IN THE MATTER OF THE 7TH QUADRENNIAL COMMISSION ON JUDICIAL COMPENSATION AND BENEFITS

BOOK OF DOCUMENTS OF THE ASSOCIATE JUDGES OF THE FEDERAL COURT

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Table of Contents

1. Hospira Health Corporation v. Kennedy Institute of Rheumatology, 2016 FCA 215	3
2. Ontario’s Fourth (1999) Triennial Report of the Provincial Judges Remuneration Commission (Beck Report)	45
3. Report of the Military Judges Compensation Committee, January 31, 2024	197
4. Courts Administration Service, Annual Report 2020-21	233
5. Courts Administration Service, Annual Report 2022-23	273
6. Federal Court, “Statistics (September 30, 2024)”	297
7. Penney v. The Minister of Public Safety Canada and Attorney General of Canada, 2016 FC 877	300
8. Report of the Second and Third Case Management Remuneration Commission, October 30, 2017	307
9. Leblanc v. R., 2011 CMAC 2	312

TAB 1

A-303-15
2016 FCA 215

Hospira Healthcare Corporation (*Appellant/Plaintiff*)

v.

The Kennedy Institute of Rheumatology (*Respondent/Defendant*)

and between

The Kennedy Trust for Rheumatology Research, **Janssen Biotech, Inc., Janssen Inc.** and **Cilag GmbH International** (*Respondents/Plaintiffs by Counterclaim*)

v.

Hospira Healthcare Corporation, **Celltrion Healthcare Co., Ltd.** and **Celltrion, Inc.** (*Appellants/Defendants by Counterclaim*)

Indexed as: Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology

Federal Court of Appeal, Nadon, Pelletier, Rennie, de Montigny and Gleason JJ.A.—Ottawa, April 15 and August 31, 2016.

Practice — Discovery — Examination for Discovery — Appeal from order of Federal Court dismissing appeal from order of Prothonotary limiting additional examination of witnesses to one half day per witness — Appellants seeking to invalidate '630 patent — Respondents terminating appellants' examination of patent's inventors after one day — Prothonotary satisfied that additional one half day per inventor sufficient to complete examinations — Whether motions Judge wrong in refusing to interfere with Prothonotary's order — Standard of review applicable to discretionary orders made by prothonotaries as set out in Canada v. Aqua-Gem Investments Ltd. reconsidered — Housen v. Nikolaisen standard should be adopted instead — No basis to conclude motions Judge ought to have interfered with Prothonotary's decision — Not entirely appellants' call to determine duration of examinations — In face of disagreement between parties, only Federal Court could make that determination — Circumstances, context forming parameters within which examinations must be conducted — Prothonotary keeping in mind those factors, Federal

A-303-15
2016 CAF 215

Corporation de soins de la santé Hospira (*appelante/demanderesse*)

c.

The Kennedy Institute of Rheumatology (*intimé/défendeur*)

et entre

The Kennedy Trust for Rheumatology Research, **Janssen Biotech, Inc., Janssen Inc.** et **Cilag GmbH International** (*intimées/demanderesses reconventionnelles*)

c.

Corporation de soins de la santé Hospira, **Celltrion Healthcare Co., Ltd.** et **Celltrion, Inc.** (*appelantes/défenderesses reconventionnelles*)

Répertorié : Corporation de soins de la santé Hospira c. Kennedy Institute of Rheumatology

Cour d'appel fédérale, juges Nadon, Pelletier, Rennie, de Montigny et Gleason, J.C.A.—Ottawa, 15 avril et 31 août 2016.

