rather, private sector lawyers' higher rate of income in the ten largest CMAs is a factor for broader consideration since a majority of appointments to the bench come from these areas.

69. Not surprisingly, the average salaries of private sector lawyers in the top ten CMAs are higher than in other parts of the country and are particularly high in Toronto, Hamilton and London, Calgary, and Edmonton. However, private sector lawyers' salaries in other areas of the country are lower than the national average. Federally-appointed judges' salaries do not vary by region: judges holding the same position are paid the same base salary, regardless of where they sit and regardless of where they practiced before appointment to the bench. If lawyers' salaries in the top ten CMAs became so high that attracting qualified applicants to sit in those cities became an issue, consideration of regional allowances might be appropriate. However, no one has raised this possibility, and accordingly, we do not think it necessary to pursue.

70. Accordingly, we have given very limited weight to the difference between private sector lawyers' salaries in the top ten CMAs and those in the rest of the country and have looked primarily to average national salary figures.

VALUE OF THE JUDICIAL ANNUITY

71. We must consider more than income when comparing judges' salaries with private sector lawyers' pay. The judicial annuity is a considerable benefit to judges and is a significant part of their compensation package. Deputy ministers also have pensions of considerable value, so we do not need to consider the value of the judicial annuity when examining the public sector comparator.

72. Both parties retained experts to assess the value of the judicial annuity. Their assessments are remarkably close. Mr. Pannu, the Government expert, concluded that the value

of the annuity is 32.0%, plus 4.5% for the disability benefit, of a judge's annual income.[77] Mr. Newell, the Association and Council's expert, came to a value of 30.6%.[78]

Year	Average Private Sector Income - 75th percentile	Judicial Salary	Judicial salary + value of annuity at 30.6%	Judicial salary + value of annuity at 32%
2010	$403,953	$271,400	$354,448	$358,248
2011	$392,188	$281,100	$367,117	$371,052
2012	$395,660	$288,100	$376,259	$380,292
2013	$390,983	$295,500	$385,923	$390,060
2014	$404,025	$300,800	$392,845	$397,056

73. The above chart is based on the net professional income of self-employed lawyers between the ages of 44 and 56 years, at the 75th percentile. [79] The values in the two right-hand columns were calculated using the annuity values calculated by the parties' experts. To allow for comparison on the same basis the value of the disability benefit has not been included,. We agree with the Levitt Commission regarding the superiority of the judicial annuity to alternatives available to private sector lawyers. This must be taken into account in arriving at a comparison between private sector lawyers and the judiciary. However we did not have any evidence placed before us on the value of various other benefits, including disability, in the private sector.

74. The gap between the average private sector lawyer's income and judges' salary, including the value of the judicial annuity, appears to be closing, regardless of the value used for the annuity. This is true even without considering that over the past 17 years one-third of judicial appointments come from age groups either younger or older than those reflected in this chart; those groups have lower average salaries than those noted above. In 2014, the gap widened slightly, but one year does not constitute a trend. These figures can be revisited by future Commissions if necessary.

[77] Pannu Report, *supra* note 71 at 13.
[78] Dean Newell, "Report on the Value of the Judicial Annuity", Appendix C of the Association and Council Reply Submission, supra note 51 at 14 ["Newell Report"].
[79] Association and Council Reply Submission, *supra* note 51, table 5- revised

ANALYSIS OF SECTION 26(1.1) OF THE *JUDGES ACT*

75. In inquiring into the adequacy of judicial salaries, we are required to consider the four factors set out in section 26(1.1) of the *Judges Act*.[80]

(a) Prevailing Economic Conditions, the Cost of Living, and the Overall Financial Position of the Federal Government

76. The Association and Council: Canada's fiscal position is characterized by low debt levels and sound underlying economic and fiscal fundamentals. Moreover, the Government is planning to introduce fiscal stimuli to promote economic growth. Nothing under this first criterion prevents this Commission from recommending an increase that would otherwise be justified.[81]

77. The Government: Canada is facing challenging economic times. Canada's weak economic and fiscal condition, the less optimistic outlook for growth, the very low rate of inflation, and the low rate of wage growth for other individuals paid from the federal public treasury suggest that no increase beyond indexation is justified at this time.[82]

78. The parties did not fundamentally disagree on the facts underlying current economic conditions. The issue is the impact these facts should have on this Commission's recommendation. We found nothing to suggest that we should vary our conclusions based on prevailing economic conditions. We agree that the outlook presents challenges and uncertainties, but overall, we do not find any compelling reason that would require us to alter the results of our assessment of the other factors in view of economic factors.

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[80] *Supra* note 1.
[81] Association and Council Submission, *supra* note 28 at paras 60-71.
[82] Government Submission, *supra* note 35 at paras 22-33.

(b) The Role of Financial Security of the Judiciary in Ensuring Judicial Independence

79. In the *PEI Reference*, the Supreme Court of Canada recognized financial security as a fundamental component of judicial independence.[83] No party suggested that the current level of compensation jeopardizes judicial independence.

(c) The Need to Attract Outstanding Candidates to the Judiciary

80. All parties agreed that Canada has an outstanding judiciary. To continue to attract outstanding candidates, judges' salaries must be set at a level that will not deter them from applying to the bench.

81. Comparators help us to assess this factor, but this is not a mathematical exercise. Financial factors are not and should not be the only factor –or even the major factor – attracting outstanding judicial candidates. The desire to serve the public is an important incentive for accepting an appointment to the judiciary.

82. We agree with past Commissions that have decided not to seek an exact point in the comparators at which judges' salaries should be set.[84] We have sought to ensure that overall compensation levels do not deter outstanding candidates from applying.

83. In addition to compensation, including the value of the judicial annuity, other factors, such as the desire to serve the public, security of tenure, and the availability of supernumerary status attract candidates to the bench.

84. All of the evidence leads us to conclude that judicial compensation is sufficient to continue to attract outstanding candidates. The IAI is currently achieving the objective it was

[83] *Supra* note 5 at paras 80-81.
[84] See e.g. Levitt Commission Report, *supra* note 15 at para 48.

intended to: ensuring that judges' salaries keep pace with increases in the salaries of Canadians, whom judges serve.

(d) Any other Objective Criteria that the Commission Considers Relevant

85. We did not find any objective criteria other than those already addressed that we considered relevant to our deliberations.

RECOMMENDATION 2

The Commission recommends that:

Effective April 1, 2016, the salary of federally-appointed puisne judges should be set, inclusive of statutory indexation, at $314,100.

APPELLATE JUDGES' SALARY DIFFERENTIAL

86. As the Levitt Commission noted, submissions have been made to all Quadrennial Commissions regarding a salary differential between the puisne judges of the trial and appellate courts.[85]

87. Prior Quadrennial Commissions have addressed this question. The Drouin Commission commented favourably on submissions supporting of a salary differential, but declined to act on the basis that the matter required further review and evaluation, which it offered to undertake.[86]

88. The McLennan Commission declined to act on the submissions for jurisdictional reasons, indicating that were it re-designing the system, "it is entirely probable we would design a system where appellate court members received higher compensation than trial court members".[87] That Commission was not prepared to find that such a differential could be justified based on the

[85] Levitt Commission Report, *supra* note 15 at para 62.
[86] Drouin Commission Report, *supra* note 12 at page 52.
[87] McLennan Commission Report, *supra* note 13 at page 55.

Judges Act criteria and left it for the Government to consider whether this salary differential would be appropriate.[88]

89. After a detailed review on the evolution of appellate courts and their distinct functions, the Block Commission recommended instituting a 3% salary differential.[89]

90. The Levitt Commission recommended that "puisne judges sitting on provincial and federal appellate courts should be given a salary differential of 3% above puisne judges sitting on provincial and federal trial courts".[90]

91. Before us, the Government's response to the renewed request for an appellate salary differential was that nothing had changed since the first Quadrennial Commission: hierarchy within the court system did not justify the differential increase in light of section 26 (1.1) criteria.[91]

92. This Commission received submissions on this issue from other parties.

93. The Ontario Superior Court Judges Association stressed the different but equal role of a superior court judge and the lack of evidence indicating that the current arrangement is harmful to the courts' function or to the availability of suitable candidates for appellate courts. It maintained that a salary differential could cause division between trial and appellate court judges.[92]

94. Justice Gordon Campbell of the Supreme Court of Prince Edward Island submitted that no differential was justified, based both on the historic rejection of such a differential by the Government and the lack of current justification for a change.[93]

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[88] *Ibid.*
[89] Block Commission Report, *supra* note 14 at para 171 and page 56.
[90] Levitt Commission Report, *supra* note 15 at para 65.
[91] Government Reply Submission, *supra* note 27 at para 115.
[92] Submission from the Ontario Superior Court Judges Association.
[93] Submission from Justice Gordon L Campbell on [the] Proposal for Appellate Salary Differential.

95. Chief Justice Joyal of the Court of Queen's Bench of Manitoba, on behalf of the Superior Courts Chief Justices Trial Forum, did not take a position on the differential. He requested that, should we recommend a differential, commensurate adjustments and recommendations to maintain existing differentials between superior court chief justices and appellate court puisne judges should be made.[94]

96. After the hearings, the Commission requested information from counsel for the Canadian Appellate Judges as to how many of 165 appellate judges across the country approved the submission for a salary differential, and where those judges sat. The breakdown of supporting appellate judges by province is as follows:

Court of Appeal	Number of Judicial positions including Supernumeraries	Number of Approving Judges
Federal Court of Appeal	16	
Alberta	18	12
British Columbia	23	
Manitoba	12	10
New Brunswick	7	6
Newfoundland and Labrador	7	
Nova Scotia	11	
Ontario	30	
Prince Edward Island	3	
Quebec	30	29
Saskatchewan	8	7
Total	**165**	**64**

Sources: Office of the Commissioner for Federal Judicial Affairs' website; email from Joseph R. Nuss dated May 19, 2016.

97. We observe that those appellate judges approving the salary differential represent only five provinces and territories. The Federal Court of Appeal and the appellate courts of two of the most populous provinces, British Columbia and Ontario, have not supported the differential.

98. The number of appellate court judges approving the differential seems to vary over time.

[94] Submission from the Superior Courts Chief Justices Trial Forum.

99. Before the Drouin Commission, the appellate judges of six appellate courts (Alberta, Saskatchewan, Manitoba, Ontario, Quebec, and New Brunswick) supported the request for a differential. One puisne judge of an appellate court opposed the request, as did the Government. The Association and Council remained neutral.[95]

100. Before the McLennan Commission, 74 of 142 appellate judges supported the submission. None of the judges of two provincial appellate courts supported the differential, and one judge expressly opposed it. The Government opposed the proposal. The Association and Council maintained their neutrality.[96]

101. Before the Block Commission, 99 of 141 appellate court judges supported the submission. Eighteen opposing submissions were received, some on behalf of particular courts and others on an individual basis. The Government continued to oppose the submission and the Association and Council maintained a neutral position.[97]

102. The Levitt Commission did not refer to the level of support by appellate judges.

103. This Commission's jurisdiction to recommend an appellate judge salary differential is not contested.

104. The reasons supporting the conclusions of both the Block and Levitt Commissions were repeated in submissions before this Commission. In short, these submissions reflect the different, hierarchical role of appellate judges in correcting legal errors and clarifying and stating the law within the province. These submissions also reflect the practical finality of all but a small minority of those decisions, given the number of cases considered annually by the Supreme Court of Canada and the leave to appeal restrictions that largely remove appeals as of right to the Supreme Court of Canada.[98]

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[95] Cited in the Block Commission Report, *supra* note 14 at para 127.
[96] *Ibid* at para 129.
[97] *Ibid* at paras 131-132.
[98] Appellate Judges Submission, *supra* note 29, Schedule A at 8-9.

105. We are mindful of the important, and different, role played by superior court judges in Canada, who are the front line of civil, criminal, and family litigation. The majority of this litigation is finally determined at this level. Evaluating in any qualitative way the relative values of the roles played by trial and appellate judges is too subjective an analysis, in our view, to warrant a salary differential recommendation.

106. We are, however, mindful of what seems to be a diminishing level of support for a salary differential amongst appellate judges in the country. We also note the lack of unanimity amongst appellate judges across the country. The Ontario Superior Court Judges Association, speaking on behalf of roughly 320 judges in Ontario, opposes the differential. There is no expressed support from that province's Court of Appeal. We have considered Chief Justice Joyal's observation that implementing such a recommendation would require re-engineering various existing salary differentials between the chief justices of superior courts and puisne appellate judges.

107. We have the utmost respect for the conclusions reached by the Block and Levitt Commissions, but this Commission does not believe, in light of our own analysis, according to the section 26(1.1) criteria, that such a salary differential is warranted in this quadrennial period.

108. Nothing in this decision is to be taken as demonstrating anything other than the utmost respect for and acknowledgment of the important role played by puisne judges of the appeal courts.

109. Accordingly, we decline to recommend an appellate salary differential.

RECOMMENDATION 3

The Commission recommends that:

No salary differential should be paid to puisne appellate judges.

RECOMMENDATION 4

The Commission recommends that:

Salary differentials should continue to be paid to the Chief Justice of Canada, the Judges of the Supreme Court of Canada, and the chief justices and associate chief justices of the trial and appellate courts.

Effective April 1, 2016, judges' salaries should be set, inclusive of statutory indexation, at the following levels:

Supreme Court of Canada:

Chief Justice	**$403,800**
Puisne Judges	**$373,900**

Federal Court of Appeal and Provincial and Territorial Courts of Appeal:

Chief Justices	**$344,400**
Associate Chief Justices	**$344,400**
Puisne Judges	**$314,100**

Federal Court, Tax Court, and Trial Courts

Chief Justices	**$344,400**
Senior Associate Chief Justices and Associate Chief Justices	**$344,400**
Senior Judges	**$344,400**
Puisne Judges	**$314,100**

CHAPTER 3 – PROTHONOTARIES' SALARIES AND OTHER BENEFITS

PREVIOUS SPECIAL ADVISORS' REPORTS

110. Prothonotaries' compensation was added to the work of this Quadrennial Commission by section 26.4 of the *Judges Act*, following amendments to that Act in 2014.[99]

111. Prior to these amendments, two Special Advisors issued reports on prothonotaries' compensation: the Honourable George Adams, on May 30, 2008 and the Honourable J. Douglas Cunningham, on July 31, 2013.[100]

112. Mr. Adams recommended that:

(a) prothonotaries' salaries be increased to 80% of that of Federal Court judges'. This figure represented the average of the compensation of traditional masters of superior courts and provincial court judges at the time.

(b) the Minister of Justice and the Chief Justice of the Federal Court consider establishing the opportunity for prothonotaries to elect supernumerary status upon retirement.

(c) prothonotaries receive an annual non-taxable allowance of $3,000 to assist in the payment of costs associated with carrying out their duties.

(d) all of the Prothonotaries' representation costs should be paid by the Government.[101]

113. The Government, in the economic conditions of the day, declined to implement those recommendations. However, it did make a $50,000 *ex gratia* payment to support the Prothonotaries' participation in the Adams process.[102]

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[99] *Supra* note 1, and see para 11. Amendments to s 26.4 introduced by s 321 of the *Economic Action Plan 2014 Act, No 2*, SC 2014, c 39.
[100] *Supra* notes 18 and 19.
[101] Adams Report, *supra* note 18 at 54-65.
[102] Response of the Minister of Justice to the Special Advisor on Prothonotaries' Compensation, Joint Book of Documents, Tab 32(A).

114. Mr. Cunningham made similar recommendations; however, he proposed a maximum of $80,000 be paid for the Prothonotaries' reasonable representational costs.[103] The Government responded that the $50,000 *ex gratia* payment it had already made for reimbursement of legal fees was generous and sufficient.[104]

115. Following the issuance of the Cunningham Report, the *Judges Act* and the *Federal Courts Act* were amended. Section 10.1 of the *Judges Act* now establishes the Prothonotaries' salaries at 76% of Federal Court puisne judges'. Other amendments to the Act brought the Prothonotaries under the same annuity and administrative processes that apply to federally-appointed judges.[105] However, certain benefits were not extended, such as the incidental allowance and the option to elect supernumerary status.[106]

PROTHONOTARIES' ROLES AND RESPONSIBILITIES

116. Prothonotaries are appointed under section 12 of the *Federal Courts Act*. They are judicial officers who hold office during good behaviour until age 75.[107]

117. Prothonotaries' roles are similar to Federal Court judges'. Prothonotaries:

(a) have immunity from liability[108];
(b) exercise full trial jurisdiction up to $50,000;
(c) hear and decide motions on wide-ranging matters, including final determinations on motions to strike or to dismiss proceedings;
(d) decide *Charter* issues and other general questions of law;
(e) adjudicate on complex commercial matters; and

[103] Cunningham Report, *supra* note 19.
[104] Response of the Minister of Justice to the Special Advisor on Prothonotaries' Compensation, Joint Book of Documents, Tab 33(A) at page 2
[105] See *Judges Act*, *supra* note 1 at s 2.1(1).
[106] Main submission of the Federal Court Prothonotaries at paras 49, 50 ["Prothonotaries' Submission"].
[107] RSC 1985, c F-7, s 12(7).
[108] *Ibid*, s 12(6).

(f) preside over references, pre-trial conferences, dispute resolution conferences, and case management proceedings, including in respect of the more recent class actions jurisdiction granted to the Federal Court, all as designated by the Chief Justice of the Federal Court.[109]

118. Currently, there are five prothonotaries, who, based in Toronto, Montreal, and Vancouver, serve the Court throughout the country.

PROTHONOTARIES' SALARIES

(a) The Prothonotaries' Position

119. The Prothonotaries proposed:

(a) salaries be set in the range of 83% - 86% of Federal Court judges', retroactive to April 1, 2016;[110]

(b) that the Minister of Justice and the Chief Justice of the Federal Court consider establishing the opportunity for prothonotaries, once eligible to retire, to elect some form of supernumerary status;[111]

(c) an allowance of $5,000 per year for costs associated with carrying out their duties;[112] and

(d) reimbursement for all reasonable representational costs with respect to this Quadrennial Commission.[113]

[109] On paragraphs (a)-(f), refer to the *Federal Court Rules*, SOR/98-106, s 50, and Prothonotaries' Submission, *supra* note 106 at paras 31-45.
[110] Prothonotaries' Submission, *ibid*, at 30.
[111] *Ibid* at 32.
[112] *Ibid* at 35.
[113] *Ibid* at 37.

(b) The Government's Position

120. The Government argued that, given recent significant increases to prothonotaries' total compensation, including entitlement to the generous judicial annuity upon retirement, current compensation is fully adequate, considering the statutory criteria.[114]

APPROPRIATE COMPARATORS

121. Both Mr. Adams and Mr. Cunningham had recommended that prothonotaries' salaries be set at 80% of Federal Court judges' salaries.[115]

122. They arrived at this common figure by slightly different routes. Mr. Adams averaged all known salaries for provincial and territorial court judges and masters across Canada at 79% of Federal Court judges' salaries at the time and identified the average salary for traditional masters in three jurisdictions (Alberta, British Columbia, and Manitoba). Using this calculation, he recommended that prothonotaries' salaries should be 79.4% of Federal Court judges.[116]

123. Mr. Cunningham concluded that Federal Court judges were the most appropriate comparator, given significant overlap between the work of prothonotaries and those judges. He found this to be a principled reason for linking these salaries.[117]

(a) Superior Court Masters

124. The Prothonotaries presented the average salary of provincial masters in British Columbia, Alberta, and Manitoba, as well as Ontario's grandfathered traditional master, as $265,968 in 2015, or 86.2% of Federal Court judges' salaries.[118]

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[114] Government Reply Submission, *supra* note 27 at para 81.
[115] Adams Report, *supra* note 18 at 57; Cunningham Report, *supra* note 19 at 23.
[116] Adams Report, *ibid* at 56-57.
[117] Cunningham Report, *supra* note 19 at 21-23,
[118] Prothonotaries' Submission, *supra* note 106 at paras 88-97.

125. Using the average of these salaries as a comparator is difficult because only three provinces have more than one traditional master and Ontario only has one. As Mr. Adams commented, "[t]hese are not robust comparators, to put it mildly".[119]

(b) Provincial Court Judges

126. According to the Prothonotaries' submissions, the average salary of all provincial and territorial court judges in 2015 was $258,783, or 83.9% of Federal Court judges' salaries.[120]

127. The Prothonotaries relied on the salary recommendation of the 2013 Judges Compensation Commission of British Columbia for Provincial Court Judges and Masters, which increased the average salary of masters to 86.6%, and provincial court judges to 84%, of Federal Court judges' salaries.[121]

128. It is difficult to compare the work of provincial court judges, which is primarily in the criminal and family law areas, with the rather unique role of prothonotaries in the Federal Court structure.

(c) Military Judges

129. The salaries of military judges were not seriously argued before us. The Prothonotaries rejected the comparator.[122] The Government suggested that it would be inappropriate for prothonotaries to be compensated at a level above military judges.[123]

130. We have insufficient information upon which to draw any reliable comparisons between the two positions.

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[119] Adams Report, *supra* note 18 at 56.
[120] Prothonotaries' Submission, *supra* note 106 at para 90.
[121] *Ibid* at para 91.
[122] *Ibid* at para 107.
[123] Government Reply Submissions, *supra* note 27 at para 93.

ANALYSIS ON PROTHONOTARIES' SALARIES

131. As with the superior court judges, the provisions of section 26(1.1) of the *Judges Act* must be considered in to our inquiry on prothonotaries' salaries.[124]

(a) Prevailing Economic Conditions in Canada

132. As addressed earlier in this Report, we do not view the prevailing economic conditions in Canada as militating against a salary increase, if other conditions are met.

(b) Role of Financial Security

133. The current combination of salary and annuity, and the structure around it, is sufficient to ensure financial security of prothonotaries in respect of judicial independence.

(c) The Need to Attract Outstanding Candidates

134. Chief Justice Crampton of the Federal Court provided very helpful submissions, both in writing and in our hearings, outlining some of the challenges the Court faces in attracting suitable candidates to fill the role of prothonotary.[125]

135. Currently, five of six prothonotary positions are filled, and the Federal Court is facing the retirement of two prothonotaries within the next two years.[126]

136. In our hearings, the Chief Justice shared with us some insights into the recruitment process for a sixth prothonotary.

137. Given the unique work of prothonotaries, and the likelihood that they will be recruited from practices that reflect the Court's jurisdiction, the obvious sources of such candidates are the

[124] *Supra* note 1.
[125] Submission of Chief Justice Paul Crampton.
[126] *Ibid* at 1-2.

larger urban centres where prothonotaries routinely sit: Vancouver, Toronto, Ottawa, and Montreal.

138. The Commission views this as an important consideration in addressing prothonotaries' compensation.

(d) Other Objective Criteria

139. Prothonotaries receive the benefit of a judicial annuity which, as with the annuity provided to superior court judges, the parties valued slightly differently.

140. For these purposes, we do not have to resolve the conflicting evidence as to the value of a judicial annuity.

141. Comparing the prothonotaries' annuities to traditional masters' and provincial court judges' retirement benefits emphasizes that prothonotaries' annuities more closely resemble Federal Court judges' annuities.

(e) Conclusion with Respect to Prothonotaries' Salaries

142. The Commission views the prior recommendations of Mr. Adams and Mr. Cunningham of setting prothonotaries' salaries at 80% of Federal Court judges' salaries as the appropriate conclusion. Federal Court judges represent the best relative comparator to the position and work of prothonotaries.

143. Mr. Cunningham recognized how the work of the prothonotaries was integral to the administration of justice in the Federal Court.[127] Mr. Cunningham concluded that fixing prothonotaries' salaries at 80% of Federal Court judges' would be in an acceptable range of provincial and territorial masters' salaries in relation to Federal Court judges', while also taking

[127] Cunningham Report, *supra* note 19 at 22-23.

into account the incomes of private sector lawyers.[128] This consideration, while not binding, provides us further comfort with respect to the appropriateness of the 80% figure. Moreover, the unique role of prothonotaries limits the potential applicants to a restricted pool of more urban-centred practitioners with Federal Court experience. The need to attract outstanding candidates to this role militates in favour of increasing prothonotaries' salaries to 80% of that of Federal Court judges.

RECOMMENDATION 5

The Commission recommends that:

> **The salaries of Federal Court prothonotaries should be increased, retroactive to April 1, 2016, to 80% of Federal Court judges' salaries, or $251,300.**

SUPERNUMERARY STATUS

(a) The Parties' Submissions

144. Federal Court judges, like all section 96 judges, are entitled to elect supernumerary status under the *Judges Act*, subject to certain restrictions.[129]

145. The Prothonotaries, supported by Chief Justice Crampton, requested that they also be entitled to elect supernumerary status, which would both enhance their financial security and benefit the Court.[130]

146. Even with the Chief Justice's support for a supernumerary option, the Prothonotaries' rather attenuated recommendation was for the Minister of Justice and Chief Justice of the Federal Court to consider the opportunity of granting supernumerary status or to create a senior prothonotary position for members of this group who are eligible for retirement.[131]

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[128] *Ibid.*
[129] *Supra* note 1, s 28(1).
[130] Prothonotaries' Submission, *supra* note 106 at paras 108-114.
[131] *Ibid* at (page) 30.

147. The Government argued that the creation of the supernumerary model was a policy decision by the Government of the day, motivated by a desire to find a cost-effective means to retain experienced judges on the Court, to contribute to the Court's workload, and to afford the Chief Justice additional flexibility in managing the Court's docket.[132] Any decision to implement a similar program for prothonotaries is likewise a policy decision.[133] The Government noted that programs available to provincial court judges across the country are not uniform, and some of these judges work on a *per diem* basis.[134] Facilitating those programs requires each province to enact legislation permitting section 96 judges to elect supernumerary status, although this would not be required for prothonotaries.[135] Finally, the Government stated that the workload requirements identified by Chief Justice Crampton are more a matter for discussion between the Court and the Government than for the Commission.[136]

148. In Chief Justice Crampton's very helpful submissions, he outlined what were, essentially, workload and case management benefits of supernumerary status. These benefits would also provide a significant incentive for prothonotaries to remain with the Federal Court for a period of time, after which they would be eligible to retire with a full annuity. The Court would benefit from the continued application of their expertise and institutional knowledge. Chief Justice Crampton identified the possibility of supernumerary status as an attractive recruitment option.[137]

149. Chief Justice Crampton proposed a model in which prothonotaries would be entitled to elect supernumerary status for three years from the date of election. On the recommendation of the Chief Justice, and subject to re-appointment by the Governor in Council, this initial three-year term could be extended to a maximum period of ten years.[138]

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[132] Government's Reply Submission, *supra* note 27 at para 102.
[133] *Ibid* at para 103.
[134] *Ibid* at para 105.
[135] *Ibid* at para 104.
[136] *Ibid* at para 107.
[137] Submission of Chief Justice Paul Crampton, *supra* note 125 at 1-6.
[138] *Ibid* at 5-6.

(b) The Adams and Cunningham Reports

150. Neither Mr. Adams nor Mr. Cunningham made a recommendation about supernumerary status for prothonotaries.

(c) Analysis

151. The Prothonotaries ask us to propose a recommendation that the Minister of Justice and Chief Justice of the Federal Court either consider the possibility of granting supernumerary status under the *Judges Act* or create a senior Prothonotary program for those officers eligible for retirement. This is not inconsistent with the Government's position that any decision to implement such a program would be a policy decision.

152. Whether such a structure is put in place and its actual features is a matter for Parliament. The Commission cannot offer any detailed recommendations.

153. The relevant consideration under section 26(1.1) of the *Judges Act* is whether this option would help attract outstanding candidates for the prothonotary position.[139]

154. The Chief Justice's supernumerary model for prothonotaries potentially offers much shorter tenure than what is contemplated under the *Judges Act*. Accordingly, this proposed model might not entice applicants in the same way as supernumerary status under the *Judges Act.*

155. For these reasons, we would do no more than recommend that the Government of Canada examine the question of supernumerary or equivalent status for prothonotaries, with a view to enhancing the opportunities of recruiting outstanding candidates to these positions.

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[139] *Supra* note 1.

RECOMMENDATION 6

The Commission recommends that:

The Government of Canada and the Chief Justice of the Federal Court of Canada should consider the possibility of allowing prothonotaries to elect supernumerary status under the *Judges Act* or of creating a senior prothonotary program for those eligible for retirement.

INCIDENTAL ALLOWANCE

156. Both Mr. Adams and Mr. Cunningham recommended an allowance of $3,000.[140] The Government rejected both of these earlier recommendations on the basis that all of prothonotaries' reasonable travel and related living expenses, including education and training costs, will continue to be paid by the Government.[141]

157. Before us, the Prothonotaries proposed an incidental allowance of $5,000.[142] They argued that Federal Court judges, whose reasonable travel and related living expenses, education, and training costs are paid by the Government, can also access an allowance of up to $5,000.[143]

158. The Government is now prepared to adopt the recommendations of both Mr. Adams and Mr. Cunningham and offer a non-taxable allowance of $3,000.[144]

159. As Mr. Cunningham's recommendation of a $3,000 allowance is recent, this Commission is prepared to recommend this figure, subject to it being revisited by subsequent Quadrennial Commissions in the event that it proves, in the future, to be inadequate.

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[140] Adams Report, *supra* note 18 at 65; Cunningham Report, *supra* note 19 at 33.
[141] Government Response to Cunningham Report, *supra* note 104 at 2.
[142] Prothonotaries' Submission, *supra* note 106 at para 121.
[143] *Ibid.*
[144] Government Reply Submission, *supra* note 27 at para 111.

RECOMMENDATION 7

The Commission recommends that:

> **Prothonotaries should receive a non-taxable allowance of $3,000 annually, retroactive to April 1, 2016, to be used for the payment of expenses related to their duties.**

REPRESENTATIONAL COSTS

160. Pursuant to section 26.3 of the *Judges Act*, a representative of the judiciary participating in the Commission Proceedings is entitled to be paid two-thirds of its costs on a solicitor-client basis, to be assessed in accordance with the *Federal Court Rules*.[145] Prothonotaries are eligible for two-thirds of their costs by virtue of section 26.4 of the *Judges Act*.[146]

161. The Prothonotaries brought a preliminary motion requesting that we immediately recommend they receive full funding for the representational costs in respect of this Commission.[147]

162. In our Ruling dated February 18, 2016, we declined to make such an order and left the question of representational costs to be addressed during formal submissions.[148]

163. The request for full representational costs funding was fully argued in the preliminary motion and once again in formal written and oral submissions.

164. The Prothonotaries argued that, by virtue of the 2014 amendments to the *Judges Act*, they have been added to the Quadrennial Commission process, which is more complex than the previous, singularly-focused, Special Advisor process. Their costs are borne by six – in reality, the existing five – prothonotaries. This amounts to an undue burden on an individual basis,

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[145] *Supra* note 1.
[146] *Ibid.* This section was enacted in 2014.
[147] Letter dated January 19, 2016 from Andrew Lokan to the Commission.
[148] *Supra* note 22.

given the small number of prothonotaries, compared to the more than 1000 superior and appellate court judges who bear those parties' costs.[149]

165. The Government argued the Prothonotaries should not have full funding for representational costs, as giving this party unchecked discretion in deciding what legal costs should be incurred is not in the public interest. It says that the existing structure is adequate.[150]

166. The Commission is sensitive to the burden placed on the Prothonotaries.

167. The solution lies in better protection for members of this group on an individual basis, but with some overall safeguard against incurring unnecessary costs.

168. The assessment process under the *Federal Court Rules* is not a particularly desirable solution, given that the taxing officers of the Federal Court would be assessing the fees payable to the relatively small number of prothonotaries of the same court. This is less of an issue for the assessment of costs payable to judges under section 26.3 of the *Judges Act*, given the far larger number of judges and the smaller proportion of representational costs that each judge bears

169. We therefore recommend that 95% of the Prothonotaries' reasonable full indemnity costs be paid by the Government and, only if necessary, be assessed under the *Federal Court Rules*. We think it preferable, however, to amend the *Judges Act* to allow these costs to be assessed in the Ontario Superior Court of Justice at Ottawa.

[149] Prothonotaries' Submission, *supra* note 106 at paras 122-132.
[150] Government Reply Submission, *supra* note 27 at para 112.

RECOMMENDATION 8

The Commission recommends that:

Prothonotaries should be paid 95% of the reasonable full indemnity costs incurred before this Quadrennial Commission. Only if necessary should these costs be assessed under the *Federal Court Rules*. The Government should consider amendments to the *Judges Act* to permit these costs to be assessed in the Ontario Superior Court of Justice at Ottawa.

CHAPTER 4 - OTHER ISSUES

STEP-DOWN AMENDMENTS

170. The Honourable J.E. (Ted) Richard filed written submissions, dated February 9, 2016 and March 7, 2016.[151] Justice Richard was appointed a judge of the Supreme Court of the Northwest Territories in September 1988. In April 1996, he became senior judge of the Court, a position equivalent to chief justice of the southern superior courts. In December 2007, he elected supernumerary status, and served as a supernumerary judge until his retirement on May 1, 2012. Since his retirement, he has been receiving a judicial annuity pursuant to the *Judges Act*, but he argued that, due to a legislative drafting error, this annuity is not in the correct amount. He maintained that his annuity should be based on his salary as a senior judge.[152]

171. The Block Commission agreed that "senior judges should receive the same treatment with regard to their retirement annuities as chief justices".[153]

172. Consequently, Recommendation 5 of the Block Commission provided that:

> The *Judges Act* be amended so that senior judges of the territorial courts who elect supernumerary status receive the same treatment with regard to their retirement annuities as do chief justices who elect supernumerary status.[154]

173. However, in its formal response to the Block Commission Report, the Government declined to implement any of the Commission's recommendations. The Government did not comment on the merits of Recommendation 5.[155]

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[151] Submission of the Hon J.E. (Ted) Richard ["Richard Submission"]; Response to Government Submissions from the Hon J.E. Ted Richard.
[152] Richard Submission, *ibid*.
[153] *Supra* note 14 at para 180.
[154] *Ibid* at (page) 61.
[155] Response of the Government of Canada to the Report of the 2007 Judicial Compensation and Benefits Commission, Government's Book of Documents, tab 16.