Pratique — Communication de documents et interrogatoire préalable — Interrogatoire préalable — Appel d'une ordonnance de la Cour fédérale rejetant l'appel à l'encontre d'une ordonnance de la protonotaire portant notamment que l'interrogatoire complémentaire de deux témoins par les appelantes serait limité à une demi-journée par témoin — Les appelantes ont introduit une action afin d'invalider le brevet '630 — Les intimés ont mis un terme à l'interrogatoire des inventeurs du brevet par les appelantes à la fin de la première journée — La protonotaire a estimé qu'il suffirait d'une demi-journée de plus par inventeur pour achever les interrogatoires — Il s'agissait de savoir si le juge des requêtes a eu tort de refuser d'infirmer ou de modifier l'ordonnance de la protonotaire — La norme de contrôle applicable aux ordonnances discrétionnaires des protonotaires formulée dans l'arrêt Canada c. Aqua-Gem Investments Ltd. a été réexaminée — La norme formulée dans Housen c. Nikolaisen devrait plutôt être adoptée — Rien ne permettait de conclure que le juge des requêtes aurait dû infirmer ou modifier l'ordonnance de la protonotaire — Il

2016 FCA 215 (CanLII)

Courts Rules, r. 3 in making impugned order — Appeal dismissed.

n'appartenait pas entièrement aux appelantes de décider de la durée de leurs interrogatoires — Étant donné le désaccord des parties, seule la Cour fédérale pouvait décider de cette durée — Les circonstances et le contexte forment les limites à l'intérieur desquelles les interrogatoires doivent être tenus — La protonotaire a gardé ces facteurs et la règle 3 des Règles des Cours fédérales à l'esprit en rendant l'ordonnance attaquée — Appel rejeté.

Judges and Courts — Standard of Review — Appellants seeking to invalidate patent — Respondents terminating appellants' examination of patent's inventors after one day — Prothonotary satisfied that additional one half day per inventor sufficient to complete examinations — Motions Judge applying Canada v. Aqua-Gem Investments Ltd. (Aqua-Gem) standard of review to dismiss appellants' appeal from Prothonotary's order — Finding reattendance of inventors, continued examination not vital to final issue of case, Prothonotary's order not clearly wrong — Whether Court should reconsider standard of review applicable to discretionary orders made by prothonotaries as set out in Aqua-Gem — Court should adopt Housen v. Nikolaisen standard with regard to discretionary decisions made by prothonotaries — No principled reason why there should be a different, more stringent standard of review for such decisions — Role of prothonotaries evolving since Aqua-Gem decided — Now performing essentially same task as Federal Court judges — Supervisory role of judges over prothonotaries no longer requiring that latter's discretionary orders be subject to de novo hearings — Aqua-Gem, Housen in effect same standards notwithstanding different language — No reason therefore not to apply to discretionary orders of prothonotaries standard applicable to similar orders by motions judges, i.e. Housen standard.

Juges et Tribunaux — Norme de contrôle — Les appelantes voulaient faire invalider un brevet — Les intimés ont mis un terme à l'interrogatoire des inventeurs du brevet par les appelantes à la fin de la première journée — La protonotaire a estimé qu'il suffirait d'une demi-journée de plus par inventeur pour achever les interrogatoires — Le juge des requêtes a appliqué la norme de contrôle formulée dans Canada c. Aqua-Gem Investments Ltd. (Aqua-Gem) pour rejeter l'appel formé par les appelantes à l'encontre de l'ordonnance de la protonotaire — Il a conclu que la nouvelle comparution des inventeurs et la poursuite de leur interrogatoire n'avaient pas d'influence déterminante sur l'issue de la cause, et que l'ordonnance de la protonotaire n'était pas entachée d'erreur flagrante — Il s'agissait de savoir si la Cour devrait réexaminer la norme de contrôle qui s'applique aux ordonnances discrétionnaires des protonotaires énoncée dans l'arrêt Aqua-Gem — La Cour devrait adopter la norme formulée dans Housen c. Nikolaisen à l'égard des décisions discrétionnaires rendues par les protonotaires — Il n'existe aucun motif fondé sur des principes d'appliquer une norme de contrôle différente et, en fait, plus rigoureuse à ces ordonnances — Le rôle des protonotaires a continué à évoluer depuis le prononcé de l'arrêt Aqua-Gem — Ils remplissent maintenant en fait les mêmes fonctions que les juges de la Cour fédérale — Le rôle de surveillance des protonotaires n'exige plus que les ordonnances discrétionnaires des protonotaires donnent lieu à des instructions de novo — La norme Aqua-Gem et la norme Housen, malgré les différences dans l'expression des idées sous-jacentes, sont en fait identiques — Par conséquent, il n'y a aucune raison pour laquelle la Cour ne devrait pas appliquer aux ordonnances discrétionnaires des protonotaires la norme applicable aux ordonnances de même nature rendues par des juges des requêtes, c.-à-d. la norme Housen.

This was an appeal from an order of the Federal Court dismissing the appellants' appeal from an order of a Prothonotary ordering, *inter alia*, that the additional examination of two witnesses by the appellants would be limited to one half day per witness.

Il s'agissait d'un appel d'une ordonnance de la Cour fédérale rejetant l'appel formé par les appelantes à l'encontre d'une ordonnance de la protonotaire portant notamment que l'interrogatoire complémentaire de deux témoins par les appelantes serait limité à une demi-journée par témoin.

The respondent The Kennedy Trust for Rheumatology Research (Kennedy) is the owner of patent number 2261630 ('630 patent). The appellant Hospira Healthcare Corporation (Hospira) commenced an action against Kennedy seeking, *inter alia*, declarations that the '630 patent was invalid and that Hospira's proposed product did not infringe it. The

L'intimée Kennedy Trust for Rheumatology Research (Kennedy) est la titulaire du brevet nº 2261630 (le brevet '630). L'appelante Corporation de soins de la santé Hospira (Hospira) a introduit contre Kennedy une action afin d'obtenir notamment des déclarations que le brevet '630 était invalide et que le produit qu'elle projetait de vendre ne le

2016 FCA 215 (CanLII)

appellants conducted a discovery of each of the two inventors of the '630 patent but the examinations were terminated by the respondents at the end of one day. Before the Prothonotary, the appellants sought to continue the examination of the inventors for one additional day per inventor. The Prothonotary was satisfied that an additional one half day per inventor would be sufficient to complete the examinations. In dismissing the appellants' appeal from the Prothonotary's order, the motions Judge applied the *Canada v. Aqua-Gem Investments Ltd.* (*Aqua-Gem*) standard of review, wherein the majority opinion stated that discretionary orders of prothonotaries ought not to be disturbed on appeal to a judge unless they are clearly wrong or they raise questions vital to the final issue of the case. Where such discretionary orders are clearly wrong or where they raise questions vital to the final issue of the case, a judge ought to exercise his own discretion *de novo*. The motions Judge found that the reattendance of the inventors and their continued examination was not vital to the final issue of the case, and that the Prothonotary's order was not clearly wrong. He emphasized that the Federal Court was reluctant to interfere with case-management decisions made by prothonotaries who were to be given "'elbow room'" in performing "a difficult job".

The respondents argued, *inter alia*, that discretionary decisions made by prothonotaries, vital or not to the final issue of the case, should not be subject to *de novo* review, but rather to the test adopted by the Supreme Court in *Housen v. Nikolaisen*, i.e. the standard of palpable and overriding error with respect to factual conclusions reached by a trial judge, and the standard of correctness with respect to questions of law and questions of mixed fact and law. The respondents stated that the compromise reached in *Aqua-Gem* to resolve the tension between the powers given to prothonotaries and those given to judges is no longer adequate in the present context. The respondents submitted that the Court should follow the decision in *Zeitoun v. Economical Insurance Group* (*Zeitoun*) wherein the Ontario Court of Appeal abandoned the equivalent of the *Aqua-Gem* standard in Ontario and held that the standard to be used in reviewing discretionary orders of masters should be the one enunciated in *Housen*.