174. The Levitt Commission agreed with the Block Commission's conclusion that "the adequacy of judicial remuneration requires similar treatment for similarly placed judges on the various courts".[156] Accordingly, Recommendation 4 of the Levitt Commission Report stated:

> The *Judges Act* should be amended so that senior judges of the territorial courts who elect supernumerary status receive the same treatment with regard to their retirement annuities as chief justices of both trial and appellate courts who elect supernumerary status.[157]

175. Recommendation 5 of the Levitt Commission Report stated:

> The *Judges Act* should be amended so that the retirement annuity of a senior judge of a territorial court who ceases to perform the duties of a senior judge and performs only the duties of a puisne judge, receiving the salary of a puisne judge, be granted a retirement annuity based on the salary of a senior judge.[158]

176. The Government accepted Recommendations 4 and 5 of the Levitt Commission, and sections 43(1) and 43(2) of the *Judges Act* were amended in December 2012. However, the amendments were not made retroactive. [159]

177. The Honourable Ted Richard argued that the amendment to section 43(1) should be made retroactive to April 1, 2012, the effective date of other changes included in the December 2012 amending legislation.[160]

178. The Government agreed that "s. 43(2) should be amended to entitle the Honourable J.E. (Ted) Richard to an annuity based on his former position as Senior Judge of the Supreme Court of the Northwest Territories"[161] and that the *Judges Act* should also be amended to address the

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[156] *Supra* note 15 at para 72.
[157] *Ibid* at page 27.
[158] *Ibid* at page 28.
[159] Government Response to the 2011 Judicial Compensation and Benefits Commission, Judiciary's Book of Documents, Tab 10 at 2.
[160] Section 217 of the amending Act came into force on Assent: December 14, 2012.
[161] Government Submission, *supra* note 35 at para 169.

situation of a chief justice or senior judge who steps down to a different court as a puisne judge.[162]

179. We agree with the recommendations of the Block and Levitt Commissions that similarly-placed judges on various superior courts should receive similar treatment with respect to salary, benefits, and annuities, and that the situation with respect to the Honourable J.E.(Ted) Richard's annuity should be corrected.

RECOMMENDATION 9

The Commission recommends that:

> **The *Judges Act* should be amended to provide that the retirement annuity of a chief justice or senior judge who has stepped down to a different court as a puisne judge be based on the salary of a chief justice and that the 2012 amendments to section 43(1) and section 43(2) be made retroactive to April 1, 2012.**

REMOVAL ALLOWANCE

180. The Honourable Mr. Justice Robert P. Stack filed written submissions dated March 1, 2016. Mr. Justice Stack presided as the only Labrador resident judge of the Supreme Court of Newfoundland and Labrador until his transfer to St. John's in September 2013. In his submission, he noted that, to date, all of the judges appointed to preside in Labrador relocated from Newfoundland and then transferred back to the Island.[163]

181. Section 40(1)(c) of the *Judges Act* authorizes a removal allowance for a judge in any of the three territories who moves to another province or territory, subject to certain criteria relating to the time of the move relative to the judge's retirement. Section 40(1)(d) of the Act authorizes a removal allowance be paid to the survivor or child of a judge in any of the three territories who

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[162] *Ibid* at para 171. We note, however, that the relevant section of the *Judges Act, supra* note 1, is section 43(1), which refers to judges who have elected supernumerary status, rather than section 43(2), which refers to chief justices who have elected to cease to perform the functions of a chief justice and perform "only the duties of a judge". Section 43(2) does not refer to supernumerary judges.

[163] Submission of Justice Robert P Stack at 1-2 ["Stack Submission"].

has died in office, if the survivor or child lived with the judge at the time of death and moves within two years of the death.[164]

182. Due to Labrador's remoteness and the consequent challenges in recruiting superior candidates to sit there, Justice Stack argued that the removal allowances provided for in sections 40(1)(c)and (d) of the *Judges Act* should apply to relocations between Labrador and Newfoundland.[165]

183. The Government agreed that "an amendment be made to extend the entitlement to a removal allowance as described in s. 40(1)(c) and (d) to the judge sitting in Labrador".[166]

184. We agree that relocations between Labrador and Newfoundland are akin to relocations from a province to a territory and that the Labrador judge should be entitled to the removal allowance under sections 40(1)(c) and (d) of the *Judges Act*.

RECOMMENDATION 10

The Commission recommends that:

> **The *Judges Act* be amended to extend the entitlement to removal allowances as described in sections 40(1)(c) and (d) to a judge sitting in Labrador, effective April 1, 2016.**

COMPENSATION OF THE CHIEF JUSTICE OF THE COURT MARTIAL APPEAL COURT

185. Written submissions, dated February 24, 2016, were filed on behalf of the Honourable B. Richard Bell, Chief Justice of the Court Martial Appeal Court of Canada (CMAC). Chief Justice Bell was appointed a judge of the Federal Court, Court Martial Appeal Court of Canada, and Chief Justice of the CMAC on February 5, 2015. His functions on the CMAC are performed on a

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[164] *Supra* note 1.
[165] Stack Submission, *supra* note 164 at 1-2.
[166] Government Reply Submission, *supra* note 27 at para 124.

permanent, not *ad hoc* basis. Consequently, he seeks compensation and allowances equal to other chief justices of superior courts in Canada.[167]

186. Currently, the Chief Justice of the CMAC is paid as a Federal Court judge, with a representational allowance as prescribed under section 27 of the *Judges Act*. Chief Justice Bell is the only member of the Canadian Judicial Council and the only chief justice of a court governed by the Courts Administration Service Act who is remunerated at the rate of a *puisne* judge. Counsel for Chief Justice Bell submitted that his functions and responsibilities are equivalent to those of the other chief justices of superior courts in Canada.[168]

187. The Government agreed that the Chief Justice of the CMAC should receive the same annual salary as other superior court chief justices. Further, should the Chief Justice of the CMAC step down from that office, he or she should be entitled to an annuity, on retirement, based on the Chief Justice's salary.[169]

188. As with senior judges in the territories, we agree that the Chief Justice of the CMAC, who is similarly placed as the chief justices of other superior courts, should receive the same compensation and benefits as other chief justices.

RECOMMENDATION 11

The Commission recommends that:

> **The necessary legislative amendments should be made to provide, effective April 1, 2016 the Chief Justice of the Court Martial Appeal Court of Canada compensation and allowances equal to those of other superior court chief justices, including an annuity based on the Chief Justice's salary in cases where he or she has stepped down to a puisne judge position.**

[167] Submission of Chief Justice B Richard Bell at paras 2, 12.
[168] *Ibid* at paras 13-20.
[169] Government Reply Submission, *supra* note 27 at para 125.

PENSION CREDIT FOR A PROVINCIAL COURT JUDGE APPOINTED TO A SUPERIOR COURT

189. The Honourable Leonard S. Mandamin filed written submissions, dated March 8, 2016.[170] Mr. Justice Mandamin, who was appointed a Federal Court judge on April 27, 2007, had previously served for seven years as a judge of the Provincial Court of Alberta, from 1999 to 2007.[171]

190. Justice Mandamin proposed that we recommend that provincial court judges who are appointed to superior courts be able to transfer their years of service from the provincial pension plan to the judicial annuity under the *Judges Act*. He explained that the inability to transfer pension credit is a significant disincentive for provincial court judges seeking appointment to a superior court. Justice Mandamin, who is himself an Indigenous judge, also argued that this lack of portability is especially significant for the appointment of qualified Indigenous provincial court judges to superior courts.[172]

191. The Government agreed that the recruitment of Indigenous judges, as well as judges drawn from minority populations, is essential to ensuring that the federal judiciary reflect the diverse face of Canada.[173] However, it noted that allowing for portability in pension credit would require not only significant amendments to the *Judges Act* but would also "require coordinated amendments to provincial and territorial judicial pension legislation, which differ across jurisdictions, to ensure consistency."[174]

192. Nonetheless, the Government stated that it would consider any recommendations this Commission might make on the issue. The Government added that ensuring a more diverse judiciary and encouraging more Indigenous candidates to apply for the bench is likely best addressed through other policies.[175]

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[170] Submission of Hon Leonard S Mandamin.
[171] *Ibid.*
[172] *Ibid.*
[173] Government Reply Submission, *supra* note 27 at para 127.
[174] *Ibid* at paras 128, 131.
[175] *Ibid* at para 132.

193. We are sympathetic to the lack of pension portability and its potential to discourage provincial court judges from seeking appointment to the superior courts. We believe this is a matter worthy of study. However, in the absence of any detailed proposal for changing the federal judicial annuity scheme, and in the absence of any comment from the Association and Council on the matter, it would be premature for us to make any specific recommendation for change to the federal judicial annuity scheme.

RECOMMENDATION 12

The Commission recommends that:

> **The Government should consider whether portability of provincial judicial pension benefits to the federal judicial annuity scheme could be achieved as a means of removing a possible disincentive for provincial court judges seeking appointment to superior courts, while maintaining the financial security of federally-appointed judges.**

CHAPTER 5 – PROCESS MATTERS

APPOINTMENT OF COMMISSIONERS

194. The Association and Council raised a number of what they described as process matters, the first of which surrounds their complaint about the Government's initial appointee to this Commission.

195. The focus of this matter was the nomination of a retired Deputy Minister of Justice and the Association and Council's understanding that he had been directly involved in the Government's representation before the Levitt Commission and in other bilateral discussions with the representatives of the judiciary.[176]

196. The Association and Council consistently stated that they were not questioning the professionalism and integrity of the nominee in question.[177] We are of the same view.

197. When the Association and Council questioned this nomination, the nominee withdrew.

198. The Government sought to strike certain paragraphs of the Association and Council's principal submissions which referred to this.[178]

199. On March 22, 2016, we issued a Ruling with reasons denying the Government's motion.[179]

200. Although the Association and Council did not request a formal recommendation, they did request that we provide guidance for the future with respect to the nomination process.[180]

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[176] Association and Council Submission, *supra* note 28 at paras 46-49.
[177] See e.g. Ruling on Objection, *supra* note 23 at 1.
[178] Government's Objection to Paragraphs 46 to 49 and Exhibit B of the Judiciary's Principal Submissions.
[179] Ruling on Objection, *supra* note 23.
[180] Association and Council Submission, *supra* note 28 at para 48;

201. We consider that the matter, whatever its merits, was self-correcting at the nomination stage and see no useful purpose being served in further exploring this area. Accordingly, we will make no recommendation.

TIMING ISSUES

202. Section 26(2) of the *Judges Act* requires that the Commission commence its inquiry on October 1, 2015 and submit a report containing its recommendations within nine months after the date of commencement.[181]

203. The intervention of the general election in 2015 delayed the commencement of the Commission's inquiry. The Orders in Council appointing the Commissioners were not made until December 15, 2015. This, in addition to the challenges for Government counsel in obtaining instructions so soon after the election of a new Government, jeopardized the nine-month completion date for our report.

204. Even though section 26(5) of the *Judges Act* allows the Governor in Council, on the request of the Commission, to extend the time for submission of its report, granting an extension does not remedy the delay in establishing the Commission and consequent non-compliance with section 26(2) of the *Judges Act*.[182]

205. The Association and Council noted that, given the current confluence between the statutory start date of future Commissions and the fixed-date election period in the *Canada Elections Act*, this problem is likely to arise again in October 2019.[183]

206. The Association and Council's position is, notwithstanding an election period, the Government is required to comply with the Act and constitute future Commissions by October 1 in a relevant year.[184]

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[181] *Supra* note 1.
[182] *Ibid.*
[183] Association and Council Submission, *supra* note 28 at para 44.
[184] See e.g. *ibid* at paras 44-45.

207. The Government appreciated the issues that arose because of the election coinciding with the intended start date of the Commission, but made no specific recommendation for us to consider.[185]

208. We appreciate the exigencies which arise in an election year. However, the Quadrennial Commission process is constitutionally and statutorily mandated, and must be complied with.

209. The Government must consider alternatives, such as:

(a) adjusting the quadrennial period automatically for a fixed period in the face of a general election;

(b) requiring the Government to appoint the Commission notwithstanding an election; and,

(c) adjusting time periods under the *Judges Act* to accommodate the intervention of an election.

210. These are not easy alternatives to work with, considering the impossibility of predicting the length of an election campaign or the timing of an election call.

RECOMMENDATION 13

The Commission recommends that:

The Government should explore means of ensuring that the time periods set out in section 26(2) of the *Judges Act* are complied with in a manner consistent with the guidelines set out by the Supreme Court of Canada.

MOTION COSTS

211. In oral argument, the Association and Council alluded to difficulties caused by the longer and more complicated Commission process, given the preliminary motions brought by the Government.

[185] Government Reply Submission, *supra* note 27 at para 11.

212. Although counsel for the Association and Council stated he was not seeking an amendment to section 26.3 of the *Judges Act*, he suggested some other form of reimbursement would be warranted. The notion was somewhat vague.

213. Section 26.3 of the *Judges Act* provides adequate reimbursement of representational costs related to participation in the Commission's inquiry.[186]

214. We do not consider that any other form of reimbursement for representational costs is warranted at this time.

COOPERATION AND COLLABORATION AMONGST THE PARTIES

215. At the heart of the Association and Council's process issue submissions was the sense that the Government does not respect the Quadrennial Commission process or Commissions' recommendations.

216. While we note the Levitt Commission's comments with respect to the need for a less adversarial process, we were struck by the degree of cooperation exhibited between the various parties, and most particularly between the Association and Council and the Government.

217. For example, these parties agreed to have their expert actuaries consult to identify the differences between their respective positions on the current value of the judicial annuity.

218. We endorse the Levitt Commission's comments that the parties should pursue as collaborative and cooperative a process – and reaction to the recommendations – as possible.[187]

219. We see no need for a specific recommendation other than to encourage the parties to continue to operate in as cooperative and collaborative a way as they can.

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[186] *Supra* note 1.
[187] *Supra* note 15 at paras 112-117.

CHAPTER 6 – FUTURE STUDIES

PRE-APPOINTMENT INCOME STUDY

220. The Government brought a preliminary motion to the Commission, asking us to undertake a study of the pre-appointment income of sitting judges appointed between 2004 and 2014.[188] It argued that the data would be relevant to, and highly probative of, a central question before us, namely, whether judges' salaries are adequate to attract outstanding candidates to the judiciary.[189]

221. After hearing from the parties, we issued a Ruling on February 18, 2016, declining to order or request that study at that preliminary stage.[190] We left open the possibility for further study of the request in the context of the full inquiry.

222. The Government later renewed the request for a pre-appointment income study to be conducted during the course of the quadrennial period, and the Association and Council continued to oppose the request.[191]

223. As part of the Commission process, the Canada Revenue Agency produced data on the income of self-employed lawyers for the purposes of the self-employed lawyers' income comparator referred to in Chapter 2 of this Report.

224. The Government asked the Commission to obtain, over this quadrennial period, full pre-appointment income of self-employed lawyers to assist in the next Quadrennial Commission process.

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[188] Submissions o the Government of Canada on the Proposal for a pre-Appointment Income Study.
[189] *Ibid* at para 1. And see Government Submission, *supra* note 35 at paras 135-138, 174-176.
[190] *Supra* note 22.
[191] See e.g. Government Reply Submission, *supra* note 27 at para 55; Association and Council Reply Submission, *supra* note 51 at paras 97-98.

225. The Block Commission rejected a snapshot of appointees' pre-appointment salaries as not "particularly useful in helping to determine the adequacy of judicial salaries".[192] It concluded that such a study would not tell whether judicial salaries deter outstanding candidates who are in the higher income brackets of private practice from applying for judicial appointment.[193]

226. The Block Commission did, however, conclude that it would be helpful to study whether judicial salaries deter outstanding candidates in the higher income brackets from applying to the judiciary. Ideally, that information would be obtained through a targeted survey of individuals at the higher end of the earning scale who could be objectively identified as potential outstanding candidates for judicial appointment. The Block Commission urged the Government and the Association and Council to consult on the design and execution of such studies if sought in the future, to provide future Commissions with information that both parties agree is reliable and useful.[194]

227. At the preliminary motion stage, and in the formal submissions, both the Association and Council and the Prothonotaries resisted the recommendation for a pre-appointment income study.[195] The Association and Council argued it would be irrelevant, self-serving, and incomplete. It relied on the expert evidence of Sandra Haydon, who stated that such a study would be neither reliable nor useful to the Commission. Ms. Haydon also stated that the income of a particular individual appointee is itself highly contextual and not a fair or reasonable predictor of future income based on a substantially different occupation.[196]

228. The criteria that this Commission must consider under section 26(1.1) of the *Judges Act* include the need to attract outstanding candidates to the judiciary. While a high income may be one indication of an outstanding candidate, the Quadrennial Commission process would benefit

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[192] Supra note 14 at para 90.
[193] *Ibid.*
[194] *Ibid.*
[195] Response of the Federal Court Prothonotaries to the Proposal by the Government of Canada for a Pre-Appointment Income Study; Response of the Canadian Superior Court Judges Association and the Canadian Judicial Council to the Proposal of the Government of Canada for a pre-Appointment Income Study; Association and Council Reply Submission, *supra* note 51 at paras 97-98.
[196] Association and Council Reply Submission, *ibid* at paras 97-98.

from objective evidence, in an agreed form of study, of high-income-earning lawyers in private practice, as described at paragraph 90 of the Block Commission Report.

229. The pre-appointment income of those accepting an appointment does not tell us much about why other attractive candidates do not put their names forward and whether this is connected to a significant compensation reduction were they to accept a judicial appointment.

230. We agree with the Block Commission that a targeted survey of individuals who are at the higher end of the earning scale, and who could be objectively identified as outstanding potential candidates for judicial appointments, should be the focus of such a study. Linking that information with an analysis of whether the number of high-earning appointees is increasing or decreasing over time would be useful.

231. The Government and the Association and Council should consult on the design and execution of those types of studies to ensure that future Commissions receive useful information derived in a manner agreed upon by the parties.

232. Given the need for consultation and agreement on such an approach, we will not make a formal recommendation at this time.

QUALITY OF LIFE STUDY

233. The Government proposed that this Commission undertake a quality of life study during the quadrennial period to examine the intangible aspects of judicial life that factor into applying to the bench.[197]

234. The Government explained that understanding non-compensation based motivators for accepting a judicial appointment would assist in the Commission's work.[198]

[197] Government Submission, *supra* note 35 at para 173, 177-179.
[198] *Ibid* at paras 177-178.

235. The Association and Council responded that this Commission focuses on salary and benefits rather than quality of life. They relied on Ms. Haydon's opinion that such a study is "unheard of" in a compensation context. This type of study would address matters of personal motivation not relevant to the compensation-setting exercise.[199]

236. Lastly, the Association and Council observed that the Government's proposal lacked details.[200]

237. We do not have sufficient information before us to make any formal recommendation.

238. We do observe that the type of study identified by the Block Commission in response to the request for a pre-appointment income study could embrace some of the intangible concepts contemplated by a quality of life study.

239. Ultimately, whether that is of more use to the Government in identifying appointees as opposed to determining the adequacy of judicial compensation is a matter which will have to be left for future consideration.

[199] Association and Council Reply Submissions, *supra* note 51 at para 104.
[200] *Ibid* at para 100.

CHAPTER 7 – CONCLUSION

240. As Canadians, we can be justifiably proud of the outstanding calibre of this country's judges. The judiciary plays an important role in safeguarding the personal liberty and the rule of law, upon which so much of our way of life is founded. In conducting this inquiry, we have taken very seriously the important role that judges' compensation plays in ensuring an independent and outstanding judiciary and have applied ourselves diligently to the task of assessing the adequacy of that compensation in the context of the criteria under the *Judges Act.*

241. Our recommendations represent our considered and unanimous views of what best serves the public interest with respect to judicial compensation and benefits for this quadrennial period.

242. The high quality submissions and expert evidence presented to us by all parties contributed greatly to our efforts and were invaluable in helping us reach our conclusions. We were heartened by the degree of collaboration demonstrated by the parties in this process, even when they took opposing views on particular issues. We commend them for this and express our hope that this spirit of cooperation will continue into the future.

243. We join past Commissions in urging that great care be taken to preserve the integrity of the Quadrennial Commission process. A robust and timely response by the Government to the Quadrennial Commission process is an essential component of maintaining that integrity and ensuring the judiciary's continued confidence in the process.

Gil Rémillard
Chair

Margaret Bloodworth
Commissioner

Peter Griffin
Commissioner

CHAPTER 8 – LIST OF RECOMMENDATIONS

This Commission recommends:

1. Judges' salaries should continue to be adjusted annually on the basis of increases in the Industrial Aggregate Index, in accordance with the current *Judges Act*.

2. Effective April 1, 2016, the salary of federally-appointed puisne judges in all Canadian trial courts should be set, inclusive of statutory indexation, at $314,100

3. No salary differential should be paid to puisne appellate judges.

4. Salary differentials should continue to be paid to the Chief Justice of Canada, the judges of the Supreme Court of Canada, and the chief justices, associate chief justices, and senior judges of the trial and appellate courts.

Effective April 1, 2016, judges' salaries should be set, inclusive of statutory indexation, at the following levels:

Supreme Court of Canada:	
Chief Justice	**$403,800**
Puisne Judges	**$373,900**
Federal Court of Appeal and Provincial and Territorial Courts of Appeal:	
Chief Justices	**$344,400**
Associate Chief Justices	**$344,400**
Puisne Judges	**$314,100**
Federal Court, Tax Court, and Trial Courts:	
Chief Justices	**$344,400**
Senior Associate Chief Justices and Associate Chief Justices	**$344,400**
Senior Judges	**$344,400**
Puisne Judges	**$314,100**

5. The salaries of Federal Court prothonotaries be increased, retroactive to April 1, 2016, to 80% of Federal Court judges' salaries, or $251,300.

6. The Government of Canada and the Chief Justice of the Federal Court of Canada should consider the possibility of allowing prothonotaries to elect supernumerary status under the *Judges Act* or of creating a senior prothonotary program for those eligible for retirement.

7. Prothonotaries should receive a non-taxable allowance of $3,000 annually, retroactive to April 1, 2016, to be used for the payment of expenses related to their duties.

8. Prothonotaries should be paid 95% of the reasonable full indemnity costs incurred before the Quadrennial Commission. Only if necessary should these costs be assessed under the *Federal Court Rules*. The Government should consider possible amendments to the *Judges Act* to permit these costs to be assessed in the Ontario Superior Court of Justice at Ottawa.

9. The *Judges Act* should be amended to provide that the retirement annuity of a chief justice or senior judge who has stepped down to a different court as a puisne judge be based on the salary of a chief justice and that the 2012 amendments to section 43(1) and section 43(2) be made retroactive to April 1, 2012.

10. The *Judges Act* should be amended to extend the entitlement to removal allowances as described in sections 40(1)(c) and (d) to a judge sitting in Labrador, effective April 1, 2016.

11. The necessary legislative amendments should be made to provide, effective April 1, 2016 the Chief Justice of the Court Martial Appeal Court of Canada compensation and allowances equal to those of other superior court chief justices, including an annuity based on the Chief Justice's salary in cases where the he or she has stepped down to a puisne judge position.

12. The Government should consider whether portability of provincial judicial pension benefits to the federal judicial annuity scheme could be achieved as a means of removing a possible disincentive for provincial court judges seeking appointment to superior courts, while maintaining the financial security of federally-appointed judges.

13. The Government should explore means of ensuring that the time periods set out in section 26(2) of the *Judges Act* are complied with in a manner consistent with the guidelines set out by the Supreme Court of Canada.

APPENDIX A

Department of Justice Canada | Ministère de la Justice Canada

News Release

Judicial Compensation and Benefits Commission Appointments

Ottawa, December 18, 2015 – The Honourable Jody Wilson-Raybould, Minister of Justice and Attorney General of Canada, today announced the appointments of Margaret Bloodworth, Peter Griffin, and Gil Rémillard to the Judicial Compensation and Benefits Commission.

Margaret Bloodworth of Ottawa is appointed a member as recommended by the Minister of Justice and Attorney General of Canada.

Ms. Bloodworth, a native of Winnipeg, received her LLB from the University of Ottawa and was called to the bar in 1979.

Ms. Bloodworth had a distinguished career with the federal public service that spanned more than 30 years. She held senior positions with several departments, including serving as deputy minister at Transport Canada, Defence, and Public Safety and as Associate Secretary to the Cabinet and National Security Advisor from 2006 till her retirement in 2008. Ms. Bloodworth is a member of the Order of Canada and has received many awards and honours, including the Public Service of Canada Outstanding Achievement Award and the Vanier Medal of the Institute of Public Administration of Canada. She is a Senior Fellow at the University of Ottawa's School of Public and International Affairs.

Peter Griffin of Toronto is appointed a member as recommended by the judiciary.

Mr. Griffin obtained his LLB from Queen's University's Law School in 1977 and was admitted to the bar in 1980.

Mr. Griffin is Managing Partner at Lenezner Slaght and one of the firm's founding partners. He is widely recognized as one of the top litigators in Canada, particularly in the areas of corporate commercial litigation, class actions, securities matters, insolvency, and professional liability. In some 35 years as a member of Ontario's legal community, he has appeared before all levels of court in the province and before the Supreme Court of Canada. A past president of the Advocates' Society, Mr. Griffin is also a Fellow of the American College of Trial Lawyers, where he serves as chair of the Ontario Committee. He is a frequent speaker at conferences and programs on legal issues, including the challenges of cross-border litigation.

Gil Rémillard of Montreal is appointed Chair as nominated by the other two members of the Judicial Compensation and Benefits Commission.

Mr. Remillard earned his LLL from the University of Ottawa in 1968 and a doctorate in law from the Université de Nice in 1972.

Mr. Rémillard has distinguished himself throughout his long career for his work in the academic world as well as in public life. He was a professor at Laval University for some 13 years before he turned to politics. From 1985 to 1994, he held several positions within the Quebec government, including Minister of International Relations, Minister of Public Security and Minister of Intergovernmental Affairs. As Minister of Justice, he was responsible for the implementation of the new Civil Code of Quebec. A member of the Order of Canada, Mr. Rémillard has been awarded the Médaille du Barreau du Québec and has also been invited by a number of foreign governments to assist in reforming their legal systems.

The Judicial Compensation and Benefits Commission was established under the Judges Act to examine at least every four years the adequacy of the salaries and benefits of the federally appointed judiciary. The Commission consists of three members: one is nominated by the judiciary and another by the federal Minister of Justice, and these two then nominate a Chairperson.

Additional information on the Judicial Compensation and Benefits Commission can be found at http://www.quadcom.gc.ca/.

-30-

Contacts

- Media Relations
  Department of Justice
  613-957-4207

Date modified: 2015-12-18

Gil Rémillard

Gil Rémillard currently serves as counsel with Dentons in Montreal. With degrees in philosophy, political science and economics and a doctorate in law, Gil Rémillard has put his skills to use in teaching as well as in private law practice and politics. From 1973 to 1985, he was a professor at the Université Laval law faculty and served as counsel to both the provincial and the federal governments. From 1985 to 1994, he was a Quebec government minister under Robert Bourassa.

As Quebec Justice Minister for over five years, Gil Rémillard presided over the completion of the new *Civil Code of Québec*, which has been in effect since January 1, 1994. From 1994 to 2016, Mr. Rémillard taught at École Nationale d'Administration publique (ÉNAP) in Quebec City and was counsel with Fraser Milner Casgrain, now Dentons Canada LLP. From 2008 to 2011, he was chair of the board of Université de Sherbrooke. From 2009 to 2012, he was Secretary General of the bilateral committee for the Quebec-France agreement on mutual recognition of professional qualifications.

Mr. Rémillard serves on a number of boards of directors and chairs the International Economic Forum of the Americas. He is also a member of the board of the Institute for Canadian Citizenship (ICC). He has published a number of works, including "Le fédéralisme Canadien", volumes I and II, and has been a visiting professor at a number of universities in Canada and abroad.

Mr. Rémillard, who is dyslexic himself, encourages a variety of organizations in support of children with learning disabilities.

Margaret Bloodworth, CM, LLB

Margaret Bloodworth is a former senior federal public servant, most recently Associate Secretary to the Cabinet and National Security Advisor to the Prime Minister (2006-2008). Prior to that, she was the first Deputy Minister of Public Safety (2003-2006), Deputy Minister of Defence (2002-2003) and Deputy Minister of Transport (1997-2002).

Currently she is chair of the boards of the Council of Canadian Academies and Cornerstone Housing for Women, Vice Chair and Chair of the Nominating and Governance Committee of the Canada Foundation for Innovation and a member of the board of the Community Foundation of Ottawa where she chairs the Grants Committee. She is an honorary Senior Fellow of the Graduate School of Public and International Affairs at the University of Ottawa.

She is a member of the Order of Canada. She has received the Upper Canada Law Society Medal, the Public Service of Canada Outstanding Achievement Award, the Vanier Medal of the Institute of Public Administration of Canada, honorary degrees from the University of Winnipeg and Carleton University, an honorary diploma from the Canadian Coast Guard College and charter membership in the Common Law Honour Society of the University of Ottawa.

She is a graduate of the University of Winnipeg and the University of Ottawa and was admitted to the Ontario bar in 1979.

Peter Griffin

Peter Griffin is Managing Partner of Lenczner Slaght. His civil litigation practice focuses on class actions, commercial disputes, shareholder and oppression litigation, insolvency litigation, securities litigation, audit and accounting issues and professional liability matters.

Mr. Griffin graduated from Queen's University with an LL.B. in 1977. He was admitted to the Ontario Bar in 1980.

Mr. Griffin is recognized as one of the leading 500 lawyers in Canada in the Lexpert / American Lawyer Guide in class action litigation, corporate commercial litigation, directors' and officers' liability litigation and securities litigation. Mr. Griffin was recognized in the Lexpert Guide to the 100 Most Creative Lawyers in Canada.

Most recently Mr. Griffin was voted one of the 25 most influential lawyers in Canada for 2014 by Canadian Lawyer Magazine.

Mr. Griffin's broad experience and involvement in the cases of the day have led to his extensive participation at law schools and continuing education programmes throughout the Province.

Mr. Griffin is past President of The Advocates' Society 2012-2013. He is a Fellow of the American College of Trial Lawyers and Chair of its Ontario Committee.

APPENDIX B

Judicial Compensation and Benefits Commission

Commission d'examen de la rémunération des juges

NOTICE

The Judicial Compensation and Benefits Commission was established in 1999 to inquire every four years into the adequacy of the salaries and other amounts payable to federally-appointed judges under the *Judges Act* and into the adequacy of judges' benefits generally. In 2014, the *Act* was amended to provide that for the purposes of the inquiry the prothonotaries of the Federal Court be considered as judges. Under the provisions of the *Act*, the Commission must submit a report containing its recommendations to the Minister of Justice, who shall respond to the report within four months after receiving it.

The Commission invites parties wishing to comment on matters within the Commission's mandate to forward their written submissions, in either official language, preferably in electronic format, to: info@quadcom.gc.ca. Paper versions of submissions will also be accepted at the Commission's offices at 99 Metcalfe Street, 8th floor, Ottawa, Ontario, K1A 1E3. Parties wishing to make an oral presentation at the Commission's hearings in Ottawa should indicate so when they file their written submission.

The Commission has received notice that the Government of Canada intends to raise a preliminary issue concerning the commissioning of a study on Pre-Appointment Income and that Federal Court prothonotaries intend to raise as a preliminary issue their request for full representational funding. Accordingly, the following schedule is established:

- 19 January 2016- deadline for filing submissions on preliminary issues
- 20 January 2016 - deadline for filing notice of any extraordinary issue
- 29 January 2016 - deadline for filing responses on preliminary issues
- 8 February 2016, 2:30 pm EST - teleconference if required on preliminary issues
- 29 February 2016 - deadline for the Government, the judiciary and prothonotaries to file their main submissions
- 11 March 2016 - deadline for other parties to file their main submissions
- 29 March 2016 - deadline for filing responses to submissions
- 5 and 6 April 2016 - oral hearing in Ottawa

All submissions will be posted on the Commission's web site at www.quadcom.gc.ca.

APPENDIX C

News Release

Judicial Compensation and Benefits Commission | Commission d'examen de la rémunération des juges

Quadrennial Judicial Compensation and Benefits Commission Begins Inquiry

Ottawa, Ont. – January 25, 2016

The quadrennial Judicial Compensation and Benefits Commission, has begun its inquiry into the adequacy of the salaries and benefits paid to federally-appointed judges and to prothonotaries of the Federal Court. The Commission welcomes comments from the public. A Notice setting out filing deadlines and directions for parties wishing to send in submissions can be found on the Commission's Website at www.quadcom.gc.ca.

Quick Facts

- The inquiry is held every four years, pursuant to s. 26 of the *Judges Act*.
- The first Quadrennial Commission was established in September 1999, with subsequent Commissions in 2003, 2007 and 2011. This is the fifth Commission.
- The Commission consists of three members appointed by the Governor in Council. One member is nominated by the judiciary, and in the case of this Commission that member is Mr. Peter Griffin. The second member is nominated by the Minister of Justice and Attorney General of Canada. In this instance, that member is Ms. Margaret Bloodworth. These two members together nominated Mr. Gil Rémillard to act as the Chair of the Commission.
- In conducting its inquiry, the Commission examines the various submissions it receives keeping in mind the following factors:
    1. the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government;
    2. the role of financial security of the judiciary in ensuring judicial independence;
    3. the need to attract outstanding candidates to the judiciary; and
    4. any other objective criteria that the Commission considers relevant.
- Under the provisions of the *Judges Act* the Commission must submit a report containing its recommendations to the Minister of Justice, who shall respond to the report within four months of receiving it.