At issue was whether the Court should reconsider the standard of review applicable to discretionary orders made by prothonotaries as set out in *Aqua-Gem*, and whether the

contrefaisait pas. Les appelantes ont procédé à l'interrogatoire préalable de chacun des deux inventeurs du brevet '630, mais les intimés ont mis un terme à l'interrogatoire à la fin de la première journée. Les appelantes ont déposé une requête devant la protonotaire afin d'obtenir l'autorisation de poursuivre l'interrogatoire des inventeurs, à raison d'une journée de plus pour chacun d'eux. La protonotaire a estimé qu'il suffirait d'une demi-journée de plus par inventeur pour achever les interrogatoires. En rejetant l'appel formé par les appelantes à l'encontre de l'ordonnance de la protonotaire, le juge des requêtes a appliqué la norme de contrôle formulée dans l'arrêt *Canada c. Aqua-Gem Investments Ltd.* (*Aqua-Gem*), où, selon l'opinion de la majorité, les ordonnances discrétionnaires des protonotaires ne doivent pas faire l'objet d'un appel devant un juge, à moins que l'ordonnance soit entachée d'une erreur flagrante ou qu'elle porte sur des questions ayant une influence déterminante sur l'issue du principal. Si l'ordonnance discrétionnaire est manifestement erronée ou si elle porte sur des questions ayant une influence déterminante sur l'issue du principal, le juge saisi du recours doit exercer son propre pouvoir discrétionnaire en reprenant l'affaire depuis le début. Le juge des requêtes a conclu que la nouvelle comparution des inventeurs et la poursuite de leur interrogatoire n'avaient pas d'influence déterminante sur l'issue de la cause, et que l'ordonnance de la protonotaire n'était pas entachée d'erreur flagrante. Il a insisté sur la réticence de la Cour fédérale à infirmer ou à modifier les décisions en matière de gestion des instances rendues par les protonotaires, dont le « travail difficile » exige qu'on leur laisse une « "liberté d'action" ».

Les intimés ont soutenu, entre autres, que les décisions discrétionnaires rendues par les protonotaires, qu'elles aient ou non une influence déterminante sur l'issue du principal, ne devraient pas être soumises à un examen *de novo*, mais plutôt au critère adopté par la Cour suprême dans l'arrêt *Housen c. Nikolaisen*, c.-à-d. à la norme de l'erreur manifeste et dominante applicable aux conclusions de fait d'un juge de première instance et à la norme de la décision correcte pour les questions de droit, et les questions mixtes de fait et de droit. Les intimés ont fait valoir que le compromis par lequel l'arrêt *Aqua-Gem* a voulu résoudre la tension entre les pouvoirs conférés aux protonotaires et ceux des juges ne répond plus aux besoins actuels. Ils ont soutenu que la Cour devrait s'aligner sur l'arrêt *Zeitoun v. Economical Insurance Group* (*Zeitoun*), où la Cour d'appel de l'Ontario a abandonné l'équivalent ontarien de la norme *Aqua-Gem* en Ontario et a établi que la norme de contrôle qu'il convenait dorénavant d'appliquer aux ordonnances discrétionnaires des protonotaires ontariens était celle que la Cour suprême a formulée dans l'arrêt *Housen*.

Il s'agissait de savoir si la Cour devrait réexaminer la norme de contrôle qui s'applique aux ordonnances discrétionnaires des protonotaires énoncée dans l'arrêt *Aqua-Gem* et si

2016 FCA 215 (CanLII)

motions Judge was wrong in refusing to interfere with the Prothonotary's order.

Held, the appeal should be dismissed.

The Court should adopt the *Housen* standard with regard to discretionary decisions made by prothonotaries as was done in respect of similar decisions made by judges of first instance in *Decor Grates Incorporated v. Imperial Manufacturing Group Inc.* (*Imperial Manufacturing*). There is continuing confusion in the Federal Court as to what constitutes an order that raises questions vital to the final issue of the case. The manner in which prothonotaries deal with a question is irrelevant in determining whether their orders are ones that raise questions vital to the final issue of the case. Unfortunately, this approach has been misunderstood by a number of judges of the Federal Court where a line of case law, also relying on *Aqua-Gem*, has taken the view that "it is not what was sought but what was ordered by the Prothonotary which must be determinative of the final issues in order for the judge to be required to undertake *de novo* review". The effectiveness of the process of appeals to a Federal Court judge from an order of a prothonotary has been tainted by the language used in *Aqua-Gem*. Confusion has crept in the process and has detracted from the effective review of discretionary orders made by prothonotaries. There is nothing in the legislation that prevents the Court from moving away from the *Aqua-Gem* standard and doing away with *de novo* review of discretionary orders made by prothonotaries in regard to questions vital to the final issue of the case. There appears to be no principled reason why there should be a different and, in effect, more stringent standard of review for discretionary orders made by prothonotaries.

It is entirely open to the Court to move away from the *Aqua-Gem* standard and replace that standard by the one set out by the Supreme Court in *Housen*. The standard of review set out in *Aqua-Gem* has been overtaken by a significant evolution and rationalization of standards of review in Canadian case law. The role of prothonotaries of the Federal Court has continued to evolve since *Aqua-Gem* was decided. For all intents and purposes, they now perform the same task as Federal Court judges. The supervisory role of judges over prothonotaries enunciated in rule 51 of the *Federal Courts Rules* no longer requires that discretionary orders of prothonotaries be subject to *de novo* hearings. Such orders should only be interfered with when they are incorrect in law or are based on a palpable and overriding error in regard to the facts.

le juge des requêtes a eu tort de refuser d'infirmer ou de modifier l'ordonnance de la protonotaire.

Arrêt : l'appel doit être rejeté.

La Cour devrait adopter la norme *Housen* à l'égard des décisions discrétionnaires rendues par les protonotaires comme cela a été fait relativement aux décisions de même nature prononcées par les juges de première instance dans l'arrêt *Decor Grates Incorporated c. Imperial Manufacturing Group Inc.* (*Imperial Manufacturing*). Il continue d'y avoir à la Cour fédérale de la confusion à propos du critère permettant d'établir si une ordonnance soulève des questions à influence déterminante sur l'issue du principal. La manière dont les protonotaires règlent les questions dont ils sont saisis n'est pas pertinente pour savoir si leurs ordonnances soulèvent des questions ayant une influence déterminante sur l'issue du principal. Malheureusement, ce point de vue a manifestement été mal compris par un certain nombre de juges de la Cour fédérale, où un courant jurisprudentiel, qui s'appuie aussi sur l'arrêt *Aqua-Gem*, part du principe que « ce n'est pas le recours présenté, mais plutôt l'ordonnance que le protonotaire rend qui doit avoir une influence déterminante sur l'issue du principal pour que le juge ait à examiner l'affaire *de novo* ». Le libellé employé dans l'arrêt *Aqua-Gem* a compromis l'efficacité de la procédure d'appel des ordonnances des protonotaires devant les juges de la Cour fédérale. Il s'est glissé dans la procédure une confusion qui nuit à l'efficacité du contrôle des ordonnances discrétionnaires rendues par les protonotaires. Aucune disposition légale n'interdit à la Cour de s'écarter de la norme *Aqua-Gem* et de supprimer l'examen *de novo* des ordonnances discrétionnaires des protonotaires qui portent sur des questions ayant une influence déterminante sur l'issue du principal. Il ne paraît exister aucun motif fondé sur des principes d'appliquer une norme de contrôle différente et, en fait, plus rigoureuse aux ordonnances discrétionnaires des protonotaires.