Contact

Louise Meagher
Executive Director
Judicial Compensation and Benefits Commission
613-992-5446
louise.meagher@quadcom.gc.ca

Search for related information by keyword

Judicial Compensation and Benefits Commission Law

Date modified: 2016-01-25

APPENDIX D

Judicial Compensation and Benefits Commission

Commission d'examen de la rémunération des juges

99 Metcalfe Street
Ottawa, Ontario K1A 1E3

Chairperson/Président
Gil Rémillard

Members/Membres
Margaret Bloodworth
Peter Griffin

Executive Director/Directrice exécutive
Louise Meagher

Tel./Tél. : 613-995-5300
e-mail/courriel: info@quadcom.gc.ca

Ruling Respecting Preliminary Issues: Pre-Appointment Income Study and Representational Costs of Prothonotaries

February 18, 2016
Gil Rémillard (Chair); Margaret Bloodworth (Commissioner); Peter Griffin (Commissioner)

Pre-appointment income study: Counsel for the Attorney General of Canada has requested that the Commission undertake a study of the pre-appointment income of sitting judges appointed between the years 2004 and 2014 by the Federal Government according to a methodology to be established by the Commission in conjunction with the parties and Canada Revenue Agency. Canada Revenue Agency would be asked by the Commission to provide the requested information in accordance with that methodology. The parties accept that this would require between two and four months from initiation to complete.

The Commission received written submissions from counsel for the Attorney General, counsel for the Canadian Superior Courts Judges Association and the Canadian Judicial Council and from counsel for the Federal Court of Canada Prothonotaries.

Representational costs of Prothonotaries: Counsel for the Prothonotaries has requested that the Commission immediately recommend that the prothonotaries receive full funding for their representational costs in connection with the Commission process.

The Commission received written submissions from counsel for the Prothonotaries and counsel for the Attorney General.

The Commission convened a telephone conference call on February 8, 2016 to hear oral submissions from counsel on both requests and reserved its decision.

The Commission has carefully considered the written and oral submissions of counsel on both issues and, after due deliberation, has determined as follows:

With respect to the pre-appointment income study, the Commission is not prepared to undertake or order such a study at this time for the following reasons:

1. **At this point, the Commission has received a preliminary indication of the issues that it will have to consider. It has not yet received the detailed submissions in accordance with its established schedule or conducted the formal hearings that will enable the Commission to focus on the exact positions taken by the Attorney General, the Judiciary, the Prothonotaries or any other parties, and the arguments and evidentiary support for them. To commission such a study at this time is premature;**

2. Without the benefit of a fully developed set of submissions and a record, the benefits of such a study are not established on what is now before us; and

3. **The delay attendant upon such a process will inevitably cause the Commission to be unable to report to the Minister of Justice within the time set by the provisions of the *Judges Act.* If the Minister of Justice is to be requested to permit a delay to its report, the Commission requires a clearer justification for doing so than exists at present.**

Accordingly, the Commission declines to order or request a pre-appointment income study at this stage of its proceedings.

With respect to the representational costs for Prothonotaries, the Commission is not prepared to make such a recommendation at this time.

Counsel for the Prothonotaries has raised a number of reasons why he argues that the cost allocation applicable in the *Judges Act* is not reasonable or fair to apply to the Prothonotaries. These include:

1. the disproportionate burden of the costs that members of the group must bear in relation to judges due to their small numbers,

2. the smaller remuneration base, including the lack of an incidental allowance, from which Prothonotaries have to meet the costs and

3. the apparent lack of equity in comparison with Military Judges who are compensated for the total costs of the pay review process applicable to them.

However, in light of the provisions of section 26.3 of the *Judges Act*, the Commission is not satisfied that it is appropriate to make such a recommendation at this early stage in the Commission's process, separate from the report and recommendations that will follow its consideration of detailed written submissions and oral submissions at formal hearings.

Accordingly the Commission declines to issue a recommendation on representational costs for Prothonotaries at this stage of the proceedings.

APPENDIX E

Judicial Compensation and Benefits Commission

Commission d'examen de la rémunération des juges

99 Metcalfe Street
Ottawa, Ontario K1A 1E3

Chairperson/Président
Gil Rémillard

Members/Membres
Margaret Bloodworth
Peter Griffin

Executive Director/Directrice exécutive
Louise Meagher

Tel./Tél. : 613-995-5300
e-mail/courriel: info@quadcom.gc.ca

Ruling Respecting Preliminary Issue: Objection to Paragraphs 46-49 and Exhibit B of the Judiciary's Principal Submissions.

March 22, 2016

Gil Rémillard (Chair); Margaret Bloodworth (Commissioner); Peter Griffin (Commissioner)

The Government of Canada has requested that the Commission strike paragraphs 46-49 and Exhibit B of the Judiciary's principal submission, filed on February 29, 2016. In the alternative, it requests that the revised submission (with a redacted version of paragraphs 46-49) filed on March 2, 2016 be considered as the Judiciary's submission and that Exhibit B be marked as a confidential exhibit.

The Commission received written submissions, dated March 8, 2016 and March 11, 2016, from counsel for the Attorney General, and written submissions dated March 10, 2016 from counsel for the Canadian Superior Courts Judges Association and the Canadian Judicial Council. The Commission has carefully considered the written submissions.

The paragraphs and Exhibit in question reflect the circumstances surrounding the proposed nominee of the Government to this Commission and the objection to that nomination by the Judiciary. Pending the decision on the Government's objection, the Judiciary's revised submissions formed part of the public record and Exhibit B was treated as confidential.

The Government objects to the paragraphs and Exhibit on three grounds:

1. relevance to the Commission's inquiry;

2. prejudicial impact on the proposed nominee's reputation; and

3. adverse impact on candour and trust between the parties.

The Commission considers it important to note at the outset that the Judiciary has been explicit in its endorsement of the undoubted integrity of the individual involved, something which this Commission fully accepts and likewise endorses. In the Commission's view there is no question as to the integrity of the proposed nominee and nothing surrounding the events referred to in the paragraphs and Exhibit suggests otherwise.

With respect to the grounds for objection raised by the Government, the Commission finds as follows:

1. It is premature for the Commission to conclude that the question of process surrounding the appointment of nominees is irrelevant to the questions it must decide;

2. There is no question as to the integrity of the individual involved. Prior involvement by an individual on behalf of a party before a commission or tribunal is the type of activity that may dictate that individual's recusal from a decision-making role. In most circumstances, as in this one, there is no suggestion of actual bias. It is the appearance of impartiality which is at issue; and

3. The nomination of a member to the Commission, whether it be by the Government or the Judiciary, is part of the process of a public proceeding. The Commission is not convinced that there is any confidence or privilege which would attach to the documents in question.

The courts have recognized limited circumstance in which documents filed in a public proceeding would be sealed or struck in the manner requested by counsel for the Attorney General. In the view of the Commission, none of those circumstances apply here.

Accordingly, the request of the Attorney General is denied. The original version of paragraphs 46-49 of the Judiciary's principal submission is reinstated and Exhibit B will form part of the public record.

Given its findings on ground 2 above, the Commission does not consider it necessary to accede to the Government's request that the proposed nominee be invited to comment.

APPENDIX F

Judicial Compensation and Benefits Commission

Commission d'examen de la rémunération des juges

NOTICE

March 31, 2016

Due to unforeseen circumstances resulting in its counsel being unable to appear at the hearings scheduled for April 5 and 6, 2016, the Government has requested an adjournment.

Having considered the Government's request, and on consent of the parties scheduled to appear, the Commission has adjourned the hearings to April 28 and 29, 2016.

APPENDIX G

Judicial Compensation and Benefits Commission
Hearing Participants

The Judicial Compensation and Benefits Commission

- Gil Rémillard
  Chair of the Commission

- Margaret Bloodworth
  Commissioner

- Peter Griffin
  Commissioner

- Louise Meagher
  Executive Director

Representing the Government of Canada

- Anne Turley
  Senior General Counsel
  Department of Justice
  Litigation Branch
  (lead counsel for preparation of written submissions
  and in preliminary matters)

- Christopher Rupar
  Senior General Counsel
  Office of the Assistant Deputy Attorney General
  Justice Canada

- Kirk Shannon
  Counsel
  Civil Litigation
  Justice Canada

- Stephen Zaluski
  General Counsel and Director
  Judicial Affairs, Courts and Tribunal Policy
  Justice Canada
  Observer

- Adair Crosby
  Senior Counsel and Deputy Director
  Judicial Affairs, Courts and Tribunal Policy
  Justice Canada
  Observer

Representing the Canadian Superior Court Judges Association and the Canadian Judicial Council

- Pierre Bienvenu, Ad E
  Senior Partner
  Norton Rose Fulbright Canada LLP

- Azim Hussain
  Partner
  Norton Rose Fulbright Canada LLP

- Jamie Macdonald
  Associate
  Norton Rose Fulbright Canada LLP

- The Hon. Mr. Justice J.C. Marc Richard
  President, Canadian Superior Court Judges Association
  Observer

- The Hon. Madam Justice Susan Himel
  Vice-President, Canadian Superior Court Judges Association
  Observer

- Frank McArdle
  Executive Director, Canadian Superior Court Judges Association
  Observer

- The Hon. Madam Justice Julie Dutil
  Secretary, Canadian Superior Court Judges Association
  Observer

- The Hon. Madam Justice Lynne C. Leitch
  Past president of the Canadian Superior Court Judges Association and
  Chair of the Association's Compensation Committee
  Observer

- The Hon. Mr. Justice T. Mark McEwan
  Past President, Canadian Superior Court Judges Association
  Observer

- The Hon. Mr. Justice David H. Jenkins
  Chair of the Judicial Salaries and Benefits Committee of the Canadian Judicial Council
  Observer

Representing the Federal Court Prothonotaries

- Andrew K. Lokan
  Counsel
  Paliare Roland Rosenberg Rothstein LLP

- Roger Lafrenière
  Federal Court Prothonotary
  Observer

Representing the Canadian Bar Association

- Janet M. Fuhrer
  President
  Canadian Bar Association

- Hugh Wright
  Vice-Chair Judicial Compensation and Benefits Commission
  Canadian Bar Association

- Sara MacKenzie
  Lawyer, Legislation and Law Reform
  Canadian Bar Association

Representing Canadian Appellate Judges

- The Hon. Joseph Nuss Q.C./c.r., Ad. E.
  Senior Counsel
  Woods LLP

- The Hon. Madam Justice Marie St-Pierre
  Québec Court of Appeal
  Observer

- The Hon. Madam Justice Marina Paperny
  Court of Appeal of Alberta
  Observer

Representing the Federal Court

- The Hon. Paul Crampton
  Chief Justice of the Federal Court

APPENDIX H

LIST OF DOCUMENTS RECEIVED

From the Government of Canada represented by the Department of Justice of Canada

- Pre-submission Letter on Issues to be Raised
- Submission on the Proposal for a Pre-appointment Study
- Main Submission
- Government's Objection to Paragraphs 46 to 49 and Exhibit B of the Judiciary's Principal Submission
- Government's Reply on the Objection to Paragraphs 46 to 49 and Exhibit B of the Judiciary's Principal Submission
- Book of Documents (Volumes 1 and 2)
- Supplementary Book of Documents
- Joint Book of Documents (Volumes 1 and 2)
- Response to the Request for Full Funding by Federal Court Prothonotaries
- Reply Submissions
- 2016 Salary Adjustment issued by FJA on March 31, 2016
- Post hearing letter dated May 2, 2016
- Letter from Newell and Pannu dated May 26, 2016

From the Canadian Superior Courts Judges Association and the Canadian Judicial Council

- Pre-submission Letter on Issues to be Raised
- Main Submission
- Book of Documents
- Response to the proposal by the Government of Canada for a Pre-appointment Income Study
- Submission in response to the Government of Canada's Motion dated March 8, 2016 (Objection to Paragraphs 46 to 49 and Exhibit B)
- Reply Submission
- Reply Book of Exhibits and Documents
- Post hearing letter dated May 6, 2016
- Letter from Newell and Pannu dated June 15, 2016

From the Federal Court Prothonotaries

- Pre-submission Letter on Issues to be Raised
- Submission on the Funding for Representational Costs
- Main Submission
- Book of Documents
- Response to the Proposal by the Government of Canada for a Pre-appointment Income Study
- Reply Submission
- Submission from Chief Justice Paul Crampton regarding Supernumerary Status for the Federal Court Prothonotaries

Others

- Submission from the Honorable J.E. (Ted) Richard
- Response to the Government Submission from the Honorable J.E. (Ted) Richard
- Submission on behalf of Chief Justice B. Richard Bell
- Submission from Justice Robert P. Stack
- Submission from the Canadian Bar Association
- Submission from the Association of Ontario Superior Court Judges
- Submission on behalf of Canadian Appellate Judges
- Submission from Justice Gordon L. Campbell
- Submission from the Hon. Leonard S. Mandamin
- Submission from the Superior Courts Chief Justices Trial Forum
- Submission from Chief Justice Paul Crampton

Response of The Government of Canada to the Report of the 2015 Judicial Compensation and Benefits Commission

This is the Response of the Government of Canada to the Report of the fifth Judicial Compensation and Benefits Commission, dated June 30, 2016. It is issued pursuant to section 26(7) of the *Judges Act*.

The Government wishes to thank the Chair of the Commission, Mr. Gil Rémillard, and the Commission Members, Ms. Margaret Bloodworth and Mr. Peter H. Griffin, for their commitment to this important public interest process. They reviewed the submissions of the participants and the evidence before them thoroughly and thoughtfully, and addressed the issues raised before them in a timely manner.

Background

Since the first commission process in 1999, there have been four previous Government Responses. Each one has included an overview of the context in which judicial compensation is established. The Government does so again in recognition of the unique nature of the exercise, the important constitutional provisions and principles involved, and the need for clarity in the public interest since the process is, at heart, designed to ensure public confidence in the independence and impartiality of the judiciary.

At the federal level, section 100 of the *Constitution Act, 1867* requires that Parliament, rather than the Executive, fix the compensation and benefits of superior court judges. Compensation and benefits for these judges are established in the *Judges Act*; since 2014, the *Judges Act* also provides for the compensation and benefits of the prothonotaries of the Federal Court, judicial officers to whom the protections of judicial independence are also extended.

In *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 S.C.R. 3, the Supreme Court of Canada held that before any changes are made to judicial compensation, the adequacy of judicial compensation must be considered by an “independent, objective and effective” commission.

Subsection 26(1) of the *Judges Act* provides for the establishment of the Judicial Compensation and Benefits Commission every four years. The Commission’s mandate is to inquire into and make recommendations regarding the “adequacy” of judicial compensation and benefits of federally-appointed judges as well as, for the first time in 2015, the prothonotaries of the Federal Court.

Subsection 26(1.1) of the *Judges Act* provides that the adequacy of judicial compensation and benefits, which is taken to include the compensation and benefits of the prothonotaries, is considered in light of the following criteria:

a. the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government;
b. the role of financial security of the judiciary in ensuring judicial independence;
c. the need to attract outstanding candidates to the judiciary; and
d. any other objective criteria that the Commission considers relevant.

The Commission must report to the Minister of Justice within nine months, and the Government must respond publicly to the Commission's report and recommendations within four months of receipt of the Report (section 26(7)).

The current Commission (the "Rémillard Commission") convened on October 1, 2015, and delivered its Report to the Minister of Justice on June 30, 2016. The Report contained 13 recommendations: ten related directly and immediately to compensation (Recommendations 1-5 and 7-11), and three that suggested further study or consultation (Recommendations 6, 12, and 13). A full list of the Commission's recommendations is included at the end of the Response.

Government Response

The Government fully accepts the compensation-related recommendations of the Rémillard Commission. The Government has also taken initial steps to address the recommendations of the Commission that suggest additional study and consultation, and will carry on with these efforts as appropriate and as outlined in further detail below.

Recommendations 1-4: Judicial Salaries

The Commission's recommendation that judges' salaries should continue to be adjusted annually on the basis of increases in the Industrial Aggregate Index (IAI) (Recommendation 1) maintains the *status quo* as provided in section 25 of the *Judges Act*. The Government had proposed that the Consumer Price Index was a more generally understood indexation measure, and that the historic reasons for which the IAI was initially chosen are no longer relevant. The Commission, however, accepted the expert evidence presented to it on the issue of indexation measures and the purposes for which they are used, which differed from the Government's submissions. The Commission also noted the Levitt Commission's statement in 2011 that the "legislative architecture governing judges' salaries … should not be lightly tampered with" (paragraph 38). In light of the Commission's careful analysis of the arguments and evidence on the issue, the Government accepts the recommendation.

The Commission had been urged to recommend that a salary differential be paid to the *puisne* judges of appellate courts. The Commission, however, citing the decline in the number of appellate judges who supported such a proposal over the years, recommended instead that *puisne* judges

from both appellate and trial judges continue to be paid at the same level (Recommendation 3). The Commission also noted that a qualitative evaluation of the relative value of trial and appellate judges is too subjective an analysis on which to base a salary differential recommendation. The Government agrees and, further, reiterates its view that any attempt to quantify the value of trial and appellate judges' roles in monetary terms risks creating the impression that the role of one or the other is more important to the Canadian justice system. The Government echoes the Commission's acknowledgement of the distinct and important roles played by both trial and appellate judges, and accepts its recommendation.

Recommendations 2 and 4, which set salary levels effective April 1, 2016, flow directly from the operation of Recommendation 1, but merit specific comment in light of the Commission's analysis of the evidence. The Commission acknowledged the challenge inherent in any analysis of judicial salaries since "no job is similar to a judge's" (paragraph 44), but carefully considered the evidence related to public sector and private sector comparators that have been used by previous commissions in their inquiry into the adequacy of judicial salaries. The Commission concluded that the DM-3 comparator should not be used in a mathematical, formulaic fashion, and observed that the "total average compensation" of such a small group, the average salary of which can be so significantly affected by individual outliers, is not a useful reference point (paragraph 52). The Commission's caution about mathematical approaches applied equally to its treatment of private sector lawyers' salaries: while noting that certain segments of that population (based on age, region of practice, or minimum income level) may merit careful consideration, the Commission declined to exclude them entirely from the comparison, as the judiciary's arguments proposed. The Commission also carefully considered the value of the judicial annuity, which represents a unique arrangement that the Commission concluded is superior to alternatives available to private sector lawyers (paragraph 73). The Government is satisfied that the Commission gave due consideration to the evidence at its disposal as it related to the relevant factors.

The Commission declined to accept the judiciary's proposal that a substantive increase in salary over the course of the quadrennial period was necessary in order to maintain an adequate level of compensation. It concluded that indexation in accordance with the IAI is serving its intended function (paragraph 56). The Government accepts this conclusion, and the recommendations that flow from it, in light of the information currently available.

Recommendation 5: Salaries of the Prothonotaries of the Federal Court

The Commission recommended that the salaries of the prothonotaries of the Federal Court be increased from 76 to 80 percent of the salary of a Federal Court *puisne* judge. In doing so, the Commission noted that this was the level that had been recommended by the two Special Advisors who had previously reviewed prothonotaries' compensation, and also considered the evidence presented by the Chief Justice of the Federal Court. Its assessment of the evidence relevant to the statutory criterion that requires the commission to consider the "ability to attract outstanding candidates" militated in favour of an increase. While it addressed the arguments of the

prothonotaries in relation to appropriate comparators, the Commission noted that Federal Court judges represent the best relative comparator to the position and work of prothonotaries (paragraph 36). The Government accepts this analysis and the recommendation that flows from it, and further notes that prothonotaries' salaries will also continue to benefit from the statutory indexation based on IAI.

Recommendation 8: Prothonotaries' Representational Costs

The Commission recommended that the prothonotaries be reimbursed for 95 percent of their representational costs incurred before this Quadrennial Commission. The Government agrees that the prothonotaries must be supported to an extent that allows them to participate meaningfully in this constitutional process, and acknowledges that the small number of prothonotaries poses challenges that are not present in the costs arrangement of two-thirds reimbursement that applies to judges and makes a similar arrangement inequitable. The Government accepts this recommendation and will introduce amendments to the *Judges Act* that will provide for this level of reimbursement for the 2015 Quadrennial Commission and future commission processes. The Government trusts that this arrangement will allow for prothonotaries' meaningful participation while also encouraging participants to exercise prudence in the expenditure of public funds, as well as coordination and cooperation when their interests and arguments align.

The Commission's recommendation also encouraged the Government to consider a different costs assessment process than that which currently governs the costs regime in the *Judges Act*. The Government notes that the assessment of the judiciary's expenses has never in the past been controversial and has, in fact, been concluded on the basis of consent. The Government is confident that the same practices that have worked well for judges will be appropriate for prothonotaries.

Recommendations 7, 9, 10, and 11: Miscellaneous Adjustments to Compensation and Benefits

The Commission made four recommendations related to the compensation and benefits of various individuals and groups. In its submissions before the Commission, the Government had agreed that these adjustments would be appropriate, but recognized that, in the context of the constitutional framework, it could not unilaterally make the changes in the absence of a commission recommendation. The Government accepts these recommendations and offers the following brief comments:

- *Incidental Allowance for Prothonotaries (Recommendation 7):* The Government agrees that the prothonotaries should receive a non-taxable allowance of $3,000 annually, beginning April 1, 2016, for the payment of expenses related to their duties.
- *Step-down Amendments (Recommendation 9):* The Government has stated that it believes it is fair, appropriate and in the public interest to extend the "step-down" provisions (i.e., those that allow a former chief justice or senior judge who "steps down" to the duties of a *puisne* judge to receive an annuity based on the chief justice/senior judge salary) to include chief

justices or senior judges who step down to become *puisne* judges of a different court. The Government also agreed that the 2012 amendments, which previously extended the step-down entitlements to senior judges, should be made retroactive to address the situation of the Honourable J.E. (Ted) Richard, former Senior Judge of the Supreme Court of the Northwest Territories, who retired after the Government had announced its intention to make the change, but whose date of retirement preceded the coming into force of the 2012 amendments.

- *Removal Allowance for Judge Resident in Labrador (Recommendation 10):* A judge of the Supreme Court of Newfoundland and Labrador proposed that the removal allowance entitlements in s. 40(1)(c) and (d), which are currently enjoyed by the judges of the territorial superior courts, be extended to judges of the Supreme Court of Newfoundland and Labrador resident in Labrador. Judges resident in Labrador are currently entitled to the same allowance provided for in s. 27(2) that is also provided to territorial court judges in recognition of similarly higher costs of living. It is appropriate that the removal allowance entitlement also be provided on an equal basis, and the Government will introduce necessary amendments to the *Judges Act*.
- *Compensation of the Chief Justice of the Court Martial Appeal Court of Canada (Recommendation 11):* The Government agrees that it is appropriate that the Chief Justice of the Court Martial Appeal Court receive a salary equal to that of other superior court chief justices, and that the step-down provisions also be extended to that office.

Recommendation 6: Pre-Retirement Arrangements for Prothonotaries

The Commission recommended that the Government and the Chief Justice of the Federal Court consider the possibility of allowing prothonotaries to elect supernumerary status or of creating a senior prothonotary program for those eligible for retirement. The Government notes that, while the Commission made the recommendation for further consultation on the basis of the statutory criterion described in s. 26(1.1)(c) (the need to attract outstanding candidates), the Chief Justice was also concerned with ensuring that a sufficient complement of prothonotaries was available to undertake the court's work that is within their jurisdiction. In superior courts (other than the Supreme Court of Canada), when a judge elects supernumerary status, a vacancy on the court is automatically created, while the supernumerary judge remains available to undertake reduced duties (generally understood to be half-time), while in receipt of full salary. This is an arrangement that has been reached with all the provinces and territories, which are constitutionally responsible for the administration of justice in the provincial superior courts, but this is not the only way of structuring a pre-retirement arrangement.

The Government is committed to engaging with the Chief Justice of the Federal Court on the issue of possible pre-retirement arrangements, and continuing to communicate with him on workload issues that affect that Court. Effective collaboration has already been established with regard to the judicial complement, and the Government is confident that similar collaboration will be helpful in addressing prothonotaries' workload issues as well.

Recommendation 12: Portability of Provincial Judicial Pensions

The Commission recommended that the Government consider whether portability of provincial judicial pensions to the federal judicial annuity scheme could be used to remove a possible disincentive for provincial court judges seeking appointment to a superior court. This issue was raised in submissions specifically with reference to encouraging Indigenous provincial court judges to consider applying for federal judicial appointment, it being suggested that the current arrangements act as a deterrent to this important pool of possible candidates for appointment to the superior courts.

The Government takes very seriously the need to increase diversity within the federal judiciary to ensure it better reflects the face of Canada, and specifically seeks to encourage Indigenous applicants. The Government encourages applications for federal judicial appointment not only from among current provincial and territorial court judges, but also from Indigenous lawyers, and lawyers from other historically under-represented groups.

As noted in the Government's submissions before the Commission, the annuity provided to superior court judges in the *Judges Act* is unique and its structure does not lend itself to portability with other judicial pension schemes. Such an endeavor would require a review of the entire federal judicial annuity structure, as well of the provincial and territorial legislation that governs judicial pensions. This would involve negotiations and multi-jurisdictional amendments to ensure alignment across Canada and among jurisdictions to provide for portability across all judicial pensions. Even assuming the willingness of relevant actors to engage in such a discussion, this would be a substantial undertaking. The Government also observes that most pension plans include options for deferred or partial pensions; these provisions ensure that accumulated entitlements are not lost for provincial or territorial court judges who are appointed to the superior court.

While the Commission heard that the disincentive that arises is due to the traditional career path for an Indigenous judge, this could be true of other populations as well. The Government is committed to enhancing the diversity of the federal judiciary, and believes that there may be more effective means of addressing this goal. A policy approach that instead seeks to change expectations about anticipated career paths is likely to have a broader impact, be more effective, and achieve the desired result more quickly.

Recommendation 13: Timing Issues

In 2015, the statutory start-date of the Commission coincided with the writ period for the October 19 fixed-date election. This prevented the Government from taking certain steps that were necessary for its full engagement with the commission process until some time after the election. The Government recognizes that since a four-year cycle applies to both the Judicial Compensation and Benefits Commission and fixed-date general elections under the *Canada Elections Act*, the same challenges could arise again in 2019. The Commission recommended that the Government explore

means of ensuring that the statutory time periods are complied with, and the Government, in its submissions before the Commission, committed to ensuring that the judiciary had an appropriate opportunity to provide input on this issue.

The Commission identified a non-exhaustive list of three alternatives (paragraph 209), which the Government has fully considered in light of Government structures and processes, as well as what is permissible under the Westminster model of ministerial accountability that applies in Canada. The Government consulted the judges and the prothonotaries, and has seriously considered the input they provided.

Of note, however, the Commission also identified a factor that, in the Government's view, is fundamental to the underlying challenge: the "impossibility of predicting the length of an election campaign or the timing of an election call" (paragraph 210). The need for certainty in the applicable time frames has proven decisive to the Government's ultimate decision on how to respond to this recommendation. The Government will propose amendments to the *Judges Act* to provide that the next commission will commence its inquiry on June 1, 2020, with subsequent commissions to commence on June 1 every four years thereafter. The Government carefully considered other approaches, including a contingent provision that would operate only when certain conditions are met so as to delay subsequent procedural steps and deadlines. While this would have addressed the possibility of an off-cycle election, the Government concluded that the Commission's underlying interest in ensuring compliance with the statutory time periods would be best addressed if the start date of the next commission process is known well in advance.

The Government is mindful of the Supreme Court of Canada's guidance on the question of frequency of judicial compensation reviews, which the Court identified as being necessary every three to five years. The Government notes that an eight-month delay would still see the inquiry take place within a five-year window. More importantly, the change in date will be a one-time event, and subsequent inquiries will continue to take place on a quadrennial cycle. Furthermore, the change will affect the start date only; it will not create a gap in the period for which compensation will be reviewed.

Conclusion

The Government recognizes that the success of the process depends not only on compliance with statutory timeframes but also on the cooperation and collaboration among the participants. The Government is pleased that the Commission saw fit to comment specifically in this regard that it was struck by the degree of cooperation between the various parties during the commission process (paragraph 54). The Government reiterates its commitment to ensuring that this positive dynamic continues in the current and future commission processes.

The Government will take steps to ensure the timely implementation of the Commission's recommendations by introducing the necessary legislative amendments "within a reasonable period", as required by section 26(7) of the *Judges Act*.

Annex: List of the Recommendations of the 2015 Judicial Compensation and Benefits Commission

Recommendation 1

Judges' salaries should continue to be adjusted annually on the basis of increase in the Industrial Aggregate Index, in accordance with the current *Judges Act*.

Recommendation 2

Effective April 1, 2016, the salary of federally-appointed *puisne* judges in all Canadian trial courts should be set, inclusive of statutory indexation, at $314,100.

Recommendation 3

No salary differential should be paid to *puisne* appellate judges.

Recommendation 4

Salary differentials should continue to be paid to the Chief Justice of Canada, the judges of the Supreme Court of Canada, and the chief justices, associate chief justices, and senior judges of the trial and appellate courts.

Effective April 1, 2016, judges' salaries should be set, inclusive of statutory indexation, at the following levels:

Supreme Court of Canada:

Chief Justice $403,800

Puisne Judges $373,900

Federal Court of Appeal and Provincial and Territorial Courts of Appeal:

Chief Justice $344,400

Associate Chief Justices $344,400

Puisne Judges $314,100

Federal Court, Tax Court, and Trial Courts:

Chief Justices $344,400

Senior Associate Chief Justices and Associate Chief Justices $344,400

Senior Judges $344,400

Puisne Judges $314,100

Recommendation 5

The salaries of Federal Court prothonotaries be increased, retroactive to April 1, 2016, to 80% of Federal Court judges' salaries, or $251,300.

Recommendation 6

The Government of Canada and the Chief Justice of the Federal Court of Canada should consider the possibility of allowing prothonotaries to elect supernumerary status under the *Judges Act* or of creating a senior prothonotary program for those eligible for retirement.

Recommendation 7

Prothonotaries should receive a non-taxable allowance of $3,000 annually, retroactive to April 1, 2016, to be used for the payment of expenses related to their duties.

Recommendation 8

Prothonotaries should be paid 95% of the reasonable full indemnity costs incurred before the Quadrennial Commission. Only if necessary should these costs be assessed under the *Federal Courts Rules*. The Government should consider possible amendments to the *Judges Act* to permit these costs to be assessed in the Ontario Superior Court of Justice at Ottawa.

Recommendation 9

The *Judges Act* should be amended to provide that the retirement annuity of a chief justice or senior judge who has stepped down to a different court as a *puisne* judge be based on the salary of a chief justice and that the 2012 amendments to section 43(1) and section 43(2) be made retroactive to April 1, 2012.

Recommendation 10

The *Judges Act* should be amended to extend the entitlement to removal allowances as described in sections 40(1)(c) and (d) to a judge sitting in Labrador, effective April 1, 2016.

Recommendation 11

The necessary legislative amendments should be made to provide, effective April 1, 2016 the Chief Justice of the Court Martial Appeal Court of Canada compensation and allowances equal to those of other superior court chief justices, including an annuity based on the Chief Justice’s salary in cases where he or she has stepped down to a *puisne* judge position.

Recommendation 12

The Government should consider whether portability of provincial judicial pension benefits to the federal judicial annuity scheme could be achieved as a means of removing a possible disincentive for provincial court judges seeking appointment to superior courts, while maintaining the financial security of federally-appointed judges.

Recommendation 13

The Government should explore a means of ensuring that the time periods set out in section 26(2) of the *Judges Act* are complied with in a manner consistent with the guidelines set out by the Supreme Court of Canada.

Special Advisor on Federal Court Prothonotaries' Compensation

Report of The Honourable George W. Adams, Q.C.

May 30, 2008

Submitted to The Minister of Justice of Canada

Appearances:

On Behalf of the Prothonotaries:

Andrew Lokan, Counsel (Paliare Roland Rosenberg and Rothstein LLP)

Roger LaFreniere, Prothonotary

On Behalf of the Government of Canada:

Peter Southey, Counsel (Department of Justice Canada)

Judith Bellis, General Counsel (Judicial Affairs)

On Behalf of the Chief Justice, Federal Court of Canada:

Emily McCarthy, Counsel (Federal Court of Canada)

Hearing held at Toronto, Ontario on April 2, 2008

1. Introduction

The purpose of the Special Advisor's Review is to provide recommendations to the Minister of Justice on the salary and benefits of six prothonotaries appointed under section 12 of the *Federal Courts Act* ("FCA"). They are located in Toronto, Montreal and Vancouver but function throughout Canada.

Prothonotaries are judicial officers who hold office during good behaviour until age 75, have the same immunity from liability as a judge of the Federal Court (FC judge) and exercise many of the same powers and functions as a judge of that court. In particular:

- They exercise full trial jurisdiction up to $50,000;

- They hear and decide motions on a wide range of matters, regardless of the relief sought or amount in issue, including final determinations such as motions to strike or dismiss proceedings;

- They decide questions such as *Charter* issues and other general questions of law, and adjudicate complex commercial matters;

- They conduct references, pre-trial conferences, dispute resolution conferences and case management of proceedings, including in respect of class actions, as designated by the Chief Justice;

- They routinely decide cases or issues as between private entities and the Federal Crown, and/or Ministers of the Crown and other officials.

This is the first independent and comprehensive review of prothonotaries' compensation since the creation of the office in 1971. I was jointly nominated by the prothonotaries and the Department of Justice pursuant to P.C. 2007-1015 (June 21, 2007). The preamble to this Order in Council provides:

> Whereas, pursuant to paragraph 127.1(1)(c) of the *Public Service Employment Act*, the Governor in Council may appoint a special advisor to a minister;
>
> Whereas the adequacy of the salary and the benefits of prothonotaries of the Federal Court have not been comprehensively considered to date;
>
> And whereas the Governor in Council deems it necessary that there be a special advisor to the Minister of Justice to undertake an external review of, and advise on, the adequacy of the salary and the benefits of prothonotaries of the Federal Court;
>
> Therefore, Her Excellency the Governor General in Council, on the recommendation of the Prime Minister, hereby sets out in the annexed schedule the terms and conditions governing the appointment of a special advisor to the Minister of Justice, to be known as the Special Advisor on the Federal Court Prothonotaries' Compensation, who may be appointed by the Governor in Council under paragraph 127.1(1)(c) of the *Public Service Employment Act.*

By virtue of the annexed schedule, I am to report by May 31, 2008. My mandate is set out in paragraph 4(1) of the schedule in these terms:

4(1) The Special Advisor shall inquire into the adequacy of the salary and the benefits of the prothonotaries, whether current or past.

(2) In conducting the inquiry, the Special Advisor shall consider

(a) the nature of the duties of a prothonotary;

(b) the salary and the benefits of appropriate comparator groups;

(c) the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government;

(d) the role of financial security in ensuring the independence of prothonotaries;

(e) the need to attract outstanding candidates to the office of the Federal Court prothonotary; and

(f) any other objective criteria that the Special Advisor considers relevant.

The prothonotaries submit that their current compensation is neither appropriate nor in keeping with the status, dignity and responsibility of their office. It is, they suggest, wholly inadequate to ensure their independence and falls well short of relevant comparators. The compensation is argued to be a product of *ad hoc* arrangements, unilateral decisions, and one-sided "negotiations" in which the Government held all the cards. The major issues for this review are: a) salary, b) pension, c) other benefits (including short and long-term disability and leave arrangements), and d) retroactivity and transitional arrangements.

The prothonotaries submit that:

- their salary should be fixed at 91% of a FC judge's salary;

- they should receive the FC judge judicial annuity (full pension upon 15 years of service) or, alternatively, their pension benefit should be set at 3.5% of the final year's salary multiplied by all years in office;
- other benefits should match those received by FC judges; and
- they should receive retroactive compensation to April 1, 2001.

The Government, in reply, submits that the current overall compensation of the prothonotaries is demonstrably adequate to ensure their independence and ensure that outstanding candidates continue to be attracted to that office. The Government's position is premised on three arguments:

First, adequacy of compensation must be considered in light of the range of demands on the public purse and overall government priorities;

Second, compensation adjustments for prothonotaries should be roughly proportional to overall compensation trends required to attract and retain other professionals of the highest capacity and caliber who choose to contribute to the public interest and work in the federal public sector; and

Third, tangible remuneration, including salaries, pension, and other benefits are not the sole or predominant reason why outstanding candidates seek the office of prothonotary. Other benefits such as quality of work life and inherent interest of the work are also persuasive.

The Government further submits that prothonotaries are not judges and, therefore, judicial comparators are not relevant. The fact that they operate within a hierarchical superior court structure is not relevant to the adequacy of their compensation. The Special Advisor, it is submitted, has no mandate to consider non-

compensation issues relating to the structure of the Federal Court, such as supernumerary status, the establishment of the title “associate judge”, the locus of the administration of compensation and benefits, or the funding mechanisms for the payment of the prothonotaries’ compensation. The Government submits that the assumptions and considerations of provincial and territorial governments in establishing salary levels and pension schemes for their judges and masters are not clearly stated and, in any event, do not apply to prothonotaries.

2. The Process

The Special Advisor met with the parties and received their agreement to a process of sharing information, the exchange of written primary briefs and reply briefs, public notification of a hearing and a related Canada-wide call for submissions from all interested parties and a public hearing held April 4, 2008 in Toronto with simultaneous translation. This agreement was supplemented by a limited pre-hearing examination of one government expert in respect of a filed report. I will refer to the constitutional underpinnings of the process below.

3. Submissions of the Chief Justice of the Federal Court

These very brief and helpful submissions bear repeating in full. The Chief Justice wrote:

> [1] The Chief Justice of the Federal Court welcomes this first, comprehensive and independent review of the salaries and other benefits of prothonotaries. The institutional judicial independence of prothonotaries is of importance to the Federal Court as a whole.
>
> [2] The office of prothonotary was established in 1971 by the enactment of section 12 of the *Federal Court Act,* R.S.C. 1985 c. F-7. While section 12 has

remained virtually unchanged, the role and jurisdiction of prothonotaries have evolved significantly. Today their work, which is judicial, is essential to the efficient management and timely disposition of proceedings before the Federal Court.

[3] Pursuant to the *Federal Courts Rules*, SOR/98-106 as amended, prothonotaries have both procedural and substantive jurisdiction. They preside over motions within their jurisdiction and trials where the monetary relief sought does not exceed $50,000, exclusive of interest and costs. There has been a preliminary discussion within the Court about the possibility of increasing their trial jurisdiction to some greater amount.

[4] Currently, prothonotaries case manage over 85% of specially managed proceedings before the court. They determine virtually all interlocutory motions in those cases. The rate of appeal from decisions of prothonotaries is statistically insignificant.

[5] The following are practical examples of how prothonotaries contribute to the timeliness of the Federal Court:

- They case manage complex *Patented Medicines (Notice of Compliance)* proceedings before the Court. These have tripled since 2002. Aggressive and timely case management is necessary to ensure that the case can be heard and determined by the judge within the 24-month period required by the regulations. In fact, prothonotaries have jurisdiction to dismiss such proceedings summarily on the merits taking into account factual and expert evidence.
- The prothonotaries are also a necessary part of the Court's effort, working closely with the intellectual property bar, to set trial dates in patent and other infringement actions early in the life of the proceeding. The goal of this initiative is to ensure that, where possible, infringement actions are tried within 24 months of their commencement. Timely and intensive case management is essential to the attainment of this goal.

- Effective case management by prothonotaries has removed a substantial portion of a judge's work in motions court. The typical motions day for a judge is limited to *Anton Piller* proceedings, infrequent appeals from orders of prothonotaries and simple motions for summary judgment. This has enabled the motions judge to deal with the ever increasing number of motions to stay deportation orders.

[6] Prothonotaries have developed a substantial expertise in alternative dispute resolution. Their work as mediators and early neutral evaluators facilitates the resolution of cases that otherwise would have required a full hearing.

[7] The depth of knowledge and expertise of the prothonotaries contribute significantly to securing the most expeditious and least expensive determination of proceedings before the Federal Court.

[8] The Federal Court is pleased that the institutional independence of the prothonotaries will be enhanced by this process. Of particular interest to the Court are the recommendations that the Special Advisor may make concerning the necessary statutory amendments to reflect the status of the prothonotaries as associate judges. Here, the concern is to include prothonotaries as part of the constitution of the Federal Court within the meaning of section 5.1 of the *Federal Courts Act.* Also in making recommendations concerning the remuneration and pension benefits, the Special Advisor may wish to consider a form of supernumerary status for prothonotaries.

[9] The ability to attract outstanding candidates to the office of prothonotary is of great importance to the Court. Compensation for prothonotaries must be competitive to make certain that individuals of outstanding talent from across the legal profession continue to submit their candidacy. There should be a regular review of the compensation and benefits of prothonotaries to ensure that they remain competitive and to safeguard the institutional independence of the office.

4. Submissions of the Chief Administrator, Courts Administration Service (CAS)

CAS came into existence in 2003. It is an arm's length government entity that provides registry, judicial and corporate services to four courts of law – the Federal Court of Appeal, the Federal Court, the Court Martial Appeal Court of Canada and the Tax Court of Canada. The CAS limited its submissions to "the role of financial security in ensuring the independence of Prothonotaries" and "any other objective criteria that the Special Advisor considers relevant". The brief notes that disputes between the prothonotaries and the Government of Canada over compensation of prothonotaries have been in existence for some time. Reading selectively, the CAS submits:

> 12. As the functions of the Prothonotaries consist exclusively of those matters specified in the Federal Court Rules including Rules 50, 382 and 383 to 387, and are therefore entirely of a judicial nature, the Courts Administration is of the opinion that the administration of the salary and benefits of Prothonotaries must respect principles of judicial independence.
>
> 13. The Courts Administration Service takes no position concerning the quantum of compensation for the Prothonotaries. The concern of the Courts Administration Service pursuant to the statutory imperative of the CAS, as found in section 2 of the *Courts Administration Service Act* is to "enhance…. and safeguard the independence of the judiciary". As such, this submission concerns strictly the issue of the administration of Prothonotary compensation.
>
> 15. Permanent and secure funding for Prothonotaries' salaries, however, does not necessarily flow with the appointment of a Prothonotary. Only two of the six Prothonotaries appointed currently have permanent secure funding.
>
> 18. Since 2003, CAS has needed to make annual submissions to fund the salaries, benefits and other costs pertaining to four Prothonotaries. Following these submissions, the temporary funding has been provided on an annual, case-by-case basis. The position of the Treasury Board in the context of these submissions has been that on-going policy issues such as the appointment of Prothonotaries does not benefit from a permanent funding mechanism.

Consequently, these matters have been funded under the Treasury Board "Management Reserve" which is restricted to temporary situations only….

19. Beyond the fact that the process is cumbersome, this situation raises questions as to whether the process is truly consistent with principles of judicial independence. It could certainly be said that on-going funding for these positions is left to the discretion of the Government of the day. A lack of funding could also truly jeopardize the Prothonotaries in the exercise of their functions, and consequently also impact on the effective operation of the Federal Court….

21. In CAS' opinion, a permanent funding mechanism that ensures the payment of salaries, benefits, and other matters necessary for the exercise of the Prothonotaries' functions, would not only be less cumbersome for CAS, but also more respectful of the principles of judicial independence. CAS therefore recommends that a separate authority be created under the *Judges Act*, the *Federal Courts Act* or the *Courts Administration Service Act* to secure compensation, travel and incidental expenses out of the *Consolidated Revenue Fund.*

With respect to leave and travel requests as well as governance and discipline, CAS submits:

22. Issues pertaining to leave and travel by Prothonotaries are governed by authorities affecting all Governor in Council appointees with the exception of judges – namely, the *Terms and Conditions of Employment for Full-Time Governor in Council Appointees* (which have already been submitted in the context of the Prothonotaries' submission) and the Treasury Board's Special Travel Authorities.

23. CAS takes no position as to the adequacy of the entitlements contained within those instruments. In CAS' opinion, however, these instruments were drafted for the proper administration of the terms and conditions of employment of the *executive* branch of government *by* the executive branch of government. This is evidenced in matters of approvals which reside with Deputy Heads. Currently, as Deputy Head of the Courts Administration Service, I must review, approve or decline the various leave and travel requests made by the Prothonotaries in accordance with the *Terms and Conditions of Employment for*

Full-Time Governor in Council Appointees and the Treasury Board's *Special Travel Authorities.*

24. Issues of travel and leave by Prothonotaries (among others) are intimately tied to the judicial functions of the Federal Court – all travel is undertaken for judicial business, and leave affects the functioning of the Court. While CAS has implemented the instruments pertaining to the terms and conditions of employment of the Prothonotaries with great deference to their judicial functions, issues of judicial independence arise from the fact that these matters are governed by policies designed for the executive branch and that requests flowing from a judicial imperative may be denied on grounds of non-adherence to such policies.

25. In this context, CAS wishes to stress that the terms and conditions of employment of Prothonotaries, as well as the administration of such terms, must be consistent with the principles of judicial independence. In CAS' opinion, the role of the Chief Administrator in the administration of the terms and conditions of employment of Prothonotaries should either be removed or limited and clarified in such a way that such administration is truly consistent with principles of judicial independence. CAS takes no position as to whether such any required amendments to affect such a change should proceed by separate policy instruments, amendments to the *Federal Courts Act* or amendments to the *Judges Act.*

V. Governance and Discipline

26. As with terms and conditions of employment, the governance and discipline of the Prothonotaries is currently governed by instruments created for the executive branch of government – for example, the *Conflict of Interest Act* and Treasury Board Policies such as the Policy on *Harassment in the Workplace.*

27. In light of the judicial functions performed by the Prothonotaries, CAS questions the suitability of those instruments as a framework for the governance and discipline of Prothonotaries. CAS is of the opinion that a governance and discipline scheme distinct from that which applies to the executive branch and

that reflects the judicial duties of the Prothonotaries would be a more suitable framework for these matters.

5. Masters and Prothonotaries

As the Chief Justice of the Federal Court submits:

> While section 12 has remained virtually unchanged, the role and jurisdiction of prothonotaries have evolved significantly. Today their work, which is judicial, is essential to the efficient management and timely disposition of the proceedings before the Federal Court.

They function essentially as a master does in the judicial systems of England and Canada. This judicial role is therefore ancient and, where it is employed, has become integral to the independent administration of the rule of law. Thus, in *Canada v. Aqua-Gem Investments Ltd.* (C.A.), [1993] 2 F.C. 425 Chief Justice Isaac wrote:

> Doubtless, in providing for the office of the registrar or master in the Exchequer Court and of the prothonotary in this Court, Parliament was mindful of the pre-trial and post-judgment support which the master system provided for superior court judges in the judicial systems of England and Ontario, both of which made extensive use of these judicial officers.
>
> In his Hamlyn Lectures (published under the title *The Fabric of English Civil Justice,* London: Stevens & Sons, 1987), Sir Jack Jacob, Q.C., himself a former senior master of the High Court of Justice in England, sketched the historical development of the master system in England and the manner of its operation. The following passage at pages 110-111 is instructive of the historical evolution of that system:
>
> > The most striking feature of the English pre-trail process is that, save for a few exceptions, the proceedings are conducted not before a judge but before a junior judicial officer, called the

> Master or Registrar. Before 1837, the judges of the three superior common law courts themselves dealt with pre-trial applications, which were then comparatively few in number and in variety. In 1837, Parliament abolished a great number of administrative and a few quasi-judicial offices and in their place created the Masters of the three Common Law Courts to assist the judges in their pre-trial work. In 1867, Parliament took the bold leap forward to transform the position of the Master from being an assistant to the judge into becoming a separate, distinct and independent judicial officer. This was achieved by enabling the judges to make rules of court empowering the Masters to transact all such business and exercise all such authority and jurisdiction as may be transacted and exercised by the judge in Chambers, except in specified matters and proceedings. Needless to say, the requisite rules of court were immediately made and they have continued with considerable expansion to this day. They operate to confer on the Masters original jurisdiction in respect of the matters and proceedings that come before them. For these purposes in the High Court, the Master is the equivalent of the judge in Chambers and his decision, order or judgment is made or given in his capacity as "the court" itself.
>
> The jurisdiction of the Master, which has from time to time since their creation been greatly expanded, is very extensive indeed and covers almost the entire range of pre-trial proceedings, with the important exception of applications for an injunction, other than in agreed terms, and it also extends to almost all post-judgment proceedings. They have power to make final as well as interlocutory orders and to give final [page 442] judgments which are as operative and enforceable and which must be complied with as if made or given by a judge.

There is no doubt that the office and functions of a master in superior courts of civil jurisdiction in the common law provinces in Canada is an inheritance of the colonial past, but from an early date Canadian practice seems

to have diverged from that of England. So it was that as long ago as 1866, in *Sculthorpe v. Burn* (1866), 12 Gr. 427 (U.C.Ch), Mowat V.C. could say that, in pre-confederation Ontario, masters had been invested with a "larger discretion" than their counterparts in England.

In Manitoba, a 2002 Judicial Compensation Committee dealing with somewhat similar compensation issues described the masters and their compensation in these terms:

> As in other provinces, the Court of Queen's Bench has judicial officers known as "Masters". The Masters have been a feature of the judicial landscape in this province for a very long period of time. They are "full jurisdiction" Masters, and carry out a wide range of judicial responsibilities.
>
> There are five full-time masters in this province, one of whom is designated as "Senior Master". Two of the masters are female and three are male. They were appointed during periods of time between 1984 and 1997. Before appointment four were in the private practice of law and one was in the public sector.
>
> The issue of compensation for masters has been a festering one, for over a decade. By the late 1980's the Masters had been classified by the Province as "Senior Legal Officers", a civil service classification. Starting at that point, the Masters' compensation fell behind the Judges. The Judges and Masters were each paid $64,607 in 1983. In 1985 the numbers for both were increased to $67,084. By 1989 the Masters had risen to $68,678 and the Judges to $85,090. The disparity continued to grow such that in 1999 the Masters received $89,669, whereas the Judges received $112,000.

In 2001, Manitoba Bill 46 amended *The Court of Queen's Bench Act* to accord masters the same salary, pension and other benefits of judges of the Provincial Court of Manitoba. However, that amendment did not govern the 2002 Judicial Compensation

Committee which therefore was required to recommend on the masters' compensation requests for a period prior to the operation of Bill 46. The Committee set out the demand of the Masters at p. 120 of its report – demands that are similar to those of the prothonotaries in this proceeding:

> The Masters suggested that it was not disputed that their compensation should be linked to that of Judges, as was finally acknowledged in Bill 46. This has been the practice in British Columbia, Alberta and Ontario and, said the Masters, was also the practice in Manitoba until 1988 and finally again in 2001 and thereafter. The Masters further argued that Bill 46 is tantamount to an acknowledgement that Masters have not been fairly treated by the Province for the years during which they were compensated on the same basis as senior civil servants, at a lesser level than Judges….
>
> …until July, 2001, the Masters were in receipt of the same pension benefits, disability and insurance plans, holidays and sick leave as Manitoba civil servants….
>
> The Masters suggested that this JCC should not permit the Province to take advantage of such a small group which attempted in good faith to advance their position through proper channels. They said that the facts demonstrate that the Province neglected or refused to address concerns which the Courts have identified and indeed which the Province has acknowledged for many years. According to the Masters, the Province wrongly treated them as civil servants for the purposes of compensation for over a decade. The Province unilaterally imposed pay scales significantly lower than those of the Judges and, notwithstanding that the Masters' status has now been fairly acknowledged in legislation, the Province should not be permitted to "keep the fruits of their neglect". The Masters sought "a significant retroactive adjustment to the salaries and pension benefits" which they receive.

Committee observed:

> In light of the provisions of Bill 46 we do not need to analyze in detail the role, responsibility and work of the Masters. Among the observations made by the Masters and not challenged by the Province, were: "they are judges in everything but name"; "they have a regular docket in Family Court"; "they are Registrars in Bankruptcy"; "their role is complex"; "they are required to give written reasons" (one example was given of a Master who has written almost 300 written decisions over 14 years); "They have been undervalued by the system."

This quotation reflects one of the challenges faced by lower level judicial officials – achieving recognition of the importance of their judicial services. A related problem confronted Ontario's Deputy Judges who sit in Small Claims Court; a branch of the Superior Court of Justice. In *Ontario Deputy Judges' Association v. Ontario (Attorney General)* [2006] O.J. No. 2057 the Ontario Court of Appeal had to respond to the argument that Deputy Judges were only entitled to a low level of protection for their financial security and that the existing Order in Council regime met the applicable constitutional standard. The Court disagreed and wrote:

> The AG's argument, however, overlooks the institutional dimension of financial security, which flows from the "constitutional imperative that, to the extent possible, the relationship between the judiciary and the other branches of government be depoliticized" [emphasis in original]: *PEI Reference* at para. 131. Establishing judicial remuneration is an inherently political exercise requiring government allocation of limited resources from the public purse. This process is complicated by the fact that judges are prohibited from negotiating with the government about their remuneration.
>
> Moreover, when the government fails completely to address judicial remuneration, the entire process is in danger of becoming highly politicized. Such a danger became manifest in this case when a group of Toronto Deputy Judges withdrew their services for one month period in 2005. This withdrawal illustrates how the lack of an independent remuneration process can politicize the issue of

financial security and why depoliticization of judicial remuneration is essential to the maintenance of the separation of powers.

The force of the rationale behind the institutional dimension of financial security is not diminished by the fact, emphasized by the AG, that Deputy Judges sit on a part-time basis and have limited jurisdiction. Deputy Judges, who preside in the busiest court in Ontario, are an integral part of the justice system. We recognize, of course, that the court's caseload does not include criminal matters, the court possesses only a limited jurisdiction for committal, and it rarely hears Charter issues. Nevertheless, although the role of the Small Claims Court is more limited in the Canadian constitutional structure than that of the superior and provincial courts, that role is important in protecting the rule of law, preserving the democratic process, protecting the value of the constitution and maintaining public confidence in the administration of justice. As the application judge stated at paras. 18 and 20:

> Deputy Judges can hear a wide range of cases and have broad jurisdiction over proceedings involving the Canadian Charter of Rights and Freedoms, defamation, creditors' rights, intellectual property claims, estate litigation, and medical practice, among others.
>
> Deputy Judges carry out judicial functions for large number of litigants contesting significant sums of money. The Small Claims Court is the busiest court in Ontario and the court that citizens are most likely to encounter.
>
> The caseload assumed by Deputy Judges is extensive both in quantum of cases and in jurisdiction of subject matter. Even though Deputy Judges sit part-time, when sitting, they fully assume the judicial role. They are perceived as judges by the many litigants who turn to the Small Claims Court for the resolution of their disputes. To those litigants, there is no apparent reason to distinguish between the Deputy Judge presiding over their case and a judge of the former Provincial Court (Civil Division). The protection of the independence of both types of judges is equally important in order to preserve public confidence in the system.

6. Constitutional Basis to this Review Process: Compensation Commissions and Related Matters.

(a) Compensation Commissions

The Ontario Deputy Judges case reminds that this review process – no matter its form – is founded on the constitutional imperative of judicial independence. A brief review of the constitutional principles at play and the activity of compensation committees within a constitutional context is therefore merited.

In *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island,* [1997] 3 S.C.R. 3 (*PEI Judges Reference*) Chief Justice Lamer observed that litigation is a last resort for parties who cannot agree about their legal rights and responsibilities (p.33) The independence of our courts is therefore of fundamental societal importance in order for citizens to have confidence in the rule of law. The Court held that judicial independence is, at root, an unwritten constitutional principle (pp. 63-67) and agreed with the much earlier *Valente v. The Queen* [1985] 2 S.C.R. 673 that the three core characteristics of judicial independence are 1) security of tenure, 2) financial security and 3) administrative security (p. 80). With respect to financial security, any changes to or freezes in judicial remuneration require recourse to a special process, which is independent, effective and objective, for determining judicial remuneration, to avoid the possibility of, or the appearance of, political interference through economic manipulation (p.88). While they are not binding, to depart from a commission's recommendations requires a government to justify its decision, in a court of law if need be (p. 88). Moreover, under no circumstances is it permissible for the judiciary to engage in negotiations with the executive because remuneration from the public purse is an inherently political issue. The Court also held that any reductions in judicial remuneration including *de facto* reductions through the erosion of judicial salaries by inflation, cannot take those salaries below a basic minimum level of remuneration which is required for

the office of a judge (p. 89). Public confidence would be undermined if judges were paid at such a low rate that they could be perceived as susceptible to pressure through economic manipulation (p. 90). The same concerns applied to pensions. It was held that these different components of the institutional financial security of the courts were a product constitutionally required by the separation of powers.

The idea of compensation commissions is to depoliticize the relationship between the legislature and the executive on one hand and the judiciary on the other. Thus, at p. 99 it was observed, by example, that "if judges' salaries were set by the same process as the salaries of public sector employees, there might well be reason to be concerned about judicial independence." However, commissions must make recommendations by reference to objective criteria and are not a guarantee to judges for getting judicial salaries fair to their economic interests, as interest arbitrators are charged to do. Rather, they exist to guarantee the rule of law to Canadian citizens – the users of our courts. Thus, if judges do not receive the precise or "perfect" level of remuneration they would from salary arbitrators that is a price to be paid for such public service.

On the other hand, a commission's role is not to simply ensure that compensation levels remain at the "adequate minimum" required to guarantee judicial independence. Thus, this position of the Government in these proceedings is faulty and appears to have infected most of its submissions. As the Supreme Court of Canada held in the *Provincial Judges' Ass'n of New Brunswick v. New Brunswick et al.* [2005] 2 S.C.R. 286:

> 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, as the Government asserts, cannot 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 the first stage of the analysis.

(b) Adequacy

The Supreme Court of Canada in the *PEI Judges Reference* indicated the type of objective criteria to be considered by compensation commissions and these criteria are not unlike those set out in the Order in Council under which I am appointed. They are also similar to those applicable to judicial compensation commissions found in subsection 26 (1.1) of the *Judges Act.* In discussing the appropriate approach to such criteria, and in particular to the term "adequacy", the Drouin Compensation Commission in 2000 wrote at p. 23:

> Part of our principal mandate under the *Judges Act* is to inquire into the adequacy of the salaries of the Judiciary. "Adequacy" is a relational term. In seeking to determine its meaning in the context of judicial salaries, several
> questions arise. Adequate for what purpose? Adequate in relation to who, or what? Adequate over what time frame? Against the background of the constitutional principles articulated in the PEI Reference Case, we have concluded that the operative meaning of "adequacy", to guide our work, requires us to determine what constitutes a fair and sufficient salary level

for the judiciary taking into account the criteria set out under subsection 26(1.1). What is required in this context is a proper judicial salary level, not a perfect one.

(c) Comparators

Commenting on the relevance of the DM-3 comparator (a senior civil servant classification) in determining judicial salaries, the Drouin Commission (2000) summed up the perspective of previous commissions in writing at pp. 31-32:

> We have considered this matter in detail and have examined the various approaches taken by Triennial Commissions, the Judiciary and Government depending upon the timing and circumstances applicable to previous judicial compensation reviews. While we agree that the DM-3 comparator should not be determinative of our recommendations concerning judicial salaries, in our view, it is an appropriate and useful comparator at this time. More particularly, we have concluded that the important aspect of the DM-3 comparator, for the purposes of our inquiry, is the maintenance of a relationship between judges' salaries and the remuneration of those senior federal public servant whose skills, experience and levels of responsibilities most closely parallel those of the Judiciary. We agree with the substance of the observations by both the Courtois and Scott Commissions (1990 and 1996) that the relationship between the remuneration of DM-3s and judges should be maintained, not as a precise measure of "value" but as a reflection of *"what the marketplace expects to pay individuals of outstanding character and ability, which are attributes shared by deputy ministers and judges".*
>
> This approach is consistent, in our view, with the conclusions reached by successive Triennial commissions that judicial salaries are not to be addressed *"as though judges were subject to the conditions of service of federal government employees" because they are "a distinct group with compensation requirements that set them apart from the public service".* This proposition is not simply a matter of policy perspective. It has long been recognized in the relevant jurisprudence. As articulated by the House of Lords in 1933:
>
> > It is we think beyond question that the Judges are not in the position occupied by civil servants. They are appointed to hold

> particular offices of dignity and exceptional importance. They occupy a vital place in the constitution of this country. They stand equally between the Crown and the Executive, and between the Executive and the subject. They have to discharge the gravest and most responsible duties. It has for two centuries been considered essential that their security and independence should be maintained inviolate.

More recently, the Supreme Court of Canada in the PEI Reference Case unequivocally confirmed that judges are not to be regarded as civil servants for the purposes of compensation policy. As stated by Chief Justice Lamer:

> …the fact remains that judges, although they must ultimately be paid from public monies, are not civil servants. Civil servants are part of the executive: judges, by definition, are independent of the executive. The three core characteristics of judicial independence – security of tenure, financial security, and administrative independence – are a reflection of that fundamental distinction, because they provide a range of protections to members of the judiciary to which civil servants are not constitutionally entitled.

In this context, it is clear that the salaries of judges are not to be set automatically based on the remuneration of public servants. To do so would be to treat judges, indirectly, as part of the executive branch of government. That does not mean, however, that the salaries of judges must be set without any regard to remuneration levels within the senior ranks of the Government, or that they should be permitted to lag materially behind the remuneration available to senior individuals within the Government. To allow this to occur, would be to legitimize a financial gap between the overall remuneration of judges and the remuneration of those within the Government who, historically, have been regarded as possessing the same characteristics of skill, integrity, talent and leadership required of judges.

> We have concluded, therefore, as did successive compensation commissions before us, that the remuneration of DM-3s at the time of our inquiry and for the term of our mandate is relevant to our assessment of the adequacy of judicial salaries and, further, that rough equivalency between the overall remuneration of DM-3s and the salary level of judges is both proper and desirable in the public interest.

On the related issue of recruitment, the McLennan Commission (2004), expressed itself in these terms (p. 13):

> Our recommendations are for a level of compensation that will not deter the best and the brightest from seeking judicial office and that should ensure that the level of compensation provided to puisne judges is not so great that the office will be sought after for its monetary rewards alone. Rather, it should appeal to those highly qualified persons of maturity and judgment who seek to provide a valuable public service to their country. In other words, we are of the view that "too much" would not be in the public interest just as "too little" is obviously not in the public interest.

In brief, the senior civil servant comparisons are generally aimed at keeping some reasonable relationship between the compensation of the most highly paid in government and judges' compensation which also comes from the public purse. Thus, the DM-3 salary comparison goes back more than twenty years of independent review. It has not been based on the thought that the jobs of a judge and a DM-3 are similar. Rather, the theory is that the relationship is a reflection of "what the marketplace expects to pay individuals of outstanding character and ability, which are qualities shared by deputy ministers and judges". (Drouin (2000) at p. 31; Scott (1996) at p. 13, Courtois (1990) at p. 10 and most recently, McLennan (2004) at p. 25)

However, there can be no direct comparison between senior public servants and judges because judges are *sui generis* – they are independent of government. Indeed,

various provincial compensation commissions have actually rejected senior deputy minister compensation as determinative or direct comparators because (1) the compensation is unilaterally determined by a province with no element of third party review; (2) the pool of candidates for the two positions are almost completely different; and (3) there is no constitutional rule or context that governs compensation as there is with judges. (See Freedman Commission (2002) at p. 61). Thus, some provincial commissions have concluded that the only true comparison is with other judges. (Freedman Commission (2002) at p. 60; but see Ontario Beck Commission (1999) at p. 44). But with judges as the only relevant comparator, other problems can arise. This is particularly the case in the context of federally appointed prothonotaries who compare themselves to provincial masters who, in turn, have had their compensation linked to provincial court judges.

The problem has two aspects. First, provincial court judges have consistently attacked what they argue to be essentially a class-based distinction between provincial and superior courts. They submit that their criminal caseloads involve the most serious crimes and are actually heavier than those of superior court judges. This advocacy has been successful over the years in that the differential between provincial court judges and federally appointed judges has narrowed in response. Masters have become the beneficiaries of this parity argument even though they cannot and do not equate their work to that of the judges in the superior courts they both serve. The result has been a narrowing of the differential between masters and superior court judges with little comment. Thus, prothonotaries could someday be paid the same as federal court judges if their salaries are simply linked to that of provincial court judges and masters and the argument for parity prevails. This raises a second problem of fixed linkages to provincial judicial comparators – a loss of federal control to determine prothonotaries' compensation with reference to appropriate federal comparators. Federal prothonotary

compensation could become entirely dependent on the decisions made in other jurisdictions – a result which has been rejected elsewhere when it has reared its head. (See Freedman Commission (2002) at p. 73).

The prospects for parity is not "a straw man" debating point. Hierarchies are often difficult structures to defend, particularly in public interest environments. They can appear to be more the product of historical forces than current functional considerations. One can see the vulnerability of hierarchical judicial structure in the following masterful advocacy employed by Professor Peter Russell who has written (quoted by the Beck commission (1999) at p. 43):

> The traditional practice of paying judges of the intermediate and superior courts of the provinces may appear logical when the judicial system is viewed as a hierarchy. But the problem with hierarchy of salaries is that we do not want the quality of justice to be hierarchically arranged. The quality of adjudication is likely to bear some relationship to the remuneration of the adjudicator. Commentators on our judicial system never tire of observing that most Canadians who experience the quality of justice at first hand do so in the lower courts. Accepting lower standards here in the courts used most often by Canadians from lower-income brackets, is a significant source of social injustice in Canada.

Compensation commissions for federally appointed judges have shown considerable pragmatism in looking for helpful comparisons and, in doing so, have rejected arguments that to look beyond the DM-3 comparator politicizes the process or makes it arbitrary. Thus, the McLennan Commission (2004) at pp. 30-31 was willing to also look at other classes of Governor in Council appointees and their remuneration from the public purse. That commission referenced the top levels of GC-9 and 10 and GCQ-9 and 10. These levels contained the President or Chair of the Canadian Institutes of

Health Research, the National Research Council, the Canadian Radio-Television and Telecommunications Commission, the Office of the Superintendent of Financial Institutions, the National Energy Board, the Canadian Transportation Agency and the Competition Bureau. The persons appointed to these positions are likely to be leaders in their field and some would be lawyers. Indeed, the remuneration of the chairs of quasi-judicial tribunals was seen as more comparable in some respects because of the common adjudicative context. However, there have always been limits to the use of such comparables because judges are *sui generis* and their compensation cannot simply be or appear to be an output of a government's will. Moreover, appointments to administrative agencies do not demand ten years of practice as a lawyer. Agency heads do not have security of tenure. Indeed, many come from outside the public sector, will never qualify for a full pension and are not taking on the job as life-time employment. It is a stepping stone in a productive career or the culmination of a full career elsewhere.

Compensation commissions have also looked to the incomes of private practitioners as a guide or comparator. This, of course, is because of the need to attract outstanding candidates from this pool of candidates – the pool from which most of the appointees come. Unfortunately, the information available has often been problematic and sometimes anecdotal. (See the discussion in the McLennan Commission (2004) at pp. 31-50). Nevertheless, while not all the outstanding candidates will be senior lawyers in higher earning brackets, many will and they should not be discouraged by inadequate compensation.

The use of private practitioner incomes as a comparator has been challenging because of: 1) reporting problems; 2) large urban area comparisons versus national or provincial averages; 3) and the need to account for the judicial annuity which has been valued at 24% of a judge's salary (McLennan Commission (p. 37)). However, keeping these factors in mind and using a 75th percentile projected to 2004, the McLennan

Commission at p. 48 found that in larger cities the then current income of lawyers aged 44 to 56 exceeded the current level of judicial compensation. The net income of these lawyers in Montreal, Ottawa, Toronto and Vancouver reported by CRA adjusted to 2004 were $334,900, $261,300, $421,100 and $265,000 respectively.