Il est tout à fait permis à la Cour de s'écarter de la norme *Aqua-Gem* et de remplacer cette norme par celle que la Cour suprême a formulée dans l'arrêt *Housen*. La norme de contrôle établie dans l'arrêt *Aqua-Gem* est maintenant dépassée par une évolution et une rationalisation marquées des normes de contrôle dans la jurisprudence canadienne. Le rôle des protonotaires de la Cour fédérale a continué à évoluer depuis le prononcé de l'arrêt *Aqua-Gem*. En pratique, ils remplissent maintenant les mêmes fonctions que les juges de la Cour fédérale. Le rôle de surveillance des protonotaires que confère aux juges la règle 51 des *Règles des Cours fédérales* n'exige plus que les ordonnances discrétionnaires des protonotaires donnent lieu à des instructions *de novo*. Ces ordonnances ne devraient être infirmées que lorsqu'elles sont erronées en droit, ou fondées sur une erreur manifeste et dominante quant aux faits.

2016 FCA 215 (CanLII)

The *Aqua-Gem* standard and the *Housen* standard, notwithstanding the different language used to convey the ideas behind the standards, are, in effect, the same standards. There is, therefore, no reason why the Court should not apply to discretionary orders of prothonotaries the standard applicable to similar orders by motions judges. As stated in *Imperial Manufacturing*, in the interests of simplicity and coherency, only the *Housen* standard of review should be used when reviewing discretionary, interlocutory orders of motions judges. Those remarks support the view that the *Housen* standard should also be applied to discretionary orders made by prothonotaries. In *Turmel v. Canada*, the Court appears to have moved beyond the *Housen* standard and formulated a different standard applicable to the review of discretionary orders of judges. However, introducing new language that finds no basis in *Housen* will have the opposite effect of what this Court intended to achieve in *Imperial Manufacturing*. Introducing new language detracts from simplicity and coherency and will give rise to a fresh line of arguments by counsel that will inevitably detract from the effective review of discretionary orders made by prothonotaries and judges.

La norme *Aqua-Gem* et la norme *Housen*, malgré les différences dans l'expression des idées sous-jacentes, sont en fait identiques. Par conséquent, il n'y a aucune raison pour laquelle la Cour ne devrait pas appliquer aux ordonnances discrétionnaires des protonotaires la norme applicable aux ordonnances de même nature rendues par des juges des requêtes. Comme il est énoncé dans *Imperial Manufacturing*, par souci de simplicité et de cohérence, seule la norme de contrôle *Housen* devrait être appliquée aux ordonnances interlocutoires discrétionnaires des juges des requêtes. Ces observations viennent manifestement au soutien de l'opinion que la norme *Housen* devrait aussi être appliquée aux ordonnances discrétionnaires des protonotaires. Dans l'arrêt *Turmel c. Canada*, la Cour semble s'être écartée de la norme *Housen* et avoir formulé une norme différente pour le contrôle des ordonnances discrétionnaires des juges. Cependant, l'introduction d'une nouvelle formulation, qui n'a pas de fondement dans l'arrêt *Housen*, ne peut qu'avoir un effet contraire à celui que la Cour visait dans l'arrêt *Imperial Manufacturing*. L'introduction d'un nouveau libellé ne peut qu'aller à l'encontre de la cohérence et de la simplicité, et inciter les avocats à élaborer une nouvelle argumentation de nature à compromettre inévitablement l'efficacité du contrôle des ordonnances discrétionnaires rendues par les protonotaires et les juges.

The *Housen* standard was also applied herein in deciding whether the motions Judge erred in law or made a palpable and overriding error in refusing to interfere with the Prothonotary's decision. There was no basis to conclude that the motions Judge ought to have interfered with the Prothonotary's decision. Contrary to the appellants' argument, the Prothonotary did not err in shifting the burden in regard to the examination process. It was not entirely the appellants' call to determine the duration of their examinations. In the face of a disagreement between the parties only the Federal Court could make that determination. To say, as the appellants did, that there was no limitation to their right of examination is incorrect. Circumstances and context matter greatly. They form the parameters within which examinations must be conducted. Prothonotaries and judges must therefore, in addressing and determining issues pertaining to discovery and examinations, keep those factors and rule 3 of the Rules in mind at all times. This is precisely what the Prothonotary did in making the impugned order. Finally, it is always relevant for motions judges to bear in mind that the case managing prothonotary is very familiar with the particular circumstances and issues of a case and that, as a result, intervention should not come lightly.