The approach to financial security for judges, and this should be the case for related judicial officers, has been to err on the side of generosity. As Professor Friedland remarked in his study, *A Place Apart: Judicial Independence and Accountability in Canada,* A Report Prepared for the Canadian Judicial Council (1995) at p. 56:

> The greater the financial security, the more independent the judge will be, and so, in my view, it is a wise investment for society to err on the more generous side. Even if economic conditions were such that a very large portion of the bar was willing to accept an appointment at a much lower salary, we would still want to pay judges well to ensure their financial independence – *for our sake, not for theirs.* (emphasis added)

(d) Pensions

The compensation commissions have also had much to say about judicial pensions or annuities as they are called. The *PEI Judges Reference* found annuities or pensions to be an essential component of judicial compensation. Thus, in these proceedings, the prothonotaries submit that adequate retirement income arrangements comprise both an integral part of total compensation and an element of remuneration that is essential to ensure judicial independence. It has been said that ”the pension ratio” or accrual rate is as important as, and arguably more important than, salary. (See the Beck Commission (1999) at p. 5). Enhanced retirement income arrangements have been determined to be necessary and have been implemented for the federally appointed judiciary, for the provincially appointed judiciary and for masters across

Canada. The Government, on the other hand, contends the judicial annuity under the *Judges Act* is an historical anomaly that cannot be seriously considered as a model for any modern retirement planning scheme.

Professor Friedland has simply stated (*supra,* at p. 66):

> Pensions are a crucial part of judicial security. If a judge's pension is inadequate or insecure, there is a danger that the judge will not be fully independent while sitting on the bench.

The Freedman Commission (2002) at p. 74 noted that this principle was shared across Canada, pointing out that each province had distinctive pension arrangements for its judges as did the federal government for federally appointed judges. Judges and related judicial officials are not expected (or able) to apply for judicial office until at least mid-career. This is reflected in the required substantial minimum number of years of practice at the bar prior to appointment. This expectation is also reflected in the average age of judicial appointments across Canada. Indeed, the average age of appointment of prothonotaries has been 48.9 years in comparison to 51 years for federally appointed judges between 1997 and 2003. The Beck Commission (1999) at p. 65 acknowledged that one of the main reasons senior, highly remunerated practitioners are willing and able to accept a federal judicial appointment at a greatly reduced salary is because of the generous pension plan. The Beck Commission (at p. 66) also accepted that lawyers in the early years of practice and raising a family are not likely to accumulate a significant amount of savings. This is likely the reality of all Canadians not in mandatory pension plans. A recent study by Statistics Canada indicates that among families in which the major income recipient was aged 25 to 44 only 56%, even held RRSPs compared to 68% for those aged 45 to 54; and in 2005 these RRSPs had a median value of only $25,000. (See Exhibit 7, p. 3). Thus, because a judicial appointment is for

life (to age 75) and comes at the peak of a lawyer's earning capacity, unique judicial annuities are the rule in order to safeguard judicial independence. Judicial pensions are neither anomalous nor anachronistic. The judicial annuity, with its accelerated accrual period in the range of 15 to 20 years, is what makes judicial compensation unique and accords with a judicial officers *sui generis* status. It is the most distinctive feature of judicial compensation. Thus, the McLennan Commission (1999) at pp. 3-4 wrote:

> The sui generis nature of the role and responsibilities of judges in Canada requires that they be provided with salary and benefits, before and after retirement, to ensure a reasonable standard of living, in order that they may functions fearlessly and impartially in the advancement of the administration of justice and that they be independent of both government and all litigants appearing before them. [emphasis added]

Similarly, the Beck Commission (1999) at p. 59 concluded:

> It is recognized that judicial pensions, on a comparative basis, are expensive to fund. This is because judges are usually not appointed to the bench until significantly later in their careers, and their rate of accrual, as compared to other pension plans, must necessarily be considerably higher. It also explains why federal judges receive a full pension after 15 years of service. The higher accrual rate and the resultant high cost is an inherent feature of any judicial pension plan. But it is one of the necessary costs of a high-quality, respected justice system that attracts the ablest in the profession to a judicial appointment.

The Government has pointed to *Valente* (supra) as standing for a contrary principle. However, *Valente* was concerned with the application of s.11 (d) of the *Charter* to both tribunals and provincial courts. Indeed, that perspective led the Court to conclude

even salary commissions were not required in respect of judicial compensation. That *obiter* observation is no longer accurate. Moreover, by the time the Supreme Court spoke in *Valente* (1985) special provision had been made for a provincial judge's pension. More than a decade following *Valente,* the Court held in the *PEI Judges Reference* that judicial independence was not dependent on s.11(d) of the *Charter.* Rather, it was an unwritten constitutional principle and its related concepts had evolved to extend to all courts, not just the superior courts of this county. (p. 76) In my view, the Government's reliance on *Valente* is misplaced at this point in our understanding of judicial independence.

(e) Representation Costs

Finally, compensation commissions have acknowledged that it is neither right nor just that the executive be represented by persons whose services are paid out of the public purse, while those who represent the judicial branch are not. (See Beck Commission (1999) at pp. 50-54). This is particularly so for a process such as this one that is constitutionally required. Indeed, it would be inequitable for only six prothonotaries to shoulder the costs of advocating the public interest in their compensation arrangements. Thus, the representation costs of the prothonotaries should be paid entirely by the Government.

7. Current Salary and Benefits of Prothonotaries

Subsection 12(4) of the FCA provides that each prothonotary shall be paid a salary to be fixed by the Governor in Council. A prothonotary's salary is fixed by P.C. 2001-1282 July 12 '01 at 69% of the salary of a FC judge and currently stands at $173,900 per year effective April 1, 2007. Subsection 12(5) of the FCA provides that, for the purposes of the *Public Service Superannuation Act,* a prothonotary shall be deemed

to be employed in the public service. The pension entitlement is based on 2% times the average of the best five consecutive years of earnings before age 69 times the years of pensionable service before age 69. Accrual ceases at age 69 and pensionable earnings and service are frozen, notwithstanding that a prothonotary need not retire until age 75. The pension is also integrated with the CPP/QPP. There is a full range of other benefits available to senior civil servants. Of particular focus in these proceedings is the disability benefit. This benefit provides 70% of salary for 24 months if totally disabled, and two-thirds salary thereafter to age 65. Long-term disability benefits begin after an elimination period of 13 weeks or upon the expiration of sick leave, whichever is later. Significantly, as we will see, coverage terminates at age 65 whereas prothonotaries are entitled to serve to age 75 and , if they have been appointed from the private sector, are likely to so serve in order to continue their income and earn even a modest pension benefit up to age 69. In short, both the pension and disability benefits are designed for the conventional civil servant who is hired on at a young age and retires no later than age 65. Only in respect of a long serving lawyer from the federal public service would this underlying assumption be appropriate.

8. Background

The first prothonotary appointments were in 1985. One of those prothonotaries, the late Peter A. K. Giles, in a memorandum dated May 1, 2000, documented 1) that the salary was set at a level intended to represent parity with Ontario's traditional master and 2) that the federal GIC-06 classification in the Governor in Council Appointee group was used because it had a salary range in which the Ontario masters' salary fell. However, during the period of time it took to implement this salary, the Ontario Supreme Court master's pay was retroactively increased. Therefore, by the time prothonotaries' salaries were formally set they were $2200 less than the Ontario Supreme Court master.

This relationship continued until 1989, after which the prothonotaries' remuneration fell significantly behind that of Ontario's traditional masters.

By 1998, prothonotaries were paid 83% of the salary of an Ontario traditional master. Today, they remain behind all of those masters in the provinces which use them (ie. Ontario ($234,503), British Columbia ($202,356) and Manitoba ($178,230) and Alberta ($220,000)) This happened because of inflation, a federal salary freeze, and provincial master pay increases in line with provincially appointed judges. Mr. Giles pointed out that it was never decided that the responsibilities of a prothonotary were similar to public servant jobs falling within the GIC-6 classification. Prothonotaries were assigned to that category solely because its pay range bracketed that of the Ontario Supreme Court traditional masters at the time (1985). Nevertheless, the Government points out that Chief Justice Isaac in 1992 acknowledged the use of the classification in seeking the appointment of a third prothonotary who was to sit in Vancouver. (See Ex. 5, Tab 2, p. 36)

In 1998, the Rules of the Federal Court were substantially revised for the first time since 1971 and Rules 50 and 51 expanded the jurisdiction of prothonotaries i.e. their trial jurisdiction was increased to $50,000 and they became involved in case management. Following the release of the *PEI Judges Reference* [1997] 3 S.C.R. 3 and amendments to the Federal Court Rules a year later, the then five prothonotaries requested a review of their compensation. In their memorandum of April 28, 1999, they challenged the appropriateness of the GIC-6 classification. Associate Chief Justice John Richard (as he then was), the Chief Justice of the Federal Court and the Administrator of the Court in a May 12, 1999 memorandum committed to the pursuit of an upgrade of remuneration on their behalf. At a May 26, 1999 meeting between the Privy Council Office and Federal Court of Canada, it was agreed that a description of current duties and the Federal Court Rules would be provided to Wayne McCutcheon, Director of

Appointments and Compensation for the PCO. This information was provided by Ms. Cathryn Taubman, Director of Human Resources for the Court by cover of letter dated August 17, 1999. She also provided salary information pertaining to Ontario Provincial Court judges and explained:

> …The latter is provided as background information, given the comparability of the functions of Prothonotaries to those of Masters in Ontario, whose salary is directly linked to that of Provincial Court Judges…

February 15, 2000 the Administrator of the Court reported to Chief Justice Richard and Associate Chief Justice Lutfy (as he then was) that, based on its understanding of the prothonotary's role and functions, the PCO had made a preliminary finding that the prothonotaries are appropriately classified. However, Mr. McCutheon expressed a willingness to hear representations from the prothonotaries. In response, the late Prothonotary John Hargrave wrote to Mr. McCutcheon on February 24, 2000:

> It is embarrassing and highly improper to come cap in hand to bargain with the Crown for wages, one day and then to hear and decide both procedural and substantive matters, critical to the Crown, on the next day. At that point it is difficult to perceive Prothonotaries as judicially independent.

By letter dated March 14, 2000, Mr. McCutcheon agreed that the prothonotaries would be permitted to submit written information for review. Comprehensive written submissions regarding the issue of salary were prepared by counsel for the Federal Court, Mr. Roger Tasse, Q.C., who presented them to the PCO on June 20, 2000. The

submission reviewed the caselaw on judicial independence, the role of the prothonotaries and the superior compensation of the Ontario, British Columbia and Alberta masters. The recommendations read:

> We wish to recall first that the PCO had originally accepted (in 1985) that the remuneration of Prothonotaries should be tied to and generally equal to that received by Ontario Masters (see paragraph 9 above). This was no doubt done in recognition that Prothonotaries were in a special class by themselves. It seems clear that the position of Prothonotary was placed in the GIC Group for reason of convenience only. GIC6 was chosen because it provided, at that time, for a salary range that included the salary paid to Ontario Masters.
>
> With the passage of time, because of case law developments regarding the independence of the judiciary, of which Masters are part, Supreme Court Masters' remuneration was tied and equal to the remuneration of Provincial Court Judges. This kind of arrangement does, in our view, respect the exigencies of the Constitution in regard to masters.
>
> In order to ensure greater conformity with constitutional principles and exigencies, it is recommended that Federal Court Prothonotaries' remuneration be fixed at a reasonable percentage of the remuneration of a federally-appointed judge. Proceeding in this manner would eliminate the arguable perception that the federal government is setting the Prothonotaries' remuneration based on irrelevant and improper considerations and would minimize the risk of potential allegations that the method used by the federal government to set the Prothonotaries remuneration does not conform to constitutional exigencies.
>
> It is recommended that the remuneration of Prothonotaries be set at a percentage of the remuneration of federally appointed judges, which should be approximately equal to the average of the remuneration of a Provincial Court judge in Alberta, British Columbia and Ontario to which the masters' remuneration in these Provinces is tied and equal. This would be consistent with the initial approach followed by PCO at the time

> Prothonotaries were first appointed in 1985 and respect constitutional exigencies.

By e-mail of October 25, 2000, Mr. Tasse reported that the PCO was considering two options: 1) a GIC route or 2) an amendment to the *Judges Act* empowering a quadrennial commission to look into the matter and make recommendations to the government. A comprehensive review of the GIC category was to be or had just been undertaken but Mr. Tasse argued that the prothonotaries did not belong in that group. But because the legislative option would take time, Mr. Tasse argued for an interim remuneration adjustment based on an average of all provincial and territorial masters (i.e. at $136,000 or $137,000).

Unknown to the prothonotaries, a Hay evaluation purported to classify them at the level of GC-5 notwithstanding that the prothonotaries were being paid at the equivalent of the upper range limit of the GC-6 salary range. Without performance pay, the classification is now apparently known as GCQ-5 and is the same level for full time members of the Canadian Human Rights Tribunal (CHRT), the Canadian International Trade Tribunal (CITT), the Immigration and Refugee Board (IRB), the Canadian Industrial Relations Board (CIRB), and the Competition Tribunal (CT) – all adjudicative decision-makers. At the time of the Hay analysis, prothonotaries' salaries were set at $109,600 (effective April 1, 1999). The salary range for a GC-5 for that period was $83,600 to $98,3000 and for the GC-6 was $93,200 to $109,600.

On May 27, 2001 Mr. Tasse met with PCO officials who offered to fix the salary of a prothonotary at 69% of the salary of a puisne judge of the Federal Court. The issues of pensions and other terms were not addressed. The proposal communicated took the following form:

Statutory Remuneration Provision

- *Federal Court Act* paragraph 12(4)

  "Each prothonotary shall be paid a salary to be fixed by the governor in Council."

Current Situation

- Prothonotaries are currently paid $118,400 in the GIC-6 range ($100,700 - $118,400)
- The salary and range is the same for all prothonotaries (including the Senior Prothonotary, Associate Senior Prothonotary and the Prothonotaries).

Proposal

- To fix the salary of prothonotaries at 69% of the salary of a puisne judge of the Federal Court.
- Effective April 1, 2000 (once the amendments to the *Judges Act* have been passed), puisne judges will earn $198,000. As a result, 69% of a puisne judge's salary would be $136,000. The salaries of puisne judges will also be adjusted effective April 1, 2001, based on the increase in the average industrial wage plus $2,000 and such an adjustment would be made to prothonotaries' salaries under this proposal.
- In the future, the relativity will be maintained.

Mr. Tasse advised the prothonotaries the offer was non-negotiable and he recommended acceptance in that light. They accepted the offer May 9, 2001 reluctantly. Effective April 1, 2000, the original salary of $109,6000 rose to $118,400 by virtue of a regular annual GIC-6 increase. This was announced January 10, 2001. However, when the July 7, 2001 Order in Council came into effect, prothonotaries' salaries were

retroactively adjusted to $136,600, roughly equal to the figure Mr. Tasse had suggested to the PCO on October 25, 2000 and 69% of a Federal Court judge's salary effective April 1, 2000 (which was $198,000) The prothonotaries, therefore, believed that the PCO had accepted their parity with provincial masters as proposed by Mr. Tasse and, by the linkage of their salaries to a percentage of a Federal Court judge's salary, they also assumed the adjustment was only an interim one pending legislation to address the broader issue of their compensation including pension and other benefits. However, the Government points out the PCO review of GIC positions (including those of regulatory agencies) noted by Mr. Tasse above resulted in a March 2002 report and, on March 20, 2002, a new GCQ-6 rate, retroactive to April 1, 2001, of $130,600 - $153,600. Accordingly, the Government points out that GCQ-6 classification continued to embrace the prothonotaries' compensation.

While the prothonotaries agree that in December 2000 the Advisory Committee on Senior Level Retention and Compensation issued its Third Report indicating that more structural recommendations dealing with GIC appointees (including GIC-6) were expected, they point out those changes were not imminent at the time Mr. Tasse was dealing with the PCO and, in any event, the Government excluded the prothonotaries from the GIC/GCQ classification review process. On January 8, 2001, Mr. Tasse reported that Mr. McCutcheon had advised him that:

> "…letters are being sent around town requesting a review of the statement of duties of the GIC appointees. He said that no letter will be sent to the Federal court---preferring to wait for a decision to be made on the recommendation sent to the Clerk.

The exclusion of the prothonotaries from the classification review process is said to be confirmed by the fact their positions do not appear on the list of full-time GIC

appointees who were subject to the review. Nor were they included in the new 2002 compensation plan the Government implemented with the assistance of the Hay Group. Since the prothonotaries were already earning $141,174 in March 2002 when Treasury Board implemented the recommendations of the Advisory Committee's Fourth Report, the prothonotaries argue that it was sheer coincidence their salary corresponded to the middle of the new GCQ-6 range. They submit that from May 2001, their salaries ceased to be determined by a government classification system and were entirely driven by whatever increases the Federal Court judges received through their quadrennial review processes. Intended as an interim measure, they argue that the 69% ratio became fixed and soon was out of step with the comparators upon which it was based (i.e. provincial judges and masters).

May 17, 2001 Prothonotary Hargrave wrote Associate Chief Justice Lutfy (as he then was) on the issues of pensions:

> The question of other benefits remains to be resolved. However, in particular, the basis for computing the pensions of Prothonotaries will have to be addressed at some point. We presently accumulate pensions at 2% per year, as do most civil servants. The figure is most certainly workable for career government employees. However, overall, Prothonotaries generally come from, or will come from, the private sphere at an age before they reap the full benefit of senior partnership in their law firms, but an age when a pension based upon 2% per year amounts to relatively little. There are precedents for increased pension benefits, such as the *Diplomatic Service (Special) Superannuation Act* which makes available pensions between 3% to 6% of average pay per year of service for ambassadors and other diplomats, likely as a result of their appointment at a later age. I understand further that Masters, at least in Alberta and British Columbia, are at 3% per year: while the 3% rate does not

> translate into a substantial pension unless one is in the position for at least 20 years, it would be a reasonable step.

As it turned out, however, masters' salaries in other jurisdictions bounded ahead of prothonotary salaries as provincial court judges narrowed the gap between their compensation and that of federally appointed judges. (See E2 TAB M and N) This left prothonotaries, with the exception of masters in Manitoba, as the least well remunerated in any jurisdiction. Thus, they continued to have salary issues notwithstanding that their salaries were now a fixed percentage of Federal Court judges and their other terms of appointment had not been addressed at all. By legislation and by the Freedman Commission (2002), the Manitoba masters achieved parity with Manitoba provincial court judges soon thereafter, leaving prothonotaries at the bottom of the master's heap.

In the result, the prothonotaries came to accept that the only way they could redress and stabilize their compensation situation was by the establishment of a neutral compensation review process as they believed was required by the *PEI Judges Reference* decision. Hence, Prothonotary Hargrove wrote to the PCO June 21, 2002:

> Our principle concern, at this time, is to see established a process involving a neutral body to make recommendations in respect of all aspects of our compensation and benefits. This neutral process, in our view, is the appropriate means to deal with these issues in a manner that recognizes and ensures our judicial independence. We would like to engage the Privy Council Office in discussions to that end and welcome your comments in that regards.

This idea was also pursued by Chief Justice Lutfy on April 14, 2003. (See Ex. 2 Tabs T & N.) On October 14, 2003, the prothonotaries retained Ms. Janice Payne, an

Ottawa lawyer, to advocate for such a process on their behalf. She expressed concern to the PCO that her clients' interests were being pushed aside by other demands on the Government and that she had been instructed to take whatever action was necessary to ensure their issues were dealt with promptly and with full retroactivity. (Ex. 2 Tab V)

In May 2005, the Honourable Irwin Cotler, Minister of Justice, introduced legislation (Bill C-51) that would have created a statutory mechanism by which the salaries and benefits of prothonotaries would be reviewed periodically by a special quadrennial commission established by the Governor in Council. This commission would have been empowered not only to review salaries and other benefits of the prothonotaries, but also to recommend retroactive adjustments to ensure fair compensation. However, Bill C-51 died on the order paper in November 2005 when federal elections were called. As the Government's brief put it, the current Government did not accept the proposal of the former Government that a statutory three-person commission process should be established to make recommendations concerning only six prothonotaries. It was also believed that the *Ontario Deputy Judges' Association v. Ontario (Attorney General)* decision (2006) 80 O.R. (3d) 41 (C.A.)) had suggested that the existing legislative linking mechanism would satisfy the process requirements of the *PEI Judges Reference*.

This result was not acceptable to the prothonotaries. Indeed, on May 29, 2006 Chief Justice Lutfy sought the cooperation of the Minister of Justice to incorporate provisions for an independent compensation mechanism for prothonotaries in an anticipated bill to implement the recommendations of the 2003 Quadrennial commission. However, the Government explained that it could not do so in a letter from the Minister of Justice to the Chief Justice dated July 21, 2006. In the absence of any further response and in light of other attempts at a satisfactory resolution, the prothonotaries retained litigation counsel. A draft notice of application and an affidavit were prepared

and forwarded to the Department of Justice. At a meeting on March 21, 2007, the Department of Justice and the prothonotaries reached agreement on the matters reflected in the Order in Council establishing this process.

9. Criteria to be Considered.

(a) Nature of the duties of a Prothonotary

Like masters, prothonotaries contribute in important ways to the effective and efficient operation of the Federal Court. The prothonotaries rely on the description of their extensive role explained in *Canada v. Aqua-Gem Investments Ltd.* [1993] 2 F.C. 425 (C.A.). In reply, the Government relies on *TMR Energy Ltd. v. State Property Fund of Ukraine* [2005] F.C.J. No. 16 at paras. 35 and 41 noting that the expansion of prothonotary duties has essentially been circumscribed to pre-trial proceedings (except injunctions), to post-judgment proceedings and by the powers determined by the Rules Committee of the Federal Court. Nevertheless, I am satisfied that their interface as adjudicators with the users of the Federal Court is very important. Submissions by senior representatives of the Federal Court bar make this exceedingly clear. The standard of review of their decisions by Federal Court judges does not assist in an assessment of their remuneration. If there was any doubt, the prothonotaries' importance to the Federal Court is well explained in the Chief Justice's submissions reproduced above. They cannot be improved upon.

Prothonotaries are integral to the proper functioning of the Federal Court and both their actual and perceived independence are vital to that Court's integrity. They deal with a broad range of exceedingly complex and sometimes arcane matters unique to the Federal Court's jurisdiction. A prothonotary requires considerable judgment and patience in dealing with such important matters. This is why a minimum of ten years experience as a lawyer has been required. The job's requirements are demanding in terms of

volume and front-line pressure. I have come to this conclusion based on the material before me including the affidavits of Prothonotary LaFreniere and the CAS Federal Court Judicial Workload Study – the later obviously having its limitations in capturing all of the prothonotaries' time and functions.

The responsibilities of the prothonotaries have expanded over the years and this likely will continue given the modern demands of case management and court sponsored alternative despite resolution initiatives throughout Canada. Pre-trial motions, no matter the nature of the litigation, can be complex and fundamental to the direction of a matter regardless of the standard of review. A prothonotary requires a deep grasp of not only procedural issues but also the substantive law governing the proceedings and the subtle strategies of counsel and their clients who regularly litigate in the Federal Court. A prothonotary must implement all this required knowledge in real time and in a matter that produces confidence in the administration of justice and the Federal Court of Canada.

On the other hand, prothonotaries do not shoulder the onerous jurisdiction of Federal Court judges and do not regularly write the substantial reasons customarily issued by those judges. In my opinion, prothonotaries cannot make a case for parity in remuneration with Federal Court judges in the way provincial court judges have attempted to do so in relation to superior court judges by featuring their considerable involvement in a great range of serious criminal proceedings. A differential is merited and the issue arises as to whether the existing 31% difference in salary remains appropriate, all things considered. This brings us to the salary and benefits of appropriate comparator groups.

(b) Salary and Benefits of Appropriate Comparator Groups

The prothonotaries submit that the most relevant comparators are the Federal Court judges with whom they work. The Federal Court is a specialized statutory court, with a significant caseload and highly developed expertise in areas such as claims against the Federal Crown, judicial review applications from federal tribunals, intellectual property, admiralty, aboriginal cases and immigration. Those appointed judges and prothonotaries to the Federal Court usually have a background and specialized expertise in these matters. Their work overlaps substantially since prothonotaries function together with Federal Court judges in an integrated court. Prothonotaries therefore submit that their salary and benefits should continue to be fixed as a percentage of those of the Federal Court judges.

In determining that percentage, the prothonotaries contend it is useful to look at the relationship between other superior court judges and masters in various Canadian jurisdictions. Two prothonotaries are assigned to Ottawa and two to Toronto. One is located in Montreal and another in Vancouver. Ontario and British Columbia have traditional masters, although Ontario's sole traditional master is being phased out. Quebec does not use masters, but the prothonotaries argue guidance can be derived from the salaries of Quebec's provincial court judges. This is because in all provinces where there are traditional masters (i.e. British Columbia, Alberta, Saskatchewan, Manitoba and Ontario) their salaries are set at the same level as those of provincial court judges. It is contended that prothonotaries exercise at least a comparable jurisdiction to those masters and uniquely exercise full trial jurisdiction up to $50,000. They are also an integral part of a national court that is both bilingual and bi-juridicial. The prothonotaries reside in four of the largest urban centres in Canada which are also among the most expensive places to live. Salaries for lawyers in private practice in these centres are

consistently the highest in Canada. The Superior Court Judges' Association has updated to 2007 the McLennan Commission data for lawyers at the 75th percentile for Toronto ($554,286), Ottawa ($290,625), Montreal ($382,759) and Vancouver ($382,500) for a weighted average of $409,180. Thus, the prothonotaries submit that the most appropriate 2007 comparators are: 1) Federal Court judges ($260,000); 2) Traditional masters in Ontario ($234,503) and British Columbia ($202,356); 3) Quebec provincial court judges ($223,624); and 4) masters and provincial court judges in other provinces.

The prothonotaries have advised that as of April 1, 2007, salaries for masters in Alberta are $220,624 and in Saskatchewan are $198,900. The Government's brief suggests that masters are no longer utilized in Saskatchewan. The salaries for provincial court judges for the remaining provinces and territories are: NWT ($209,254), Yukon ($199,901) for 2006 and pending for 2007), Prince Edward Island ($194,144), Nova Scotia ($180,708), New Brunswick ($174,946) and Newfoundland and Labrador ($173,590). The prothonotaries point out that, following the salary adjustment made in 2001, they continued to lose considerable ground to their provincial counterparts. The average April 1, 2007 known salary for all provincial court judges and masters is calculated by the prothonotaries to be $199,144 or 76.58% of Federal Court judges' salaries whereas the prothonotaries at 69% of a Federal Court Judge are accorded a salary of $173,900 – second lowest in the country.

The prothonotaries, however, focus on the provinces of Ontario, British Columbia and Quebec where they reside: 1) the Ontario traditional master's salary is at April 1, 2007 $234,503 or 93.1% of the salary of a superior court judge; 2) a British Columbia master's salary is $202,356 or 80.3%; and 3) a Quebec provincial court judge's salary is $223,624 or 88.79%. A straight averaging of these Ontario, British Columbia and Quebec salaries would produce a ratio of 87.4% or 88.8% for 2008 assuming an increase of 3% for Ontario ($242,007), British Columbia (However, $220,000 was given

at the hearing. A 3% increase on $202,356 for 2007 gives a 2008 salary of $208,427), Quebec ($230,780) and federal superior court judges ($260,000) in 2008. The prothonotaries argue their salary should be closer to that of the Ontario traditional master because four of the six prothonotaries reside in Ontario. Thus, using a weighted average for those three provincial jurisdictions, the result is a ratio of 90.2% of a Federal Court judge's salary in 2007 and 91% in 2008 or salaries of $227,304 (2007) and $236,600 (2008). The Government submits that the most relevant comparator group for assessing the adequacy of prothonotaries' salaries is that of senior public servants including members of the federal administrative tribunal community. A comparison of the salary treatment of prothonotaries and these senior public officials is merited, the Government argues, because they share a demonstrably high level of experience, capacity, skills and abilities as well as a commitment to public life. The senior executive cadre's compensation reflects what is required to attract and retain the government's most senior office holders. It is pointed out that the Hay Group has also confirmed its recommendation that the actual duties, functions and competencies of prothonotaries actually merit a GCQ-5 classification (See Ex. 3, Vol. 1, TAB 15). The Government has listed various office holders at the GCQ-5 level who, like prothonotaries, exercise adjudicative functions. It is argued that overall their responsibilities, functions and impact on decision-making are essentially the same as those of the prothonotaries.

Noteworthy comparators are said to be members of the CHRT, CITT and IRB. These GIC appointees carry out significant adjudicative functions, including the hearing of motions, hearing *viva voce* evidence on the merits at trial-like hearings, the determination of *Charter* issues and the issuance of extensive reasons for decisions. Decisions of these tribunal members can involve the determination of foreign and international law, human rights law, the admissibility of people into Canada and the removal of people from Canada. The decisions can also involve significant sums of

money well in excess of $50,000, the cancellation of contracts worth millions of dollars, and the determination of dumping and other trade infractions for which significant tariffs can result. The Government also points out that, while the interlocutory jurisdiction of the prothonotaries is engaged across a broader spectrum of issues, the substantive merits of those proceedings are determined by Federal Court judges. In contrast, the quasi-judicial tribunal members hear evidence, apply the law to the substantive issues raised by parties before them, and finally resolve those issues subject only to judicial review.

The Government says it is also relevant to compare the duties and functions of prothonotaries with those of senior public officials who enjoy the same level of compensation. Prothonotaries' compensation is currently equivalent to that of federal assistant deputy ministers in Ex category (effective April 1, 2007 - $155,100 to $182,500 with a weighted mid-point of $168,800). Assistant deputy ministers at this level are among the most senior members of the public service, with the next level up being that of a DM-1 ($173,600 to $204,200 with a weighted mid-point of $188,900). Executive Group positions are classified and bench-marked by the Public Service Agency using a Hay-based position evaluation plan. Positions bench-marked at the Ex-5 level all require a mastery of the appropriate legislative frameworks, relevant theories and the principles applicable to an organizations' operations. These executives can shoulder management responsibility for thousands of employees and operating budgets in the millions of dollars, with the financial dimensions of their areas of responsibility ranging in the billions.

The Government notes that the requested salary of $227,300 effective April 1, 2007 is significantly higher than the $196,144 salary currently paid to military judges. This salary for a puisne military judge effective September 1, 2007 is the average of the salaries of judges appointed by the provinces and territories excluding Nunavut. The same formula has been applied for the last several years. The quadrennial inquiry of the

Military Judges Compensation Committee is underway for the period commencing September 1, 2007. The figure cited for 2007 ($196,144) assumes past practice is followed. The salary sought by the prothonotaries is also equivalent to the GCQ-8 level. The salary for a GCQ-8 for 2007-08 is $204,300 to $240,400 and contains the chairs of many of the largest federal tribunals. The Government submits that a comparison of the respective levels of responsibilities and breadth of functions between prothonotaries and these most senior public office holders shows the GCQ-8 level is not an appropriate comparator. The demand is also equivalent to that of DM-2 ($199,700 to $234,900), deputy ministers responsible for administering large federal departments.

The Chair of the IRB is responsible for the management and overall operations of the largest tribunal in Canada (i.e. staff of 800, a budget of $98.6m and 54,000 decisions per year). The impact of the CITT tribunal on Canadian markets is in excess of $1.5 billion. The Chair of the National Parole Board manages 324 members and staff with an operating budget of $28.3m. This job involves leadership and direction with respect to often publicly controversial decision-making that must balance and ensure protection of the public while facilitating, as appropriate, the timely integration of offenders as law-abiding citizens. The Government submits that the salary proposal of the prothonotaries is demonstrably unreasonable in light of these comparisons.

The Government strongly opposes the submission that masters of provincial superior courts be considered as a comparator for determining the compensation of prothonotaries. It is noted that the policy decision to use such judicial officers varies throughout Canada. Quebec, Newfoundland and Labrador and the three Territories have never appointed masters. New Brunswick and Saskatchewan have had, and then abolished the office. It is almost twenty years since Ontario limited the jurisdiction of new masters to case-management, leaving only one remaining full-time, grand-fathered “traditional master”. Nova Scotia and Prince Edward Island have established the office of

master and prothonotary, but these office-holders perform very limited functions such as assessments and the taxing of accounts and other administrative activities.

Only British Columbia, Alberta and Manitoba allocate to their masters functions roughly approximate to those of prothonotaries. However, in each jurisdiction, masters have significant overlapping jurisdiction with provincial court judges in relation to a range of family law matters. While the compensation of masters in these three provinces is set at the same level as that of their provincial court judges, the Government says no rationale can be found for this policy choice. For example, there has been no published functional comparison leading to such a parity decision.

The Government points to Manitoba's Freedman Commission which simply quoted from the masters' submissions to it but undertook no independent analysis of roles and responsibilities to support its conclusion of parity or that of the Province which had enacted a law requiring that, in the future, masters be paid the same as provincial court judges. If a justification is to be imputed, the Government submits, it is the fact that masters exercise the jurisdiction of provincial family judges in relation to a range of matters. The Government objects to any rationale which equates the remuneration for masters and provincial court judges on so-called "efficiency grounds" such the recommendation of the Hon. Coulter Osborne, Q.C. that Ontario case management masters' remuneration also be linked to that of the Ontario provincial court judges "to avoid unseemly and costly disputes about remuneration" (See *Civil Justice Reform Project, Summary of Finding and Recommendations,* November 2007). Finally, the Government objects to only British Columbia, Ontario and Quebec as comparators because 1) the Federal Court is a national court, 2) Ontario has only one (grand-fathered) traditional master and the replacement case management masters are not currently paid the same as provincial court judges, and 3) Quebec does not utilize masters.

In summary, the Government submits that the most relevant comparators should be drawn from the federal sphere and that prothonotaries' remuneration should be governed by the same policy choices and priorities that federal government applies to the remuneration of all outstanding federal senior public office holders. Because prothonotaries are paid one classification higher than that for which they have been assessed by reputable compensation experts, no further salary adjustment is required.

In reply, the prothonotaries point to the decision of the Supreme Court of Canada in *Ocean Ports Hotel Ltd. v. British Columbia* [2001] 2 S.C.R. 781 for the proposition that appointments to administrative tribunals have little in common with judicial officers and judges. They have term limited appointments; one does not have to be a lawyer; and the encumbents can be terminated. The prothonotaries argue that, contrary to using senior public compensation as but one bench-mark or indicator for public sector excellence, in these proceedings the Government is using a Hay job evaluation scheme to treat prothonotaries as members of the executive branch. The prothonotaries contend that the Government's "me too" concerns, shows it seeks to treat prothonotaries, not as judicial officers, but as a small group of civil servants whose unique treatment will create problems with other civil servants who may want similar benefits. The Hay evaluation method, it is submitted, has never before been applied to judges and flies in the face of the *PEI Judges Reference* decision. If this is allowed, the Government will effectively determine the prothonotaries' compensation in light of its priorities as a big employer and without regard to a prothonotary's *sui generis* status.

It is argued the Government defines the criteria to be applied for evaluation purposes and factors like "integration" (defined as the degree to which a position is called to coordinate/manage mental processes, policy and operational issues etc) have no application to the judicial world. It is emphasized that the evaluation of work is a highly judgmental process not a science. Indeed, the prothonotaries submit that it is

even more so in the facts at hand because only at the end of this process (November 2007) did the Government consider asking an expert to "update" the prothonotary classification evaluation. The expert was given no additional information about the job responsibilities of the prothonotaries, interviewed no one at the Federal Court, and, for the first time, his report linked the prothonotaries responsibilities to those of the Chair of the Canadian Armed Forces Grievance Board. – a job that has never before been discussed by the parties. The expert is not legally trained and has never before evaluated the work of judges. What he did to understand the prothonotary job was "peruse the statute" and review four bullet points on job functions provided by the Government which in turn were apparently drawn from material provided by the Federal Court several years ago as discussed above. His work, I note, is subject to considerable criticism by the prothonotaries' expert. (See Ex. 8) The prothonotaries therefore submit that, in the circumstances, no reliance should be placed on the Hay report. (Ex. 3 TAB 15)

(c) Prevailing Economic Conditions in Canada

The prothonotaries point out that the federal government has had ten successive budget surpluses and the budget surplus for 2006/7 was $13.8 billion. On October 30, 2007 the Minister of Finance tabled the Government's Economic Statement in the House of Commons. The October statement reported private sector forecasts expecting real economic growth to moderate and outlined measures being taken by the Government to off-set what were then seen as potential risks. Since October, the situation has evolved with developments stemming from the housing sector and mortgage markets in the United States which continue to send reverberations through the global economy. This process has greatly accelerated in recent weeks and is being reflected in severe market corrections.

The Government notes that the decisions of the Bank of Canada and United States Federal Reserve to lower interest rates signal the seriousness of concerns about a potential downturn. The Government says it must consistently and fairly apply these considerations in any decisions about compensation expenditures from the public purse.

In response, the prothonotaries submit there is nothing in the economic conditions of Canada prohibiting the redress they seek for a longstanding inequitable remuneration treatment of a very small number of individuals, particularly when the review process has an underlying constitutional imperative.

(d) Role of Financial Security in Ensuring Judicial Independence.

The Government does not dispute the prothonotaries' status as independent judicial officers and the need to ensure this independence. This common ground, the prothonotaries point out, is reflected in the Special Advisor's mandate and was reflected in the previously discussed Bill C-51 which died on the order paper. The prothonotaries further assert it should be common ground that the constitutional guarantee of judicial independence requires that the relationship between judicial officers and other branches of government be depoliticized. At a minimum, the process for determining compensation must be based upon objective criteria and not government discretion. Use of a government's job evaluation system is to treat the prothonotaries or other judicial officers as civil servants and to ignore the constitutional separation between the judiciary and the executive.

It is submitted that existing pension and disability arrangements are particularly destructive of judicial independence. A poignant example was given of the late Peter A.K. Giles. Associate Senior Prothonotary Giles was appointed at age 58 in 1985 and retired at age 75 in 2002. Although Mr. Giles was in office for almost 17 years, the

Income Tax Act prohibited him from earning a pension after the age of 71. His pensionable earnings were capped at $102,959.75, calculated as the average of the five years of earnings he had received starting eight years before his retirement, from age 67 to 71. Thus, Mr. Giles' pension benefit did not reflect his last four years of service, and did not include his income for his best five consecutive years, including the improvement to salary received by the prothonotaries in the year 2000 (ie. that average would have been $119,500). Associate Senior Prothonotary Giles purchased pension credits for his war service of 2.1 years which resulted in his having 15.5 years of pensionable service. Even so, he received a pension benefit of $2677.37 per month less the CPP offset of $298.42 for a total monthly benefit of $2378.95 or $28,547.40 annually. When he was appointed in 1985, the appointment was for life but this changed to age 75 in 2002. He worked until age 75, but was ill in his later years – impaired by emphysema, requiring him to bring a portable oxygen tank to court. By this time, he was no longer eligible for LTD benefits which ceased after age 65. Prothonotary Giles passed away in 2004 and his widow currently receives half of his pension benefits (indexed).

The Government, in reply, submits that the *PEI Judges Reference* identified three components to judicial financial security: 1) the requirement of an independent, objective and effective commission; 2) the avoidance of negotiations between the judiciary and the executive; and 3) the requirement that judicial salaries not fall below an acceptable minimum level. While the first two requirements are procedural, the third is substantive and designed to protect against government interference with judicial officers and to prevent a judge's income interests from becoming enmeshed in his or her judicial decision-making. The Government submits that since the statutory link to judicial salaries in 2000 the salaries of the prothonotaries have increased by 47%. Thus, it is contended, their salaries have clearly not fallen below an acceptable minimum.

The problem with the Government's submission is, first, that it ignores the importance of pensions and other benefits such as STD and LTD. Pensions are a significant, if not the most significant, component of judicial remuneration. The prothonotaries complain that the current pension entitlement is wholly inadequate as are the limitations associated with the long term disability plan. Both these benefits have structures which ignore the fact that judges and prothonotaries are most often appointed from the private sector mid-career (late 40's and early 50's) and likely without considerable or sufficient savings. Second, by focusing on the "acceptable minimum", referred to in the *PEI Judges Reference* case, the Government appears to be treating its obligation in a process such as this as one of only paying judges and prothonotaries an acceptable minimum. This view was clearly rejected by the Supreme Court in 2005 in the *New Brunswick Judges* case (supra) as reviewed above. Parties can only adopt this "minimum" perspective before a reviewing court and only if a government has first properly rejected a commission's recommendations in light of the constitutional requirement that the commission's process be meaningful and effective. There being an appropriate rationale of countervailing considerations expressed by a government after having reflected upon a commission's report, then a reviewing court would need to turn its mind to whether the existing terms and conditions unaltered met "an acceptable minimum". To begin with the "minimum acceptable" perspective in a process such as this is therefore constitutionally unsound.

(e) Need to Attract Outstanding Candidates to the Office.

The prothonotaries submit that to attract outstanding candidates, compensation for judicial officers must be competitive. Appointees have typically been drawn from the major urban centers where there is a high degree of competition for outstanding legal talent. These are also the centres where incomes at leading law firms are high and

particularly so in some of the specialized areas of the Federal Court's caseload. The prothonotaries warn that compensation arrangements should not be structured so as to favour applicants from the federal government. For example, pensions which provide incentives to applicants from the federal government and disincentives to applicants from outside, will limit the range of experience and quality of the applicant pool.

In reply, however, the Government says that recent appointments demonstrate there is no difficulty in attracting qualified candidates to the office. In May 2007, there were 41 applications. After a rigorous screening process by a committee which included the Chief Justice of the Federal Court, 8 qualified candidates were identified and interviewed. Similarly, for the May 2003 appointment process, there were 71 applications and 7 candidates were invited for interviews. The high quality of appointments has been widely acknowledged, with the three most recent appointees coming from major urban private sector law firms. This, says the Government, must be balanced against the fact (emphasized by the prothonotaries) that a master of the Ontario Superior Court withdrew from a competition in 1998 but before (as the Government points out) the 2000 adjustment to the prothonotaries' salaries discussed above.

10. Recommendations

(a) Salary

Both parties' submissions, in my opinion, overshoot the mark. It does appear that the prothonotaries, as a very small group of Federal Court judicial officers, have had difficulty attracting the federal government's attention to their concerns over the years. The history of their resulting dealings with the PCO is arguably the type of interaction the Supreme Court of Canada sought to avoid in the *PEI Judges Reference*. Moreover, when they did get attention in 2000/2001, the redress was partial and confined to salaries. Other terms of remuneration were not considered. The Government may have

been concerned with the potential impact of changes to prothonotaries' compensation on other G.I.C. appointments and the civil service. There is some evidence of this historically (e-mail dated October 25, 2000, Ex. 1 to Lafreniere Affidavit).

The Government's particular use of the Hay job evaluation system as a justification for the prothonotaries' salaries is problematic in a proceeding such as this. First, it treats the prothonotaries as ordinary civil servants whose pay is to be determined by government. The prothonotaries are not civil servants and their salaries must be determined by considerations appropriate to them ie. appropriate comparators given their jobs, by attention to labour market/recruitment issues germane to them, and by having regard to the requirements of judicial independence. Second, the application of the evaluation system appears too subjective or judgmental. It is, necessarily, a huge public sector labour market administrative project subject to too much government control or involvement to be determinative in these proceedings. (See Ex. 8). In my view, constitutional considerations get lost in this type of "blackbox" concern for internal relativities and other massive intra-organizational issues rightly the concern of a government as employer of such multitudes. Moreover, the prothonotaries were actually accorded a classification (GCQ-6) above the one that Hay evaluators say is appropriate. If classification GCQ-6 is more appropriate than GCQ-5, what about GCQ-7 or 8 or higher? Third, tribunal members are subject to entirely different career paths and appointment structures as discussed above.

However, public sector comparators such as GCQ-6 and other classifications should be taken into account as "a general matter" not unlike the DM-3 classification is considered for judges. Indeed, the McLennan Commission did not limit its consideration to DM-3. But the difficulty with the GCQ-6 classification being the primary comparator is that there are several levels above it which might also be indicative of the value accorded to adjudicative excellence in the public realm and its history of application to

prothonotaries is highly debatable unlike the superior court judge/DM-3 usage for over twenty years. Indeed, on the material placed before me, I prefer the prothonotaries' submission that in both 1985 and 2000 when the Government was setting a general salary for prothonotaries a dominant consideration was the salary paid to masters and provincial court judges in other jurisdictions – not to the GCQ-6 salary range or its equivalent at the time.

On the other hand, the key comparators used in 2000 were not confined to the remuneration of provincial court judges in British Columbia, Ontario, and Quebec, but rather use was made of the average of the salaries of all masters and provincial court judges across Canada. It is true that prothonotaries reside in British Columbia, Ontario and Quebec. However, there are no provincial masters in Quebec and only one grand-fathered traditional master in Ontario. These are not robust comparators, to put it mildly. There is also the fact that the masters across Canada have been the beneficiaries of a concerted provincial court judges' effort to close or eliminate the gap between their compensation and that of superior court judges. The case for parity which is driving provincial court judges' compensation is not a case prothonotaries can make independently. Their work is not equivalent to that of Federal Court judges. However, the appropriate difference between a prothonotary's salary and that of a Federal Court judge's is not a matter of science but one of judgment having regard to all the circumstances.

The average of all known salaries for provincial and territorial court judges and masters across Canada (p. 23 of Prothonotaries' Submissions Ex.1) is $199,114 as of April 1, 2007. This is 79% of a Federal Court judge's salary of $252,000 for April 1, 2007. The average salary at April 1, 2007 for masters in the three jurisdictions (Alberta ($220,000), British Columbia ($202,356) and Manitoba ($178,230)) where they are fully utilized like prothonotaries in the federal jurisdiction is $200,195 or 79.4% of a Federal

Court judge's salary. (I have not included Saskatchewan given the Government's submission that masters are no longer utilized there.) A salary of $200,195 for April 1, 2007 falls within the DM-1 range of $173,6000 to $204,200 and is in the general vicinity of what chair of various tribunals and military judges are paid. So too, does 80% of $252,000 or $201,600, if we round the percentage upward. The salary proposed by the prothonotaries, in my opinion, results in an unjustifiable narrowing of the difference between their remuneration and that of Federal Court judges. It also seems out of tune with what I consider to be more reasonable senior public service comparators.

I recommend that a prothonotary's salary for April 1, 2007 be fixed at (a rounded) 80% of a Federal Court judge's salary of $252,000 or $201,600. That salary should adjust thereafter in accordance with its 80% linkage to a Federal Court judge's salary until the next review. If I need to recommend the appropriate prothonotary salary for April 1, 2008, (pending the current Quadrennial Commission recommendations), I will assume an April 1, 2008 Federal Court judge's salary of $260,000 and 80% is $208,000.

(b) Pension and Retirement

Judicial annuities or pensions, as discussed above, are the most distinctive of all judicial compensation. The judicial annuity more than any other financial component reflects a judicial officer's *sui generis* status which is a function of both constitutional principle and the labour market reality of mid-career life-time appointments. Prothonotaries currently participate in the Public Service Superannuation Plan (PSSP) and as well in a Retirement Compensation Arrangement (RCA). Because of the *Income Tax Act* restrictions on the maximum amount of pensionable earnings under a registered pension plan (in 2007 - $126,500), the RCA "tops up" the benefit for salaries above the maximum. The existing plan at 2% of the five best consecutive years of earnings before age 69 multiplied by all years of pensionable service before age 69 requires 35 years of

service to obtain the maximum pension benefit. This pension arrangement is designed for career civil servants and has not served well, and will not serve well, mid-career prothonotary appointees from the private sector (See Ex 7). The example of the late Peter Giles was given above. He is not alone.

Prothonotary John Hargrave was appointed February 17, 1994 at age 57. When he became seriously ill with cancer, Mr. Hargrave was also no longer eligible for LTD benefits which cease at age 65. Because he had exhausted all of his vacation and sick leave credits, he had no alternative but to continue working from home for 18 months while his health declined until he passed away on January 4, 2006. At just under age 70 and with almost 12 years' service when he died, Mr. Hargrave was entitled to an annual pension of $35,025.26 or 24% of average earnings ($147,532.25 is the average of his best 5 years of earnings at the time). His widow receives half that amount or $17,512.68 a year (indexed).

Senior Prothonotary Jacques Lefebvre was appointed at age 51 on June 28, 1985. He suffered a stroke and was absent on sick leave from March 10, 1993. When his sick leave was exhausted, Mr. Lefebvre became eligible for LTD benefits. LTD benefits ceased at age 65 at which time he was forced to retire effective February 2, 1999. Mr. Lefebvre received a pension of $27,990.76 which represented 27% of his average earnings.

A prothonotary can only earn a full 70% of salary pension in office if she or he is appointed at age 34 and remains in office for 35 years. An average appointee who is appointed at 48.9 years of age, and who remains in office 20 years to age 69 (the last year a Prothonotary is currently entitled to earn a pension under the terms of the plan), would receive only 40% of the average of the best five consecutive years of earnings at the time. If the prothonotary worked six more years to age 75, there would be no greater pension benefit. By contrast, a federally appointed judge is entitled to a full (two-thirds)

pension at age 65 after 15 years in office. Indeed, while there is significant variation in pension arrangements for federally and provincially appointed judges and masters across Canada, the standard accrual has been fixed substantially higher than the 2% civil service accrual rate of prothonotaries. Prothonotaries have the least attractive pension arrangement by far in relation to these comparables.

In response, the Government objects to pension analysis predicated on assumptions relating comparability to judges. It takes the view that every individual is responsible for his or her own sound financial retirement planning. Prudent retirement planning also involves other savings including investment in capital assets and securities. Private sector lawyers from large law firms are assumed to enjoy a range of opportunities for responsible retirement planning and investment before their appointments to judicial office. Moreover, even in the federal public service, a decreasing number of employees will retire with an unreduced pension. For example, in 2005, 59% of all retirements took place with at least 30 years of pensionable service.

The Government cautions against underestimating the ability of an individual to accrue retirement savings prior to appointment as a prothonotary. Thus, the Government's actuarial expert calculated that a prothonotary appointed at age 49 who contributes the maximum allowable amount to an RRSP over the course of a career, both in the private sector and as a member of the PSSP, could retire at 65 with an annuity approximately equal to 32 years of public service. It is pointed out that the calculation does not take into account other forms of retirement savings through investments and acquisition of capital assets typical of higher-income earners. Prothonotaries who are appointed from the public sector have typically been federal lawyers who have participated from the outset of their careers in the PSSP and are thus able to accrue sufficient years of service to secure an unreduced pension under a plan which is widely considered to be one of the best and most flexible pension plans in

Canada. In sum, it is the Government's position that the current pension entitlements of prothonotaries are adequate to attract outstanding candidates for the office of prothonotary whether from the public or private sector.

The evidence before me is decidedly in favour of the prothonotaries' submissions. The proper comparators for prothonotary pensions are judicial annuities not civil service plans. The reason, once again, is judicial independence in the context of the customary mid to late career judicial appointment where peak earnings and savings years are being foregone. The pensions of legislators would probably also succumb to the Government's reasoning. Moreover, when combined with an inadequate disability plan, the existing pension arrangement for prothonotaries is particularly inadequate. For example, if a prothonotary is appointed at age 49 and is disabled before age 65, she or he will receive insured LTD benefits to age 65, and will then receive a PSSP pension based on service to age 65 only (i.e. a pension which is less than 30% of final average salary after factoring in the CPP/QPP offset). A Federal judge appointed at age 49 who is disabled before age 65 would receive a disability pension equal to two-thirds of final salary, and a similar Ontario judge would receive LTD benefits to age 65 and a disability pension equal to 67% of final salary to age 65. For a disability after age 65, the Federal and Ontario Judges would receive the same benefits above, but a prothonotary would receive only 2% extra per year of pre-disability service from age 65 to 69 (i.e. a pension which is less than 40% of final average salary after factoring in the CPP/QPP offset)

Moreover, a typical judge's pension plan provides for continued accrual right up to age 75 (the PSSP ceases to accrue at age 69 or 35 years of combined federal public and prothonotary service if earlier). A prothonotary who works from age 69 to 70 loses the earnings increases on his or her pension from age 69 to 70. Assuming an average salary increase of 3%, this results in a loss of 3% of the value of an age 69 pension. If we assume the age 69 pension is 40% of the final average salary, this has a value of

approximately six times final salary. This loss because of foregone earnings increases is therefore approximately 18% of his or her age 69 salary (i.e. 3% of six times final salary). In addition to the loss because of frozen earnings at age 69, a prothonotary who works from age 69 to age 70 also loses one year of pension accrual which at age 69 is an additional 30% of salary (i.e. 2% of salary times a factor of approximately 15). If we subtract employee contributions of approximately 7.5% of salary, this represents an additional loss of employer contributions of approximately 22.5% of salary. The two sources of loss total 40.5% of salary or $70,430 based on a current salary of $173,900. And similarly a loss will be incurred for each year a prothonotary works beyond age 70 up to age 75, representing a total dollar loss of approximately $350,000 over this 6 year period (based on a current salary of $173,900)

In 1995, Professor Friedland made the following observations and recommendations about judicial pensions (supra, at p. 72):

> There are a wide variety of provincial pension plans….
>
> Surely the amount of the pension should be linked in some reasonable way to the length of time served. In provinces where it is linked, the multiplier varies widely. In one province, the number of years of service is multiplied by only 1.5%; in another, it is as high as 3.3%. What is a reasonable multiplier – or to put it another way, what is a reasonable period of service that will result in a full pension? If the pension is 2% of salary times the number of years, one would need to work 33 years to get two-thirds of one's salary on retirement. If the pension is 3.3% times the number of years, then a pension of two-thirds of one's salary is achieved in 20 years. The present federal pension of two-thirds of salary is the equivalent of 4.4% of salary multiplied by 15 years of service….
>
> A twenty-year accrual period is, in my view, reasonable for provincially appointed judges…Time served as a supernumerary judge should be included in the 20 year period, as contributions continue to be made toward the pension during that period. Perhaps contributions should cease in all cases after twenty years. Persons appointed at a younger

> age will have no difficulty putting in the necessary twenty years. Those appointed at an older age will, of course, have some difficulty and would have to take an actuarially reduced pension.

I recommend an appropriate retirement income arrangement for the office of prothonotary with an accrual rate of 3.5% per year of service, applied to the final year of earnings. This will provide a 70% benefit after 20 years as a prothonotary, consistent with the profile of the average appointee who is appointed at 49 years of age and remains in office until she or he is 69. The pension should continue to accrue to age 75, or until the maximum benefit is achieved, upon continuing annual contributions, for the benefit of the older than average appointee. Prothonotaries should contribute at a rate of 7% of their annual earnings up to the date they have accrued the maximum benefit. Upon retirement, the benefit should be indexed to the CPI. I also recommend against CPP/QPP integration as is the case with all other judicial annuities. There should be a grand-fathering of accrued entitlements for the current prothonotaries with PSSP participation prior to appointment from employment in the public service. PSSP provisions for survivor benefits and division on marriage breakdown should continue to apply. Thus, as is the case of provincially appointed judges and masters in Manitoba, Alberta, New Brunswick, P.E.I., Nova Scotia and Newfoundland and Labrador, the proposed arrangement can be implemented through the existing PSSP (registered plan) with a supplementary RCA to top up the difference. A similar arrangement is already in place for federal deputy ministers.

The new retirement income arrangements should apply on retirement to all service that prothonotaries have accumulated. In other words, in the case of a combined PSSP and RCA, the prothonotaries pension should not be calculated on a 2% basis for some years of service in office and 3.5% on others. The proposal is for full retroactivity.

On three separate occasions, the prothonotaries attempted through counsel to engage the government in a formal way to persuade it to establish a review process required by the Constitution. In any event, these inadequate pension arrangements should have been addressed long ago. Prothonotaries and their survivors ought not to be prejudiced. Finally, I recommend the correlative enhancement of the pension arrangements for the retired prothonotaries or their widows in the case of the late Peter Giles and the late John Hargrave. Alternatively, I recommend an appropriately sized *ex gratia* payment or payments to these persons if my primary recommendation on their behalf cannot in law be implemented for whatever reasons.

(c) Sickness and Disability.

I recommend the sick leave and long-term disability benefits be tailored to reflect the fact that prothonotaries, like all federally appointed judges, are appointed to age 75. I accept the prothonotaries' submission that the current sick leave regime is inadequate. Sick leave credits are earned on the basis of 15 days per year. Long term disability benefits begin after an elimination period of 13 weeks or upon expiration of sick leave, whichever is later. Thus, in order to achieve the minimum 13 weeks, a prothonotary must work for at least four years. Prothonotaries are therefore vulnerable to being without any income before LTD benefits become available. More importantly, LTD coverage terminates at age 65. Former prothonotaries worked well beyond the age of 65 and found themselves in an untenable financial position of no LTD benefits and an inadequate pension benefit when they encountered health issues. They were forced to work as long as they physically could further compromising both their health and the reputation of a justice system that would allow their situations to occur.

Specifically, as prothonotaries currently have available to them the basic insurance coverage afforded Federal Court judges (i.e. life insurance, extended health, dental etc),

I recommend that any increases or improvements to these coverages, following recommendations for the current Quadrennial Commission, be automatically extended to the prothonotaries. I recommend that prothonotaries receive automatic salary protection for 13 weeks in the event of sickness. Finally, I recommend LTD benefits be made available to prothonotaries to age 75 or, alternatively, in the event the LTD plan cannot be made available to age 75, that it be replaced by an annuity amounting to 70% of salary to age 75 and trigger at the date an LTD benefit is no longer payable.

(d) Supernumerary Status

The Minister of Justice and the Chief Justice of the Federal Court, I recommend, should consider establishing the opportunity for prothonotaries upon retirement to elect supernumerary status. Such a program helps courts manage work load issues and permits the appropriate ongoing use of the expertise of older judicial officers. Consideration should also be given to taking the necessary steps to reflect the status of the prothonotaries as associate judges.

(e) Vacation Entitlement, Other Leaves, Travel etc.

I recommend that all vacation entitlements be harmonized to the six weeks currently afforded Federal Court judges. This may result in a reduction of leave entitlements for some of the prothonotaries. However, the recommendation will ensure a consistent and equitable entitlement for the group as a whole. These vacations should be administered in the same way as those of Federal Court judges as proposed in the submissions of the Chief Administrator of Courts Administration Services (CAS). Similarly, as proposed by the CAS, other leaves and travel arrangements should be brought under the administrative arrangements pertaining to the Federal Court judges. Whether or not I have the jurisdiction to deal with the administration of compensation and other terms of employment (and I find I do), these are issues of judicial independence and require the

Government's attention. The same can be said for the problematic application to prothonotaries of the public service *Values and Ethics Code.* However, prothonotaries must be subject to an appropriate judicial complaint and discipline procedure mechanism. Finally, the temporary funding of four of six prothonotary positions described by CAS is not adequate and needs to change.

(f) Allowances

I recommend prothonotaries receive an annual non-taxable allowance of $3,000 to assist in the payment for memberships in law related organizations and other costs associated with carrying out their duties as prothonotaries.

(g) Retroactivity

I recommend the linkage of a prothonotary's salary to 80% of a Federal Court judge's salary be made retroactive to April 1, 2004. I have chosen April 1, 2004 because it is a suitable period of time after the late Prothonotary John Hargrave wrote to the PCO requesting a neutral review process and after Chief Justice Lutfy's supporting request in April 2003. I have previously recommended full retroactivity for the recommended new pension arrangement.

(h) Interest and Costs

I recommend reimbursement of all legal fees and costs of the prothonotaries, if any, beyond the amount previously advanced by the Department of Justice in accordance with case law. I do not recommend the claim for interest requested by the prothonotaries.

11. Periodic Reviews

I agree with the prothonotaries that subsequent reviews ought to track the timeframes of the quadrennial commission process for federally appointed judges.

Dated at Toronto, this 30th day of May, 2008.

Original signed by The Honourable George W. Adams, Q.C.

The Honourable George W. Adams, Q.C.

Special Advisor

Response of the Minister of Justice to the Report of the Special Advisor on Federal Court Prothonotaries' Compensation

I. Background

Prothonotaries are judicial officers of the Federal Court appointed by the Governor in Council pursuant to s. 12 of the *Federal Courts Act*. They are appointed on good behaviour until age 75. There are currently six prothonotaries who make an important contribution to the work of the Federal Court.

The Government of Canada has accepted that as judicial officers prothonotaries are entitled to the protections of judicial independence established by the Supreme Court of Canada in the *PEI Judges Reference* case[1]. By Order in Council (OIC) dated June 21, 2007[2], the Government established a process similar to that of the Judicial Compensation and Benefits Commission (the Quadrennial Commission).

The Honourable George W. Adams was appointed Special Advisor on Federal Court Prothonotaries' Compensation on August 31, 2007 to review and provide recommendations to the Minister of Justice respecting the salary and benefits of the prothonotaries in light of the following criteria:

a. the nature of the duties of a prothonotary;
b. the salary and the benefits of appropriate comparator groups;
c. the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government;
d. the role of financial security in ensuring the independence of prothonotaries;
e. the need to attract outstanding candidates to the office of Federal Court prothonotary; and
f. any other objective criteria that the Special Advisor considers relevant.

The OIC provided that the Special Advisor should deliver his report to the Minister of Justice by May 31, 2008, and that the Minister of Justice should respond to the Report and recommendations within six months of the delivery of the report.

The Special Advisor made a broad range of recommendations for significant improvements to prothonotaries' salary, retirement arrangements and other financial benefits, as well as changes to the overall administration of their compensation. A complete summary of the recommendations is attached as Annex A.

II. Government Position

A) The Economy

As with the Government Response to the Quadrennial Commission Report, also released today[3], this Response has been delayed to allow the Government to consider the Special Advisor's report in light of significant changes to a key criterion governing his mandate: ***c) the prevailing economic conditions in Canada, including the cost of living, and the overall economic and financial***

position of the federal government.

The global economic situation and the financial position of the Government deteriorated significantly after the Special Advisor concluded his inquiry and submitted his recommendations to the Minister of Justice on May 30, 2008. The deterioration of the economic outlook, its implications for Government revenues, and the need for the Government to take extraordinary action to respond to the immediate economic threat while securing Canada's long-term growth and prosperity are outlined in *Budget 2009 – Canada's Economic Action Plan*, announced on January 27, 2009.

Budget 2009 - Canada's Economic Action Plan announced measures to stimulate the economy, protect Canadians during the global recession, and invest in long-term growth. It also outlined measures to manage expenditures, including actions to limit discretionary spending by federal departments and agencies, and the introduction of legislation to ensure the predictability of federal public sector compensation during this difficult economic period. Legislation has now been introduced to put in place annual wage increases for the federal public administration (including senior members of the public service, public office holders and Members of Parliament) of 2.3 per cent in 2007-08 and 1.5 per cent for the following three years.

In the Government's view, the public would reasonably expect that judges and prothonotaries should be subject to similar restraint measures. The Supreme Court of Canada has established that it is to ensure continued public confidence in the judicial officers that their remuneration should be subject to measures affecting the salaries of all others paid from the public purse. In *PEI Judges Reference,* Chief Justice Lamer observed that equality of treatment "helps to sustain the perception of judicial independence precisely because judges are not being singled out for preferential treatment".[4] He explained:

> *In my opinion, the risk of political interference through economic manipulation is clearly greater when judges are treated differently from other persons paid from the public purse. This is why we focussed on discriminatory measures in Beauregard. As Professor Renke, supra, has stated in the context of current appeals (at p. 19):*
>
> > *. . . if judges were spared compensation decreases affecting other public sector groups, a reasonable person might well conclude that the judges had engaged in some behind-the-scenes lobbying. The judges' exemption could be thought to be the result of secret deals, or secret commitments to favour the government. An exemption of judges from across-the-board pay cuts is as likely to generate suspicions concerning judicial independence as the reduction of judicial compensation in the context of general public sector reductions.* [5]

The Government accepts that compensation of judges -- and judicial officers such as prothonotaries -- is subject to certain unique requirements that do not apply with respect to others paid from the public purse. In particular, it is necessary to ensure that judicial compensation does not fall below the "minimum" required to protect financial security, including through erosion of compensation levels over time. The purpose of this minimum is to avoid the perception that judges might be susceptible to political pressure through economic manipulation as witnessed in many other countries.

However, as a result of the link to the salaries of superior court judges, prothonotaries are currently protected against such erosion by annual statutory indexing, as well as the quadrennial review of judicial compensation which provides the mechanism for appropriate adjustments.

This is not the time for the kind of major enhancements contemplated by the Special Advisor's Report. Indeed, exempting prothonotaries from across-the-board public sector restraint measures would more likely undermine than enhance the public's perception of their judicial independence and impartiality.

Accordingly, the Government is of the view that prothonotaries' salaries should continue to be fixed at 69% of a Federal Court judge's salary. Their financial security will continue to be protected by annual adjustments equivalent to superior court judges in Canada, a benefit to which few, if any, Canadians could aspire in these difficult economic times. Similarly, the Government is not prepared to implement enhancements to the prothonotaries' pension arrangements or other benefits at this time.

B) Additional Considerations

While the current state of the economy is the overarching consideration in this Response, the Government is mindful that the *PEI Judges Reference* case process would otherwise require a rational justification to be provided for failure to fully implement the recommendations of the Special Advisor. We therefore turn next to discuss the Government's concerns with some of the assumptions that underpin the Special Advisor's recommendations, in particular in relation to salary.

(i) Salary

Currently, pursuant to ss. 12(4) of the *Federal Courts Act,* the salary of a prothonotary is fixed by the Governor in Council and is set at 69% of the salary of a Federal Court judge.[7] The Special Advisor recommends that the salary of a prothonotary be increased to 80% of a Federal Court judge's salary. This represents a 16% increase in salary, which would bring the April 1, 2008 salary of a prothonotary to $208,000. He further recommends that this adjustment be made retroactive to April 1, 2004, which would result in an award of more than $100,000 plus interest to five of the six prothonotaries[8].

The Special Advisor's reasoning in relation to the appropriateness and continued relevance of salary comparators is problematic. The Special Advisor accepted the prothonotaries' position that provincial masters were the most relevant historical comparators for purposes of determining their salary levels. Notably he relied on masters in only three of Canada's 13 provinces and territories.

In making his recommendation, the Special Advisor rejected the Government's position that federal public service comparators should be preferred, in particular members of administrative tribunals at the GCQ-5 and GCQ-6 levels whose adjudicative responsibilities, in the Government's submission, are comparable to those of prothonotaries. However, he also expressly acknowledged that successive Judicial Compensation and Benefits Commissions have accepted as the most relevant comparator the remuneration of senior public servants on the basis that they share the experience, capacity, skills and abilities of those similarly committed to a life of public service.[9] He offers as a reason for his rejection of the relevance of federal comparators the fact that he considers the application of the federal job evaluation system[10] problematic because "it treats prothonotaries as ordinary civil servants".[11] At the same time, in defence of his recommendation of 80%, the Special Advisor observes that this is in the "general vicinity of what chair [sic] of various tribunals and military judges are paid", without details as to why he considers these comparators, clearly functionally distinct from prothonotaries, to be preferred.

The Government also has concerns with respect to the validity of provincial masters as comparators. The Government had argued in its submissions to the Special Advisor that the relevance of provincial masters as comparators is limited because there is no evidence that their salaries were tied to provincial judges' salaries for anything other than administrative efficiency and convenience.[12] In fact, the Special Advisor points out that provincial masters have had the benefit of vigorous advocacy on the part of provincial court judges seeking greater parity with federally appointed judges, based on increasing workload and jurisdiction. Indeed he finds that masters would not have been able to independently assert this parity argument since they could not and do not equate their work to that of judges in the superior courts.[13] However, having noted that masters' remuneration is higher than could be supported by an analysis of their functions, the

Special Advisor uses the average salaries of provincial court judges and masters as a basis for recommending that prothonotaries' salary be set at 80% of a Federal Court judge's salary.

The Special Advisor also misconstrued the Government's position regarding the requirement of ensuring that salaries do not fall below a minimum.[14] While the Government submitted that prothonotaries' salaries have been protected from erosion by the link to judicial salaries, it accepted that this was not the end of the inquiry but that adequacy of prothonotaries' salaries must be considered in light of all the criteria specified in the Special Advisor's mandate, including the level of remuneration required to attract and retain outstanding candidates to the office of prothonotary.

As a result of these cumulative flaws in both assumptions and logic upon which the Special Advisor's recommendations are based, the Government would not in any event be prepared to accept his salary recommendation.

(ii) Pensions

Pursuant to ss. 12(5) of the *Federal Courts Act* prothonotaries are deemed to be employed in the Public Service for the purposes of the *Public Service Superannuation Act* ("PSSA") and are subject to the same retirement arrangements applicable to federal public servants under this plan, which many regard as providing highly advantageous pension benefits.[15]

However, the Special Advisor determined that this plan is insufficient to ensure the financial security of prothonotaries. He concluded that the proper comparators are judicial annuities not civil service plans. In addition to using the judicial model as his paradigm, the Special Advisor favoured the richest assumptions among the range of models in place in the provinces and territories. He recommends an arrangement that would provide for an accrual rate of 3.5% per year of service, applied to the final year of earnings, with accrual to age 75, for a maximum benefit of 70%. Contributions would be set at 7%. Benefits would be indexed to CPI and not integrated with CPP\QPP.[16] These entitlements would be fully retroactive so that all service as a prothonotary would be counted at the 3.5% accrual rate.

Even in a period of economic stability and growth, it would be unreasonable for the Government to accept a pension recommendation that seeks to combine in one plan the most generous elements of each of the provincial and territorial judicial pension arrangements. In fact, these various pension schemes reflect a range of maximum benefits, each calculated on the basis of a number of distinct factors, including varying accrual, contribution, and indexation rates.[17]

It is also worth noting that the Special Advisor incorrectly assumed that his recommended enhancements could be easily implemented through the existing plan. This significantly underestimates the technical complexity and cost associated with implementation within the PSSA scheme. In fact, the mechanism to implement this recommendation would be extremely complex, requiring a two-pronged approach that would address necessary adjustments to reflect both past service as well as future enhancements. Amendments to the legislative scheme would need to be carefully crafted and assessed to achieve these objectives while taking into account potential implications for other participants in the plan.

At any rate, for the reasons indicated above in relation to salary proposals, the Government has concluded that it would not be reasonable to contemplate implementing major pension or other benefit enhancements[18] in the current economic situation. Rather the Government will take the opportunity to consider how the current pension arrangements might be modified to reflect the particular circumstances of prothonotaries as judicial officers, including the admittedly unique demographics of mid-career, life-time appointments.

(iii) Supernumerary Status and Associate Judges

In addition to compensation recommendations, the Special Advisor made certain other

recommendations relating to the creation of supernumerary offices for prothonotaries and a change of their current title. He also recommended transfer of responsibility for administration of their compensation to the Office of the Commissioner for Federal Judicial Affairs and modification to the manner in which resources are provided for their compensation within the federal fiscal and budgetary process. As outlined in the Government's submission, as a legal matter, the Special Advisor has no jurisdiction under the OIC to make recommendations with respect to matters relating to court structure and organization such as supernumerary offices or titles which are not matters of remuneration. Similarly, the choice of which federal office should be responsible for the administration of prothonotaries' compensation, and the process for budgeting and funding arrangements in support of remuneration, are purely policy matters for Government that are outside the mandate of the Special Advisor. The Government is thus under no obligation to respond to these recommendations.

(iv) Interest and Costs

The Special Advisor recommended that the prothonotaries should be reimbursed in full for their legal costs of participation in this process. This is not reasonable. As the Government has repeatedly said in relation to judicial legal costs in the context of the Quadrennial Commission process, there should be a financial incentive to ensure that representational costs are prudently incurred. It is for this reason that superior court judges are only entitled to 66% of their legal costs. The Government has already paid the prothonotaries on an *ex gratia* basis the amount of $50,000 to support their participation in the process. This is in excess of 66% of their total representational costs. No additional reimbursement is necessary.

ANNEX A

RECOMMENDATIONS OF THE SPECIAL ADVISOR ON FEDERAL COURT PROTHONOTARIES' COMPENSATION

Salary
Salary be set for April 1, 2007, at 80 % of a (puisne) Federal Court judge's salary of $252,000 at $201,600 and adjusted at that rate thereafter. Adjustment be retroactive to April 1, 2004.

Pension
An appropriate retirement arrangement having:

- an accrual rate of 3.5 % per year of service;
- applied to the final year of earnings;
- to age 75, for a maximum benefit of 70 %;
- contributions at 7 %;
- benefit to be indexed to CPI;
- not integrated with CPP/QPP;
- current entitlements should be grand-fathered with *Public Service Superannuation Act* so that in conjunction with a supplementary RCA due difference is topped up. Proposal for full retroactivity so all service counted at 3.5 %.

Retired prothonotaries or widows
Correlative enhancements for retired prothonotaries or widows, or alternatively an appropriately sized *ex gratia* payment.

Sickness and disability
Elimination of 13-week waiting period (automatic salary protection); extension of benefits to age 75, or alternatively that LTD be replaced by an annuity amounting to 70% of salary to age 75.

Supernumerary Status
Consideration be given to establishing opportunity to elect supernumerary status.

Associate Judges
Consideration be given to taking the steps necessary to reflect the status of the prothonotaries as associate judges.

Vacation Entitlement, Other Leaves, Travel, etc

- harmonization of vacation entitlements to 6 weeks currently afforded to Federal Court judges;
- leave and travel arrangements to be administered in same way as for judges as proposed by Courts Administration Service submission;
- application of public service Values and Ethics Code problematic;
- appropriate judicial complaint and discipline mechanism; and
- temporary funding of positions as described by CAS needs to change.

Allowances
Non-taxable allowance of $3,000.

Interest and Costs
Full reimbursements of all legal fees and costs ("in accordance with case law"). No interest.

Periodic Review
Subsequent reviews to track the timeframes of the quadrennial commission process.

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[1] *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3.

[2] P.C. 2007-1015, June 21, 2007, P.C. 2007-1316, August 31, 2007, available at http://www.prothocomp.gc.ca.

[3] Available at: http://www.justice.gc.ca

[4] *PEI Judges,* para 156.

[5] *Ibid.,* para. 158.

[6] *Ibid.,* para. 135.

[7] As such, prothonotaries not only have the benefit of any quadrennial adjustment to judicial salaries but also receive automatic annual indexing as a result of s. 25 of the *Judges Act.*

[8] The recommendation to tie prothonotaries' salaries at 80% would result in annual increases as follows: April 1, 2004: $25,513; April 1, 2005: $26,094; April 1, 2006: $26,857; April 1, 2007: $27,720 and April 1, 2008: $28,600.

[9] Report of the Special Advisor, pp.21-23.

[10] The Hay job evaluation system, which is also the basis upon which DM compensation is established.

[11] Report of the Special Advisor, p.55.

[12] Submission of the Government of Canada to the Special Advisor on Prothonotaries' Compensation, February 4, 2008, paragraphs 47-48.

[13] Report of the Special Advisor, p.24.

[14] The Special Advisor states that "… the Government appears to be treating its obligation in a process such as this as one of only paying judges and prothonotaries an acceptable minimum", Report of the Special Advisor, p.53.

[15] Under this plan, members accrue 2% of pension for each full year of service on the basis of the five best consecutive years of earnings before age 69. The Government underscored the key principle that every Canadian is primarily responsible for his or her own financial retirement planning. Furthermore, to the degree some prothonotaries are joining the PSSA at a later age, they are by no means unique as this represents the trend in the public service more broadly.

[16] Non-integration means the pension is not reduced by a standard formula when the member becomes eligible to draw CPP/QPP benefits at age 65 or begins to draw CPP/QPP disability benefits at any age.

[17] For example, the Special Advisor recommended an accrual period of 20 years, with an accrual rate of 3.5%, using the average age at appointment of both current and retired prothonotaries. But prothonotaries themselves emphasized the changing demographics of their labour pool, which is drawing upon younger candidates from the private sector. Using the more reasonable average age of appointment of the six existing prothonotaries (45 years of age) results in an accrual period of 23.3 years with an accrual rate of 3%. Indeed, an accrual rate of 3% is applied in a number of jurisdictions with benefits based on three years best average salary rather than the final year as recommended.

[18] More specifically the Government is not prepared to implement the Special Advisor's recommendations to extend long-term disability benefits and to provide an annual tax-free allowance of $3,000 to prothonotaries. Nor is the Government prepared to make an *ex gratia* payment to the former prothonotary and the two survivors of deceased prothonotaries. However, the Government will extend vacation entitlements to 6 weeks to all prothonotaries on the basis that they all should receive the same level of benefits immediately without executive discretion.

Date Modified: 2010-08-06

IN THE MATTER OF AN INQUIRY BY THE
SPECIAL ADVISOR ON
FEDERAL COURT PROTHONOTARIES' COMPENSATION

Report and Recommendations of The Honourable, J. Douglas Cunningham, Q.C., to The Minister of Justice of Canada

July 31, 2013

Appearances:

On behalf of the Prothonotaries of the Federal Court:
Andrew K. Lokan, Counsel (Paliare Roland Rosenberg Rothstein LLP)

On behalf of the Government of Canada
Paul Vickery, Counsel (Department of Justice Canada)
Leah Garvin, Counsel (Department of Justice Canada)

Chief Justice Paul Crampton, Federal Court of Canada

Hearing conducted in Toronto, Ontario, on May 1 and 2, 2013

1. Introduction

On May 30, 2008, my former colleague, The Honourable George Adams, delivered his Report on Federal court Prothonotaries Compensation. By Order in Council, dated February 26, 2013, I was appointed as Special Advisor to provide, in a further review, recommendations to the Minister of Justice concerning the salary and benefits of Prothonotaries appointed under section 12 of the Federal Courts Act ("FCA"). These Prothonotaries, of whom there are six (6), function throughout Canada from bases in Ottawa, Toronto, Montreal and Vancouver. Each of the six (6) is assigned to a specific location as part of his or her appointment. Depending upon their location, knowledge of English or French, or both languages, is a requirement.

As judicial officers of the Federal Court, Prothonotaries are entitled to the full protections of judicial independence as established in *P.E.I. Judges Reference*, (*Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island,* [1997] 3 S.C.R. 3) *("PEI Judges Reference")* and this includes a periodic and independent review of their salaries and other benefits. My appointment as Special Advisor, on the joint recommendation of the parties, is therefore to conduct such a de novo review and to consider criteria including:

1. the nature of a Prothonotary's duties;
2. the salary and benefits of the appropriate comparator groups;

3. the prevailing economic conditions in Canada, including the cost of living, and the Federal Government's overall economic and current financial position;
4. the role of financial security in ensuring the Prothonotaries independence;
5. the need to attract outstanding candidates to the office of the Federal Court Prothonotory; and,
6. any other objective criteria that the Special Advisor considers relevant.

Thus, in this second independent review, I received written representations from the Government and from the Prothonotaries through their counsel and indeed, conducted hearings in Toronto on May 1 and 2, 2013, during which I heard viva voce evidence and full submissions. Given the delay in the commencement of this review, the time for the release of my Report was moved from May 30th to July 31, 2013.

My predecessor very thoroughly traced the Constitutional basis for the review process as well as the appointment and remuneration history as it relates to Prothonotaries, and accordingly I will not repeat that in this Report.

At the hearings in Toronto held on May 1 and 2, 2013, it was agreed that the Government would proceed first followed by the Prothonotaries. The Government was given an opportunity to reply. Submissions followed.

I should, at this point, mention that I received submissions from a number of interested parties and groups, including The Chief Justice of the Federal Court (who also gave evidence at the hearing in Toronto), the Chief Administrator, Courts Administration Service, ninety (90) senior members of the intellectual property bar in Toronto, Ottawa, Montreal and Vancouver, as well as from the Federal Court Bench and Bar Liaison Committee of the Canadian Bar Association. All of these submissions were in support of the Prothonotaries position and I am greatly indebted to them for their assistance.

The essential question for me is to determine whether the Prothonotaries' current remuneration, including salary and all benefits, is adequate to ensure the judicial independence to which they are entitled. All of this, of course, with an eye upon the other criteria in my terms of reference.

Needless to say I have, during this process, carefully reviewed the 2008 Report of my predecessor, however, I do agree with the Government that this should not be my starting point. I am mindful of what the Supreme Court of Canada has said in *Bodner v. Alberta*, [2005] 2 S.C.R. 286 that "each commission must make its assessment in its own context." So, while I consider the previous Report important background material, I make this Report entirely based upon my consideration of the evidence and submissions presented to me.

2. The Nature of the Duties of Prothonotaries

The nature of the role and the duties of Prothonotaries has been agreed upon by the parties in their agreed statement of facts which I append as an Exhibit to this report. Minor points of disagreement will be discussed later in the report. Given this agreement I will not spend further time on that portion of my mandate.

3. The Role of Financial Security in Ensuring the Prothonotaries Independence

As the Government has pointed out, "financial security is an essential characteristic of judicial independence" relying upon the decision in the *PEI Judges Reference.* This enables the Courts and its judges to be free from political interference. And of course, judicial independence is a cornerstone of any democratic society.

In order to ensure financial independence the *PEI Judges Reference* identified three components of financial security:

1. the requirement of an independent, objective and effective commission;
2. the avoidance of negotiations between the judiciary and the executive; and,

3. the requirement that judicial (here Prothonotaries) salaries not fall below a minimum level.

As the Supreme Court stated in the *PEI Judges Reference*:

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

Thus it falls upon me, as the Special Advisor to the Minister, to assess, objectively, what level of remuneration would allow "a reasonable and informed person" to conclude that Prothonotaries are independent and not susceptible to political pressure through economic manipulation (see *PEI Judges Reference*)

In undertaking this process I am mindful, as well, that I should not simply find one comparator to the exclusion of other relevant criteria. Accordingly, I have not only looked for comparator(s) but I have also carefully considered the work done by Prothonotaries within the context of the Federal Court as well as other criteria. In considering the work of the

Prothonotaries, I have carefully attempted to understand their full role in the functioning of the Federal Court and I have been greatly assisted by the various interveners, previously mentioned.

4. The Need to Attract Outstanding Candidates

No one can disagree with the notion that this office requires candidates of superior quality and how important it is that such people will be attracted. Salary alone, as many of us will attest, is not the sole factor in applying for judicial office.

Having said that, I am mindful that Prothonotaries are assigned to the four largest urban centres in Canada which unquestionably are the most expensive cities in which to live. And yet, as the Government has pointed out, in the most recent appointment process in 2007, forty-one applicants sought appointment as Prothonotaries. Following a rigorous screening process, eight candidates were identified and interviewed. This, they say, compares with the 2003 appointment process when seventy-one candidates applied. Interestingly, three of the most recently appointed Prothonotaries have come from major private sector law firms. What does concern me, however, is that the level of remuneration, including pension benefits, remain at a level so as not to become a disincentive for outstanding candidates, given the urban centres to which successful applicants will be assigned. Without doubt, for s.96 judges, the annuity is a major compensation related incentive, making up for what, in many cases, is a precipitous drop in

income. Pension benefits, in my view, are considerably less of an incentive for those seeking a Prothonotary position. More about pensions later.

After a careful consideration of the issue, I am concerned that Prothonotaries are falling behind, despite the current linkage to the salaries of Federal Court judges, when one considers some important comparators.

5. The Prevailing Eonomic Conditions in Canada (including cost of living, and the Federal Government's current financial position)

(a) The Government's position:

In spite of some recent improvement, the Government argues that the global economy remains fragile. Without question, the previous Report could not have been released at a more difficult economic time. Both parties acknowledge the significant deterioration of the global economy in 2008 and 2009. Indeed, the Federal Court of Appeal concluded that, in light of those circumstances, the Government's response was not unreasonable. Having so concluded, the Court of Appeal did urge the Government to give high priority to Prothonotaries' compensation "when economic conditions no longer require such sweeping public sector pay restraint. The current arrangements for their pensions and disability entitlement call for particularly prompt action." What then of our current economic position?

The Government says that while the Canadian economy has improved since the recession, the global economic outlook, particularly as it relates to Europe, is poor. They quote the January 2013 *World Economic Outlook Update* published by the International Monetary Fund, which stated:

> "Global growth is projected to increase during 2013, as the factors underlying soft global activity are expected to subside. However, this upturn is projected to be more gradual than in the October 2012 World Economic Outlook (WEO) projections. Policy actions have lowered acute crisis risks in the Euro area and the United States. But in the euro area, the return to recovery after a protracted contraction is delayed. While Japan has slid into a recession, stimulus is expected to boost growth in the near term. At the same time, policies have supported a modest growth pickup in some emerging market economies, although others continue to struggle with weak external demand and domestic bottlenecks. If crisis risks do not materialize and financial conditions continue to improve, global growth could be stronger than projected. However, downside risks remain significant, including renewed setbacks in the Euro area and risks of excessive near-term fiscal consolidation in the United States. Policy action must urgently address these risks."

The Government argues it is responding to these circumstances and is committed to returning to budgetary balance over the medium term. In doing so, the Department of Finance has noted:

> "In light of the uncertain global expenditures, meeting this objective will require ongoing diligence in restraining the growth of government expenditures. Recent actions taken to restrain the growth in expenditures include a two-year freeze of department operating budgets and the Government's review of departmental spending. Budget 2012 announced, as a result of this review, that the Government will reduce expenditures by $5.2 billion on an ongoing basis and eliminate approximately 19,200 positions from the public service."

They say that the planned reductions in departmental spending will eliminate approximately 12,000 Government positions over a three year period, including about 600 executive positions.

Accordingly, the Government argues that a reasonably objective person, in light of all this, would consider Prothonotaries' indexed salaries to be adequate. As was stated in the *PEI Judges Reference*, "nothing could be more damaging to the reputation of the judiciary and the administration of justice than a perception that judges were not shouldering their share of the burden in difficult economic times." Therefore the Government says while the salaries of six Prothonotaries could have little impact on the Federal Treasury in absolute terms, the perception of them receiving a significant increase at this time could be entirely negative.

(b) The Prothonotaries' Position:

The Prothonotaries recognize that I am bound to consider Canada's economic situation as I make my recommendations. However, relying upon the report dated April 15, 2013, from Professor Mario Seccareccia, a tenured professor of economics at the University of Ottawa who was retained to analyse and comment upon the Government's economic evidence, the Prothonotaries argue that Canada's current economic situation is actually quite positive. Some of the highlights of the professor's report are as follows:

- Despite the severity of the global recession of 2008, Canada weathered the financial crisis very well and has more than fully recovered from the recession in terms of some key economic indicators.
- While there remains continued uncertainties in the world economy, especially in the Eurozone, according to the Government's own forecasts, those disturbances are unlikely to be impacting much on the Canadian economy, since the bulk of our trading is within the NAFTA region (that is, with the U.S. and Mexico) that are showing more solid growth prospects, as well as China whose growth has continued at a healthy pace even during the international financial crisis.

- Prevailing economic conditions in Canada, as well as prospects for sustained growth, are positive and would hardly, in his opinion, necessitate restrictions on federal public spending that have been implemented in recent times.
- Without the austerity measures currently in place, budget balance would likely be reached a little later than the projected 2015-16 fiscal year, but there is absolutely no financial necessity to achieve a targeted budget balance within two years.
- Canada's public finances are in a very privileged position in the industrialized world with the lowest net-debt-to GDP ratio and the third lowest deficit-to-GDP ratio in the 2011, and together with Germany, fetches the highest credit rating vis-à-vis other industrialized countries in 2012.
- The federal Government's finances are as healthy as or more healthy than those of all the provinces.
- There is no evidence of across-the-board wage freezes or reductions envisaged by the Government. On the contrary, anecdotal evidence and recent trends in the rate of growth of average weekly earnings in the federal public sector indicate that the Government may make some remedial adjustments in salaries where conditions may warrant it.

As well the Prothonotaries point out that the net Federal Public debt in 2011 stood at 33.3% of GDP whereas at its peak in 1995 it was 70.7% and in 1997, the year of the *PEI Judges*

Reference, it was 64.7%. Recognizing that "equivalent treatment" is important to the public's impression of judicial independence, they urge that their compensation, which has fallen behind, ought to be adjusted before the imposition of restraints, something they say has occurred in other areas of the public service. Indeed the Prothonotaries point out that since the end of the *Expenditures Restraint Act* in 2011 the Government has not enacted measures to reduce or further limit salary increases in the public service. What the Government has done instead, they say, is to rely upon reductions in departmental spending through various efficiencies. In fact, they point out that the Government agreed to rather significant increases to the salaries of a number of groups within the federal public service including Crown Counsel and medical officers. These substantial increases allowed those groups to catch up and move closer to their various comparators. Therefore, they say, if I should find that Canada's economic prospects have improved and that we have recovered from the recession, then I ought to be mindful of the Federal Court of Appeal's admonition in which expressed its expectation that the Government would give "…high priority to the Prothonotaries compensation…".

Accordingly, it is argued on behalf of the Prothonotaries, that there is nothing in Canada's current economic condition that would justify allowing their remuneration to remain unchanged, even if a fair and reasonable level means a significant increase in the current level.

(c) The Government's Reply

As a response to Professor Seccareccia's report the Government called upon the Assistant Deputy Minister, Economic and Fiscal Policy Branch of the Department of Finance, Mr. Benoit Robidoux. In his letter dated April 22, 2013, Mr. Robidoux rejects the "sanguine" nature of Professor Seccareccia's report, stating that although Canada did weather the 2008-2009 recession better than many countries, the global economy remains fragile and poses a risk to Canada's economy. The return to a balanced budget, they say, is not politically motivated but rather something that is necessary to protect Canada's economy from future shocks and to avoid debt crises such as those experienced in Europe and the U.S.A.

Finally, they say it is irrelevant to discuss issues provided to other groups within the federal civil service as my mandate is to determine whether the current remuneration of Prothonotaries adequately ensures their judicial independence.

6. Analysis

In my view, based upon the evidence before me which I accept, Canada has indeed weathered the economic storms of 2008-2009 better than many countries. Canada's prudence in managing the economy has paid dividends such that we are now in much better shape, in relative terms, than many other countries. Are we out of the woods? Are we immune from economic shocks generated elsewhere? Of course we are not, however, in my view we are much better

poised to deflect such forces. Whether budget balance would occur over a slightly longer time frame, as Professor Seccareccia suggests, without the current measures is debatable. However, I see no inconsistency in adjusting Prothonotaries salaries now, while at the same time looking for greater efficiencies within the public service. To suggest increases to Crown Counsel and medical officers, as well as other groups, is not relevant, in my view misses the point. Clearly the Government was persuaded these salary levels were inadequate and required significant upward adjustment. Indeed rejecting the same argument advanced by the Government in the Military Judges Compensation Review, the majority report said it failed to recognize that, as with Prothonotaries, the present remuneration for Military Judges could not be considered adequate as it had never been recommended by an independent Commission. I agree with this. I am particularly attracted to the British Columbia Supreme Court decision in *Provincial Court Judges' Association of British Columbia v. Attorney General of British Columbia*, [2012] B.C.S.C. 1022, which, in agreeing with the JCC's rejection of the provincial government's attempt to rely on its "net-zero mandate" stated:

> "[78] PEI Judges Reference does not grant government a pass on its constitutional obligation, even in difficult economic times. The government reliance on the net-zero mandate cannot be permitted to trump the constitutional obligations applicable to setting judicial remuneration. The mandate is only a negotiating position for bargaining with public sector unions. Judges are not

> constitutionally permitted to participate in collective bargaining with government. The JCC understood that it was not bound by the net-zero mandate of government."

In my view the constitutional requirement concerning the setting of judicial remuneration (read Prothonotary) cannot be trumped by such things as a "net-zero mandate" or a return to budgetary balance by 2015-2016. What always must be in the forefront of these discussions is whether the Prothonotaries current remuneration is adequate even though it may be linked to that of Federal Court Judges. I have concluded it is not and requires a revision upward. I am satisfied on the basis of the evidence advanced that their salaries have not merely been consistently among the lowest of full time judicial officers in Canada but that the disparity has only intensified over the years. Clearly this was recognized by my predecessor, The Honourable George Adams, and only because of a devastating recession in 2008-2009 were his recommendations rejected.

7. Appropriate Comparators

(a) The Government's Position:

It is the Government's position that the most appropriate comparator group are members of the federal administrative tribunal community who are appointed by the Governor in Counsel. These generally are "GCQ-6" appointments which means, they have a recognition of independence and that because there is no "at risk" or performance pay, they are not beholden to

the Executive. It is agreed that these positions, such as the Vice Chair of the Canadian International Trade Tribunal, the Vice-Chair of the Canadian Human Rights Tribunal and the Executive Vice-Chair of the Parole Board of Canada, require attributes of adjudication very similar to those of the Prothonotaries. As well, it is agreed, these senior positions are relevant because they reflect the need to attract outstanding candidates. In terms of salary equivalency the Government submits that the leadership, adjudicative and administrative work of these senior public servants currently attracts a salary comparable to Prothonotaries. They argue that the skill sets required and the work undertaken in both positions are entirely similar. Granted, the Government says, individuals in the GCQ-6 group are not required to possess law degrees, however, in reality most of the incumbents in these positions are experienced lawyers.

(b) The Prothonotaries' Position:

The Prothonotaries argue that the position respecting a suitable comparator taken by the Government was rejected in the previous review by Special Advisor Adams. While in no way binding, I must consider his conclusions.

While quasi-Judicial Tribunals do perform an important role, the Prothonotaries argue that they simply lack the measure of judicial independence Prothonotaries enjoy. They submit the Government is free to set their compensation in any manner it chooses. Indeed, they say, they are part of the machinery of the Government. Rather, the Prothonotaries argue, their role is

entirely comparable to that of provincial Masters, but, as they say "with the notable exception the Prothonotaries also have full and substantial small and immediate claims trial jurisdiction." As a former Associate Chief Justice of the Ontario Superior Court of Justice, I have some familiarity with the role of Masters. While the Prothonotaries agree that they, like Masters in Ontario, British Columbia, Alberta and Manitoba, do not perform the same functions or possess the same jurisdiction as judges, they do work closely with their Court's judges. They have extensive case loads and in the words of Chief Justice Crampton, from his submissions dated April 19, 2013:

> "In short, the Prothonotaries' functions are entirely judicial in nature. Their decisions are typically entitled to deference. Their cases are assigned through the Office of the Judicial Administrator in the same manner as the cases that are assigned to Judges. They have trial jurisdiction for monetary amounts equivalent to or greater than the small claims jurisdiction of the provincial judiciary. They routinely deal with sophisticated legal counsel in a wide variety of areas of the law. They participate in all of the Court's ceremonial special sittings and are members of many of the Court's committees. They have access to the same resources as Judges, including Court's complement of law clerks. They attend many of the same internal and external education seminars as the Court's Judges. They wear robes that are very similar to those worn by the Court's Judges – only the colour

> of the trim differs. Their decisions often attract high profile media attention."

Accordingly, the Prothonotaries strongly suggest that their remuneration should continue to be a fixed percentage of that of Federal Court judges, recognizing "....the essential continuity and overlap in the work of the Court and the Judges greater jurisdiction." In this regard, the Prothonotaries point to the linkage between the salaries of Masters and provincially appointed judges in British Columbia, Alberta and Manitoba. This, they say, is clearly a reflection of the "importance, breadth, and complexity of the interlocutory and case management jurisdiction exercised by Masters...." which is "...comparable to that exercised by judges in the context of the civil, criminal and family jurisdiction of the Provincial Courts."

In that regard, they point to the *Report of the Manitoba Judicial Compensation Committee* dated April 19, 2002, (the "Freedman Commission Report) and *the Report and Recommendations of the 2009 Alberta Judicial Compensation Commission.*

Given that the Prothonotaries civil jurisdiction extends to monetary claims up to $50,000.00, which they describe as "small and intermediate claims" in the Federal Court, they argue their jurisdiction is really comparable to Provincial judges in Alberta and Quebec doing civil work and those salaries are the same as their other Provincial colleagues.

Finally, in this regard, the Prothonotaries argue that given the specialized jurisdiction of the Federal Court, their case management functions and their intermediate claims jurisdiction involving legally and factually complex matters, their compensation should be set accordingly. It is their position that Provincial judges, particularly in Alberta and Quebec, ought to be a useful comparable group given the comparable nature of the work undertaken, quite apart from any salary linkage that may exist between Masters and Provincial judges.

(c) The Government's Reply:

Repeating that the appropriate comparator should be members of the senior federal tribunal community, the Government argues that Provincial Masters are not an appropriate comparable because there was no "principled basis" for linking their salaries to Provincial judges. As to the submission that their work is that of a "small and intermediate claims" division of the Federal Court, the Government points to a number of provinces where small claims are dealt with on a modest per diem basis and that it would be unreasonable to isolate Quebec and Alberta as appropriate comparators.

8. Analysis and Recommendations

It is always a difficult exercise to find appropriate comparators in any given line of work. It is especially difficult here. While I recognize that the senior federal tribunal community does exercise broad adjudicative powers, albeit within their given areas, and while I, without question, recognize the high level of experience and the ability of those involved, I have difficulty accepting that this group in an appropriate comparator. Those involved in these important positions are usually appointed by the Government for a fixed term or at a salary level determined by the Government. The work done in these various tribunals, while specialized, is usually limited to a particular area of expertise whereas Prothonotaries are obliged to develop expertise in a wide variety of areas including intellectual property, admiralty, aboriginal law and immigration. Moreover, Prothonotaries are full judicial officers who enjoy the same immunity from liability as judges of the Federal Court. They hold office during good behaviour until age 75 and they exercise many of the same powers and functions as judges of the Federal Court. Indeed they have judicial independence. In areas of admiralty law and intellectual property, as well as in other areas, they are called upon to make important (and expensive) substantive decision. As already noted they have the full trial jurisdiction for monetary claims up to $50,000.00. And, I haven't even mentioned their important dispute resolution and case management functions. As Chief Justice Crompton has noted in his submission:

> "The Prothonotaries have also played an increasingly important role in helping to settle or mediate disputes, in assisting to streamline the number of issues in dispute and in reducing the length of trials before the Court. This has been critical in making more scarce judicial resources available to the Public."

I am indebted to the Chief Justice for his important insights. I do, however, agree with the Government that there has been a certain amount of "coat tailing" in some provinces and that some of the decisions to equate Masters' salaries in some provinces were done on a somewhat less than principled basis. Accordingly I cannot conclude that Quebec and Alberta Provincial judges who do civil work ought to be the true comparator. To me a more appropriate comparator ought to be Provincial Masters (not any remaining Ontario traditional Masters). While it is true, as my predecessor pointed out, that some Masters across Canada have benefitted from the push by Provincial Court judges for parity with Superior Court judges' salaries, the positions and the nature of their supportive work leads me to the conclusion that Masters in Alberta, British Columbia and Manitoba are a close comparator in terms of responsibilities undertaken. In fact, the best comparator may very well be the judges of the Federal Court. As Chief Justice Crampton has noted in his very helpful brief, Prothonotaries' functions are "entirely judicial in nature." I have previously quoted the Chief Justice regarding the importance of the role of the Prothonotary to the workings of the Federal Court. Who better than the Court's Chief Justice to inform me as to the nature of their work and how it permits the Court to function effectively.

Given the nature of the work they perform across a broad spectrum of important areas of the law, it is easy to understand why there should be a linkage between their salaries and those of Federal Court judges. I agree with the Prothonotaries that there is a significant overlap between their work and that of the Court's judges. They fully recognize that judges of the Court enjoy greater jurisdiction, nevertheless, in my view, based upon the evidence before me, there is here a principled reason for linking their salaries to that of Federal Court judges.

Before concluding with my recommendation, I would point out that Prothonotaries' salaries are currently fixed at 69% of Federal Court judges' salaries, effective April 1, 2000. As the Government has pointed out this salary has increased annually due to statutory indexation such that the salary as of March 1, 2013 reflects a 68% increase in salary since 2000, and with a further increase as of April 1, 2013 their current salary is $203,900.00.

After a careful consideration of the responsibilities of Prothonotaries, their status and of course the fact that they are judicial officers, I conclude and recommend that their salaries be fixed at 80% of the salaries of Federal Court judges. In saying that I am mindful that on judicial review of the Government's rejection of the Adam's recommendations MacKay D.J. concluded that only the extraordinary economic circumstances relied upon by the Government provided a reasonable basis for the rejection. I am also mindful that the Federal Court of Appeal held that the Government's response, given the circumstances, met the standards of the Bodnar test and

therefore was constitutional. The Court, however, did go on to note how the work of Prothonotaries was "integral to the administration of justice in the Federal Court," and assumed "that the Government (will) act in good faith, and will revisit the issues promptly and thoroughly when economic conditions improve." I also note that at 80% they will be in acceptable range of the salaries of Provincial and Territorial Masters in relation to Federal Court judges' salaries. Of course, I am mindful as well of the incomes of private sector lawyers appearing regularly before Prothonotaries and the importance of not allowing the disparity to impact upon the dignity of the office. This is also in line with the requirement set out in the *PEI Reference.*

Finally, I am of the view that this should be retroactive to April 1, 2012, and that this review should run until March 31, 2016, an end date with which the parties agree and which will mirror the period considered by the most recent Quadrennial Commission. Further reviews should correspond to that of Superior Court judges.

9. Pensions and Other Benefits

(a) The Government's Position:

The Government submits that the current pension plan enjoyed by the Prothonotaries is one of the best in Canada and therefore is more than adequate to protect their financial security. In his earlier report, Mr. Adams traced some of the history of the discussions surrounding judicial

pensions or annuities including the Beck Commission (1999) and the McLennan Commission (2004) in making the point that these are the most distinctive features of judicial compensation, reflecting a judicial officer's sui generis status. He concluded, upon the evidence presented, that the proper comparator for Prothonotaries' pensions are judicial annuities, not civil service plans. His reason essentially came down to judicial independence given that most judicial appointments occur in mid-to-late career which means that the peak earning years are forgone.

The Government takes another view, arguing that Canadian pension policy places the responsibility for pension planning in the hands of the individuals through various devices including Registered Retirement Savings Plans ("RRSP"). They assume that by the time a Prothonotary is appointed in mid-to-late career, he or she will have already made the necessary pension arrangements. To assist me in understanding the issue the government provided, once again, a report from Haripaul Pannu, an actuary, which developed a number of scenarios to provide examples of various pension entitlements. At its' essence, the Government position is that Prothonotaries should have maximized their pension opportunities prior to appointment, and if they had done so they would enjoy an adequate retirement financially once pre-appointment contributions are combined with the current plan. Prothonotaries' pensions, they argue, in order to be adequate, do not need to mirror judicial annuities. In other words it expects prudent retirement planning. Thus, they point to the example in Mr. Pannu's report where a Prothonotary appointed at age 44 who has maximized RRSP contributions both in the private

sector and as a member of the Public Service Superannuation Plan ("PSSP") would be able to retire at age 65 with an annuity equal to approximately 32.90 years of public service with a 6% rate of return. This more than adequate arrangement should not deter outstanding candidates from applying.

(b) The Prothonotaries' Position:

The Prothonotaries argue there is a constitutional imperative that judicial officers receive an adequate level of income protection during and after their term in office. The current pension benefit, they argue, does not meet a constitutional minimum. Currently the retirement benefits of Prothonotaries are fixed by s. 12(5) of the Federal Courts Act in which they are deemed to be employed in the public service and by which they earn a pension calculated at 2% of the average of the best 5 consecutive years of earnings multiplied by years of pensionable service, to the maximum of 70% of those average earnings. The benefit is then reduced by the amount of CPP/QPP for that service (the CPP/QPP offset). Part of the benefit (up to limits imposed by the Income Tax Act) is paid out of PSSP fund and the balance out of a retirement compensation arrangement (RCA) to enable the pension to be earned and paid based on all earnings. In essence, therefore, s. 12(5) of the Federal Courts Act deems Prothonotaries to be public servants to whom pension benefits are provided by way of the PSSP and the RCA. In their brief they illustrate the features of the current arrangement as follows:

(a) the maximum pension benefit under the arrangement, 70% of the average of 5 years' salary, can only be achieved after 35 years of work;

(b) pension accrual or accumulation ceases after age 71;

(c) only service in office to age 71 will be included in the benefit calculation;

(d) only salary in office to age 71 will be included in the calculation of the 5 year average;

(e) as a result, Prothonotaries who serve until age 75 will not see the last 4 years reflected in the benefit year which will be the highest earning years;

(f) the terms of the PSSP and the RCA may unilaterally be changed by the Government.

They point out that, indeed, the terms of the PSSP have recently been changed, first by an increase in annual member pension contributions and, secondly, by a change in the terms of the PSSP in respect of the years of pensionable service required for certain benefits as well as changes to the contribution rates for new contributors.

When questioned about these changes, the response received by the Prothonotaries has been that they are considered "deemed employees" under s. 12(5) of the Federal Courts Act and that accordingly no independent review of the changes is necessary. It is this precarious position the Prothonotaries say they find themselves in, leaving them susceptible to Government alterations without any independent oversight.

10. Analysis

In my view, the current pension arrangements enjoyed by the Prothonotaries are not appropriate for this group. These arrangements were designed for members of the public service as a benefit for those entering the service at a relatively young age, mindful of a long career. They are not adequate for judicial officers who are generally appointed mid to late career. Common sense tells me that a benefit which can only be earned to age 71 does not correspond with those appointed to age 75. By excluding the last 4 years of service from the formula is to deny Prothonotaries the benefit of the highest income years. As well it is unrealistic to think that Prothonotaries, other than those appointed from the public service, will ever achieve 35 years of service in order to receive a full pension. I completely reject the Government's position that pre-appointment RRSP contributions should form part of the mix. This position has been advanced elsewhere and rejected. As the British Columbia Supreme Court held in *Provincial Court Judges Association of British Columbia v. British Columbia* (A.G.) 2012, BCSC 1022 "....absent any empirical evidence respecting pre-appointment retirement savings of private lawyers, the government response is not legitimate." I have no compelling evidence from the Government that would lead me to a contrary conclusion. I agree with the Prothonotaries that the evidence of Haripaul Hannu is of little assistance in that

inappropriate assumptions are relied upon. More importantly, to me, the personal financial circumstances of those being appointed should not become part of the equation. In engaging the constitutional imperative to provide an adequate level of income protection both during and after a term of office, these considerations, it seems to me, are irrelevant. Indeed, the current pension arrangement was criticized by my predecessor in his report and I entirely agree with him. Even the Government in its response to Mr. Adam's report seemed to suggest that some modification was required, recognizing that these are mid-career, lifetime appointments. As well, the Federal Court of Appeal, in considering the decision of Mackay DJ stated: "the current arrangements for their (Prothonotaries) pensions and disability entitlement call for particularly prompt attention. Clearly the Prothonotaries' retirement benefits fall below the constitutional minimum and must be addressed. The delay must stop."

11. Recommendations

The pension entitlement of Prothonotaries should reflect their status as judicial officers. To do so does not mean it has to mirror that of judicial annuities. This is not what the Prothonotaries seek. What it must do is provide them with the constitutionally mandated income security following retirement. They are not members of the public service and their pension benefits should more or less accord with those of Masters across Canada. Simply extending the

2% accrual rate to age 75, in my view, is insufficient as it would still require 35 years to accumulate a full benefit. As I have already noted, given that the average age of appointment is 48.9 years, this makes no sense. Accordingly, I recommend the following:

(a) that Prothonotaries be eligible for full maximum retirement benefits after 20 years of service, taking into account all service from the date of appointment;

(b) that the maximum full benefit be the average of the 3 best consecutive years of salary, payable after 20 years in office (pro-rated for a shorter term in office) not integrated with CPP;

(c) if within a defined benefit arrangement that a 3.5% accrual rate be applied to the 3 year average salary. If through an annuity, then the maximum benefit be pro-rated for service less than 20 years;

(d) that Prothonotaries should continue to contribute the rate of 6.85% up to YMPE and 9.2% over YMPE as currently fixed effective January 1, 2013. Any future rate increases will be the subject of review within the overall compensation review process.

(e) that all other current provisions of the PSSP continue.

12. Disability

The Government, reflecting a recommendation in the Adam's Report, has proposed that the long term disability (LTD) benefits of Prothonotaries be extended to age 75. Currently these benefits terminate at age 65 which has put Prothonotaries in a most vulnerable position, given their appointment to age 75. It is not necessary for me here to outline the current arrangement in detail as it is carefully set out in the Prothonotaries' brief. As well, the Adam's Report highlights the deficiencies not only in the current sick leave regime but also as regards LTD. I believe the Government is alive to these deficiencies. The suggestion, however, that a Prothonotary over 65 who claims LTD would have to resign in order to receive LTD benefits is entirely inappropriate. It is simply too high a price to pay for quite obvious reasons. No other judicial officers are subject to such a limitation.

It would appear that the current levels of sick leave benefits provide reasonable protection for income loss. These, of course, should continue.

Accordingly, I recommend:

(a) that the Government amend the existing contract of insurance covering Prothonotaries or enter into a new contract providing that Prothonotaries are eligible for long term disability (LTD) to age 75 for the existing level of LTD as currently provided.

(b) That absence while in receipt of LTD, Prothonotaries would continue under current leave of absence without pay (LWOP) provisions so as to include the absence in pensionable service.

(c) That Prothonotaries continue to be entitled to 15 days of paid sick leave per fiscal year, accrued at the rate of 1 ¼ days for each month the appointee earned at least 10 days' pay with no limit on the total days accumulated. It is understood that the Chief Justice of the Federal Court may require a medical certificate to support a claim for sick leave.

(d) That at the discretion of the Chief Justice of the Federal Court, Prothonotaries may be granted up to 130 days of paid sick leave if they have not accumulated enough credits to cover an illness. This Special Sick Leave will be granted only once, will not be recovered from future sick leave credits, and must fulfill the following conditions:

(i) insufficient sick leave credits to cover the entire period;

(ii) all accumulated sick leave credits are exhausted;

(iii) may be granted in several periods as required depending upon progress towards recovery; and,

(iv) requires a medical certificate.

(e) that no compensation be paid for unused sick leave credits upon termination.

As these are highly important considerations, I agree with the Prothonotaries that the changes be implemented within 6 months of the date of the Government response to my report.

13. Annual Allowance

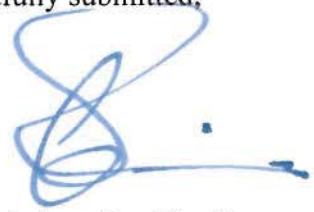
I agree with the Prothonotaries (and with Mr. Adam's earlier recommendation) that they should receive annually a non-taxable allowance of $3,000.00 to assist with the payment of dues for memberships in professional organizations, attendance at conferences and other expenses related to their work. This, I believe, will bring consistency to this area and avoid *ad hoc* decision making.

14. Representational Costs

I recognize that an *ex gratia* payment of $50,000.00 has been provided by the Government to assist the Prothonotaries with their costs during this review process. I accept that much of the work in preparing material for this review has been undertaken by the Prothonotaries themselves in an effort to limit cost. Nevertheless, I recognize that this *ex gratia* payment was intended to partially defray their costs and not as full indemnification. I recommend that the Government reimburse the Prothonotaries for all reasonable legal fees and costs beyond $50,000.00

previously advanced, up to a maximum of $80,000.00 (which includes the *ex gratia* payment). I am satisfied, given the amount of work they have done themselves, that their expenses have been prudently incurred. As Chief Justice Crampton has noted, by having to perform much of this work themselves, there has been a degree of disruption within the Court as many of their assignments had to be shifted to several judges of the Court causing the postponement of matters that would otherwise have proceeded. I recognize that Superior Court judges do not receive full indemnification. However, there are over 1000 of them and only 6 Prothonotaries. In that vein, military judges, a small group, received full indemnification in their review process.

Respectfully submitted,



(Original signed by The Honourable J. Douglas Cunningham, Q.C.)

The Honourable J. Douglas Cunningham, Q.C.

Special Advisor

Dated at Toronto, this 31st day of July, 2013.

IN THE MATTER OF AN INQUIRY
BY THE SPECIAL ADIVSOR ON
FEDERAL COURT PROTHONOTARIES' COMPENSATION

MARCH 2013

AGREED STATEMENT OF FACTS

OF THE PROTHONOTARIES OF THE FEDERAL COURT

AND THE GOVERNMENT OF CANADA

The parties agree to the facts as set out below. Either party may supplement these facts with additional evidence.

NATURE OF THE OFFICE & DUTIES OF THE OFFICE OF PROTHONOTARY

Federal Courts Act and *Federal Courts Rules*

Overview:

1. The Federal Court is a statutory court originally established in 1971 through the enactment of the *Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10. In 2003, the *Federal Courts Act*, R.S.C. 1985, c. F-7, was amended to separate the Federal Court of Canada into two separate courts. Pursuant to section 4 of the current *Federal Courts Act*, the Federal Court – Trial Division was continued as the Federal Court and is "an additional court of law, equity and admiralty in and for Canada, for the better administration of the laws of Canada and as a superior court of record having civil and criminal jurisdiction". Pursuant to section 3 of the *Federal Courts Act*, the Federal Court – Appeal Division is continued as the Federal Court of Appeal and is also a separate superior court of record.

2. The Federal Court is a bilingual court where proceedings may be conducted in either of Canada's official languages. The Federal Court is also a bi-juridical court, applying both the common law and civil law. It is a court with national jurisdiction, regularly sitting across Canada and issuing judgments with national force and effect.

3. The Federal Court's roots go back almost a century before by way of its predecessor, the Exchequer Court of Canada, which was established in 1875. The Exchequer Court originally had a very limited exclusive jurisdiction: revenue cases against the federal government, as well as shared jurisdiction (with the provincial courts) in actions by the government to enforce federal revenue law or in relation to any civil action at common law or in equity. Over time, its jurisdiction expanded to all litigation brought against the federal government, admiralty matters, tax, citizenship, as well as suits between citizens relating to industrial property like patents and trade marks. In 1960 it was given non-exclusive jurisdiction as a superior court of criminal jurisdiction for handling certain offences under the *Combines Investigation Act*.

4. The Federal Court inherited the Exchequer Court's jurisdiction in 1971, and acquired new powers including the power to review decisions of all federal boards, commissions or other tribunals. The *Federal Court Act* also gave jurisdiction in claims respecting aeronautics and inter-provincial undertakings, and in matters involving bills of exchange and promissory notes where the Crown is a party.

5. Section 4 of the *Federal Courts Act* constitutes the Federal Court as a court of equity. Although the Federal Court is a creature of statute, when the subject-matter is within its jurisdiction, the Court may exercise the powers and enforce the remedies available to a court of equity.

6. The jurisdiction of the Federal Court is conferred by Parliament and may be exclusive or concurrent with provincial superior courts.[1] Proceedings in the Federal Court include:

- Actions by the Crown and Crown agents;
- Actions against the Crown, Crown Servants and Corporations;
- Actions between private parties, in areas of federal jurisdiction;
- Applications for Judicial Review and references from Federal Boards and Tribunals;
- Applications under various statues, including the *Access to Information Act*, the *Privacy Act*, the *Patented Medicines (Notice of Compliance) Regulations (Food and Drug Act)*, the *Official Languages Act*, the *Canadian Human Rights Act*, and the *Commercial Arbitration Act*; and
- Appeals under various statutes, including the *Citizenship Act*, the *Customs Act* and the *Trade-marks Act*.

7. The substantive subject areas of litigation within Federal Court jurisdiction include:

- Administrative and Constitutional Law;
- Intellectual Property: patents, trade-mark, and copyright litigation and industrial designs;
- Pharmaceutical I.P- related proceedings;
- Maritime and Admiralty;
- First Nations;
- Immigration and Citizenship;
- National Security;
- Taxation;
- Employment;
- Access to Information;
- Civil and Contractual liability of the Crown and/or Crown agents;
- *Canadian Charter of Rights and Freedoms*; and
- Class Actions.

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[1] *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 12(1).

Office of Federal Court Prothonotary:

8. Pursuant to subsection 12(1) of the *Federal Courts Act*:

> The Governor in Council may appoint as prothonotaries of the Federal Court any fit and proper persons who are barristers or advocates in a province and who are, in the opinion of the Governor in Council, necessary for the efficient performance of the work of that court that, under the Rules, is to be performed by them.[2]

9. Subsection 12(6) provides Prothonotaries with "the same immunity from liability as a judge of the Federal Court." Prothonotaries "shall hold office during good behaviour but may be removed by the Governor in Council for cause"[3] and "shall cease to hold office on becoming 75 years old".[4]

10. The Federal Court of Appeal held in *Aalto v. Canada (Attorney General)*[5] that Prothonotaries are judicial officers performing judicial work of the Federal Court and are entitled to the same protections of judicial independence (financial security, administrative independence and security of tenure) as other judicial officers. On this point, the Court stated:

> Two fundamental questions are not in dispute. First, the work of the Prothonotaries is integral to the administration of justice in the Federal Court.... Second, Prothonotaries enjoy the constitutional guarantee of independence, including financial security, possessed by other judicial officers: judges

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[2] *Federal Courts Act*, s.12(1).
[3] *Federal Courts Act*, s.12(7).
[4] *Federal Courts Act*, s.12(8).
[5] *Aalto v. Canada (Attorney General)*, 2010 FCA 195 (CanLII).

> of superior and provincial courts, and masters. The rule of law requires nothing less. Accordingly, the constitutional principles on which the process for the determination of judges' compensation is based also apply to the Prothonotaries, including the requirement of a periodic review of their salaries and other benefits on the basis of recommendations from an independent process.[6]

11. The Government of Canada has accepted that as judicial officers, Prothonotaries are entitled to the protections of judicial independence established by the Supreme Court of Canada in *Reference Re PEI Judges*.[7]

12. The powers, duties and functions of Prothonotaries are determined by the *Federal Courts Rules*[8] and the *Federal Courts Immigration and Refugee Protection Rules*.[9] Section 72(2)(e) of the *Immigration and Refugee Protection Act*[10] provides that "no appeal lies from the decision of the Court with respect to the application or with respect to an interlocutory judgment."

13. Section 46(1) of the *Federal Courts Act* provides that "subject to approval by the Governor in Council, the Federal Courts Rules Committee may make rules and orders "empowering a prothonotary to exercise any authority or jurisdiction,

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[6] *Aalto v. Canada (Attorney General)*, 2010 FCA 195 at paras. 6-7.

[7] Response of the Minister of Justice to the Report of the Special Advisor on Prothonotaries' Compensation, February 11, 2009, citing *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3. The Federal Court website describes Prothonotaries as "full judicial officers": see http://cas-ncr-nter03.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Bio.

[8] *Federal Courts Act*, s.12(3).

[9] *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22, s.2 "Court".

[10] *Immigration and Refugee Protection Act*, S.C. 2001, c 27.

subject to supervision by the Federal Court, even though the authority or jurisdiction may be of a judicial nature".[11]

14. The *Federal Courts Rules* confers jurisdiction to Prothonotaries over a number of procedural and substantive matters.[12] Specifically, Rule 50(1) provides that:

> (1) A prothonotary may hear, and make any necessary orders relating to, any motion under these Rules other than a motion
>
> (*a*) in respect of which these Rules or an Act of Parliament has expressly conferred jurisdiction on a judge;
> (*b*) in the Federal Court of Appeal;
> (*c*) for summary judgment or summary trial other than
> (i) in an action referred to in subsection (2), or
> (ii) in respect of a claim referred to in subsection (3);
> (*d*) to hold a person in contempt at a hearing referred to in paragraph 467(1)(*a*);
> (*e*) for an injunction;
> (*f*) relating to the liberty of a person;
> (*g*) to stay, set aside or vary an order of a judge, other than an order made under paragraph 385(*a*), (*b*) or (*c*);
> (*h*) to stay execution of an order of a judge;
> (*i*) to appoint a receiver;
> (*j*) for an interim order under section 18.2 of the Act;
> (*k*) to appeal the findings of a referee under rule 163; or
> (*l*) for the certification of an action or an application as a class proceeding.

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[11] *Federal Courts Act*, s.46(1)(h).
[12] *Federal Courts Rules*, SOR/98-106, rule 50.

15. A Prothonotary may hear:

(a) an action exclusively for monetary relief, or an action *in rem* claiming monetary relief, in which no amount claimed by a party exceeds $50,000 exclusive of interest and costs;[13]

(b) a claim in respect of one or more individual questions in a class proceeding in which the amount claimed by a class member does not exceed $50,000 exclusive of interest and costs;[14] and

(c) an application under rule 327 for registration, recognition or enforcement of a foreign judgment.[15]

16. A Prothonotary may also render any final judgment that could be rendered by a judge of the Federal Court, except in a proceeding in respect of which an Act of Parliament expressly confers jurisdiction on a judge, if the prothonotary is satisfied that all of the parties that will be affected by the judgment have given their consent.

17. Other proceedings that are decided by Prothonotaries include:

- motions to strike and/or dismiss any proceeding as disclosing no reasonable cause of action, being frivolous, vexatious or an abuse of the Court's process[16] or for delay;[17]

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[13] *Federal Courts Rules*, rule 50(2).
[14] *Federal Courts Rules,* rule 50(3).
[15] *Federal Courts Rules*, rule 50(4).
[16] *Federal Courts Rules,* rule 220 for actions, inherent power of the Court for applications, see *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc. (C.A.)*, [1995] 1 F.C. 588.

- motions to amend any proceeding, including adding a party to a cause of action, even after the expiration of a limitation period;[18]

- motions to strike affidavits filed on the merits of an application or to grant or refuse leave for parties to file supplementary affidavits on the merits of applications (inherent power of the Court);[19]

- motions to order that parties be joined or removed from any proceeding, that proceedings be consolidated or severed or that claims be heard separately;[20]

- motions to grant or refuse leave to intervene in any proceeding;[21]

- motions to appoint a representative for unborn or unascertained person or persons under disability;[22]

- motions to grant default judgment in any amount, including for a declaration of rights;[23]

- motions to order a non-party to produce documents or be examined for discovery;[24]

- motions to issue letters of request for assistance of foreign courts (letters rogatory);[25]

- motions to order a tribunal to transmit certain materials to the Court in an application;[26]

- motions to make an order for the custody or preservation of property in a proceeding;[27]

- motions to make an order for the sale of property in a proceeding;[28]

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[17] *Federal Courts Rules*, rule 167.
[18] *Federal Courts Rules*, rules 76 and 77.
[19] See *P.S. Partsource Inc v Canadian Tire Corp* 2001 FCA 8, *Express File Inc. v. HRB Royalty Inc.*, 2004 FCA 341, Rule 312.
[20] *Federal Courts Rules*, rules 106 and 107.
[21] *Federal Courts Rules*, rule 109.
[22] *Federal Courts Rules*, rule 115.
[23] *Federal Courts Rules*, rule 210.
[24] *Federal Courts Rules*, rules 233 and 238.
[25] *Federal Courts Rules*, rule 272.
[26] *Federal Courts Rules*, rule 318.
[27] *Federal Courts Rules*, rule 377.
[28] *Federal Courts Rules*, rule 379.

- motions to determine any question of liability of a garnishee to a judgment debtor, or any question at issue between claimants to a debt attached, irrespective of the amount or source of the debt;[29]

- motions to make an order imposing an interim charge on real property or any interest in shares, bonds or other securities and make the said charging order absolute following a show cause hearing;[30]

- motions to determine the beneficial ownership of a vessel, for the purpose of an application to release ships under arrest;[31]

- motions to order the sale of vessels or other property arrested;[32]

- motions to make a substantive determination of the rights of all claimants to monies paid into court pursuant to the sale of a vessel, including liability, quantum, validity of security interest and priorities;[33]

- motions to make a substantive determination as to the rights of an innovator to list a patent on the Registry of Patents in respect to a medicine under the *Patented Medicines (Notice of Compliance)* [*PM (NOC)*] *Regulations*;[34]

- references, conducted as trials on damages to determine amounts payable in any amount.

19. Either Judges or Prothonotaries may be appointed to act as case management judges by the Chief Justice of the Federal Court to specially manage a proceeding.[35] In addition, section 45.1 of the *Federal Courts Act* provides that one Prothonotary is to be designated by the Chief Justice to act as a member of the Federal Courts Rules Committee.

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[29] *Federal Courts Rules*, rules 453 and 455.
[30] *Federal Courts Rules*, rules 458 and 459.
[31] *Federal Courts Rules*, rule 488.
[32] *Federal Courts Rules*, rule 490.
[33] *Federal Courts Rules*, rules 491 and 492.
[34] *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133, s. 6(5)(a).
[35] *Federal Courts Rules*, rule 383.

Current Prothonotaries of the Federal Court

20. There are currently six Prothonotaries. One Prothonotary presides at each of the Court's weekly General Sittings (motions court) in Montreal, Ottawa, Toronto and Vancouver (and regularly at General Sittings in other cities throughout Canada). In each of these four cities, one Prothonotary is also assigned every week to determine all motions in writing and requests for directions presented to the Court during that week that are within their jurisdiction in non-case-managed matters.

21. Prothonotaries case manage over 95 percent of all cases designated as specially managed proceedings before the Court, regardless of the value of the claim. Prothonotaries determine all interlocutory motions in those cases, except those that do not fall within their jurisdiction pursuant to Rule 50. They also hear and determine the majority of all trials and interlocutory motions for claims not exceeding $50,000.

22. Prothonotaries case manage all of the complex *Patented Medicines (Notice of Compliance)* ("*PM(NOC)*") proceedings before the Court from their inception. The proceedings have tripled since 2002. Intensive and timely case management is necessary to ensure that the case can be heard and determined by a judge within the 24-month period required by the regulations.[36]

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[36] *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133, s. 7.

23. Prothonotaries manage all actions in which the parties have asked for early trial dates to be set. This initiative of the Court, initially developed with the intellectual property bar for complex litigation and now extended to all actions, ensures that where possible, actions are tried within 24 months of their commencement. Timely, effective and efficient case management is essential to the attainment of this goal. Prothonotaries also conduct the vast majority of the dispute resolution conferences scheduled in case managed matters.

24. The Prothonotaries are members of various Federal Court committees established by the Court (for example, the Executive Committee, the Education Committee, and Bench and Bar Liaison Committees). They are also present at and participate in all Court meetings, seminars and social activities.

25. Upon (i) appointment and at the direction of the Chief Justice; and (ii) in response to the Office of the Conflict of Interest and Ethics Commissioner, Prothonotaries have undertaken in writing to abide by the *Ethical Principles for Judges* established by the Canadian Judicial Council.[37] The Conflict of Interest Commissioner has accepted that there are legitimate concerns as to the constitutionality of applying the *Conflict of Interest Act* to Prothonotaries as judicial officers, and has therefore exercised her discretion to accept the Prothonotaries' submission of a confidential report under section 22 of the *Conflict of Interest Act* together with an undertaking by the Prothonotaries to

[37] See: http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf.

continue to abide by the *Ethical Principles for Judges* as sufficient compliance with the *Conflict of Interest Act*.[38]

26. The Conflict of Interest Commissioner also recommended to Parliament that "prothonotaries of the Federal Court be excluded from the definition of public office holder and the application of the [Conflict of Interest] Act."[39] In support of this recommendation, the Conflict of Interest Commissioner stated:

> Judges who receive a salary under the *Judges Act* are excluded from the Act under subparagraph (*d*)(iv) of the definition "public office holder", but that exception is not extended to prothonotaries of the Federal Court, who are also appointed by Governor in Council. Even though the prothonotaries are not remunerated under the *Judges Act*, I believe that they should be excluded from the definition "public office holder" because of the nature of their judicial duties.
>
> In the circumstances, I have determined that it is sufficient for prothonotaries to adhere to the conflict of interest rules applicable to the judges of their court as an appropriate measure under section 29 of the Act by which they are to comply with the Act.

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[38] The 2011-2012 Annual Report in respect of the Conflict of Interest Act, June 21, 2012, p. 7-8, online: http://ciec-ccie.gc.ca/resources/Files/English/Public%20Reports/Annual%20Reports/Public%20Office%20Holders/2011-2012%20Annual%20Report%20Act.pdf.

[39] The Conflict of Interest Act: Five-Year Review, January 30, 2013, p. 14, online: http://ciec-ccie.gc.ca/resources/Files/English/Public%20Reports/Special%20Publications/Five-Year%20Review%20Act.pdf.

Response of the Minister of Justice to the Report of the Special Advisor on Federal Court Prothonotaries' Compensation

This is the Government's Response to the Report of the Special Advisor on Federal Court Prothonotaries' Compensation, received on July 26, 2013.

Background

Prothonotaries are judicial officers of the Federal Court (FC) appointed by the Governor in Council pursuant to the *Federal Courts Act*. They are presently deemed to be public servants for the purposes of the *Public Service Superannuation Act* (PSSA) and subject to the terms and conditions of employment applicable to all Governor in Council appointees. They hold office until the age of 75 and are removable only for cause. There are currently six prothonotaries.

As judicial officers, prothonotaries enjoy the protections of the *PEI Judges Case*, which established a requirement that compensation of judges and judicial officers must be subject to periodic review by an "independent, objective and effective" commission: *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; see also *Bodner v. Alberta*, 2005 SCC 44, [2005] 2 S.C.R. 286. The first review of prothonotaries' compensation was carried out by the Honourable George Adams in 2007-2008.

In October 2012, a second review process was established by Order in Council, and the Honourable Douglas Cunningham was appointed Special Advisor. In May 2013, Special Advisor Cunningham held a public hearing during which he received submissions from both the prothonotaries and the Government. He also received written submissions from various other individuals and organizations, including the Chief Justice of the Federal Court.

The Report of the Special Advisor was received by the Minister of Justice on July 26, 2013. A list of all his recommendations is attached at Annex 1. The two key recommendations are that 1) prothonotaries' salary be increased from 69% to 80% of the salary of a *puisne* Federal Court judge's salary (current salary would increase from $203,900 to $236,400); and 2) that prothonotaries be eligible for a maximum retirement benefit of 70% of salary after 20 years in office from the date of appointment as prothonotary, which would require an annual accrual rate of 3.5% (currently, the maximum retirement benefit is 70% of salary after 35 years of service, or 2% annual accrual).

Government Response

The Government has given the Special Advisor's Report and recommendations careful consideration. The Government will propose compensation improvements for the prothonotaries consistent with the objectives of ensuring adequacy of compensation appropriate to the nature of their judicial office and responsibilities. However, not all of the Special Advisor's recommendations will be implemented as proposed, for the following reasons.

In terms of salary, full implementation of the Special Advisor's recommendation would result in the prothonotaries being paid more than military judges whose current salary, also reviewed by a separate independent process, is 76% of that of a Federal Court judge. This would be neither fair nor reasonable in light of the weighty responsibilities that military judges bear in determining criminal matters affecting individual liberty and public safety. Accordingly, the Government will propose that prothonotaries' salaries be established at 76% rather than 80% of a Federal Court judge as the Special Advisor has recommended.

In terms of the pension recommendations, the Government has carefully examined alternative approaches to achieving the objectives of the Special Advisor's recommendations, given the high administrative costs of providing the recommended benefits under the Public Service Superannuation Act. More broadly, the Government is of the view that the separate administration of other aspects of prothonotaries' compensation entitlements, including periodic review of their compensation, is inefficient and duplicative.

For this reason, and to better recognize their status as judicial officers, the Government is proposing that prothonotaries' salaries and benefits be established under the *Judges Act*. The Act would provide that prothonotaries receive 76%, of a Federal Court judge's salary, effective April 1, 2012, inclusive of any adjustment for the loss of severance, which shall cease to accumulate as of that date. In addition, prothonotaries would be entitled to an annuity calculated in the same way as a judicial annuity based on the date of their appointment as a prothonotary, and would receive equivalent disability benefits, health and dental coverage. This said, current prothonotaries may opt to remain in the PSSA and continue to accrue service, and disability coverage, as currently provided. For clarity, the Government is not proposing that prothonotaries be entitled to elect supernumerary status.

The Special Advisor also made certain other recommendations, including in respect of incidental allowances and legal representational costs. The Government is not satisfied that adequacy of compensation requires that prothonotaries receive an annual incidental allowance of $3000. Of course all reasonable travel and related living expenses attendant to the exercise of the office of the prothonotary, including education and training costs, will continue to be paid.

The Government also does not regard the recommendation that the prothonotaries receive up to an additional $30,000 reimbursement for legal fees to be reasonable. The Government has already made a generous *ex gratia* payment in the amount of $50,000 and is of the view that this is appropriately supports their participation in the process.

For reasons of efficiency and to better recognize their status as judicial officers, the Government is further proposing that the prothonotaries be included in the *Judges Act* for purposes of *Judges Act* processes and administration. The adequacy of prothonotaries' compensation will in future be determined by the Judicial Compensation and Benefits Commission, rather than by a separate process. Complaints about prothonotaries' conduct will be dealt with under the established discipline processes administered by the Canadian Judicial Council. The overall day to day administration of prothonotaries' compensation, as well as travel and related expenses, will be assumed by the Office of the Commissioner for Federal Judicial Affairs. Their training and

education will be developed and delivered through the National Judicial Institute and other established institutions.

The Government wishes to thank Mr. Cunningham for his report. The Government also wishes to acknowledge the constructive participation of the prothonotaries throughout the current process.

February 27, 2014

Annex 1

Recommendations of Special Advisor Cunningham on **Federal Court Prothonotaries' Compensation**

Salary

Salary be set at 80% of the salary of a (puisne) Federal Court judge's salary, retroactive to April 1, 2012.

Pension

- That a prothonotary be eligible for a maximum retirement benefit after 20 years in office, taking into account all service from the date of appointment.
- Maximum full benefit be the average of the three best consecutive years of salary, payable after 20 years in office (pro-rated for a shorter term in office).
- If within a defined benefit arrangement that a 3.5% accrual rate be applied to the three-year average salary; if through an annuity, then the maximum benefit be pro-rated for service less than 20 years.
- Contribution rate set at 6.85% up to YMPE and 9.2% over YMPE, with future increases subject to the independent review process.
- Not integrated with CPP\QPP
- All other current provisions of the PSSP continue.

Sickness and disability

- Prothonotaries be eligible for long term disability to age 75 at level currently provided.
- Time spent in receipt of LTD benefits be counted as pensionable service.
- Continued entitlement to 15 days of paid sick leave per year, accrued at the rate of 1.25 days per month for each month the appointee earned at least 10 days' pay, with no limit on the total days accumulated.
- Chief Justice of the Federal Court may require medical certificate.
- At the discretion of the Chief Justice of the Federal Court, prothonotaries may be granted up to 130 days of paid sick leave, once in their career, if they have insufficient accumulated sick leave. All sick leave must be exhausted, a medical certificate is required, and it may be granted in several periods.
- No compensation will be paid for unused sick leave upon retirement/departure.

Allowances

Non-taxable annual allowance of $3,000.

Interest and Costs

Reimbursements of all reasonable legal fees and costs beyond the $50,000 previously advanced, up to a maximum of $80,000 (including the $50,000).

Periodic Review

Future reviews to track the timeframes of the quadrennial commission process.