La norme *Housen* a également été appliquée en l'espèce à la question de savoir si le juge des requêtes a commis une erreur de droit ou une erreur manifeste et dominante en refusant d'infirmer ou de modifier la décision de la protonotaire. Rien ne permettait de conclure que le juge des requêtes aurait dû infirmer la décision de la protonotaire. Contrairement à ce qu'allèguent les appelantes, la protonotaire n'a pas commis d'erreur en déplaçant la charge en ce qui concerne l'interrogatoire. Il n'appartenait pas entièrement aux appelantes de décider de la durée de leurs interrogatoires. Étant donné le désaccord des parties, seule la Cour fédérale pouvait décider de cette durée. Les appelantes se sont trompées en affirmant que leur droit à l'interrogatoire était sans limites. Les circonstances et le contexte ont une grande importance. Ils forment les limites à l'intérieur desquelles les interrogatoires doivent être tenus. Les protonotaires et les juges appelés à examiner et à trancher les questions relatives à la communication et aux interrogatoires préalables doivent donc toujours garder ces facteurs et la règle 3 des Règles à l'esprit. C'est exactement ce que la protonotaire a fait en rendant l'ordonnance attaquée. Enfin, le juge des requêtes fera toujours bien de se rappeler que le protonotaire responsable de la gestion de l'instance connaît très bien les questions et les faits particuliers de l'affaire, de sorte que l'intervention ne doit pas être décidée à la légère.

2016 FCA 215 (CanLII)

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APPLIED:

Housen v. Nikolaisen, 2002 SCC 33, [2002] 2 S.C.R. 235; *Decor Grates Incorporated v. Imperial Manufacturing Group Inc.*, 2015 FCA 100, [2016] 1 F.C.R. 246; *Zeitoun v. Economical Insurance Group*, 2009 ONCA 415, 96 O.R. (3d) 639, affg 2008 CanLII 20996, 91 O.R. (3d) 131 (Div. Ct.).

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LOIS ET RÈGLEMENTS CITÉS

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2016 FCA 215 (CanLII)

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APPEAL from an order of the Federal Court (2016 FC 436) dismissing the appellants' appeal from an order of a Prothonotary ordering, *inter alia*, that the additional examination of two witnesses by the appellants would be limited to one half day per witness. Appeal dismissed.

APPEL d'une ordonnance de la Cour fédérale (2016 CF 436) rejetant l'appel formé par les appelantes à l'encontre d'une ordonnance de la protonotaire portant notamment que l'interrogatoire complémentaire de deux témoins par les appelantes serait limité à une demi-journée par témoin. Appel rejeté.

APPEARANCES

Warren Sprigings and *Mary McMillan* for appellants.
Marguerite Ethier, *Melanie Baird* and *James S.S. Holtom* for respondents.

ONT COMPARU

Warren Sprigings et *Mary McMillan* pour les appelantes.
Marguerite Ethier, *Melanie Baird* et *James S.S. Holtom* pour les intimés.

SOLICITORS OF RECORD

Sprigings Intellectual Property Law, Toronto, for appellants.

AVOCATS INSCRITS AU DOSSIER

Sprigings Intellectual Property Law, Toronto, pour les appelantes.

2016 FCA 215 (CanLII)

Lenczner Slaght Royce Smith Griffin LLP, Toronto, for respondents.

The following are the reasons for judgment rendered in English by

NADON J.A.:

I. Introduction

[1] Before us is an appeal of an order made by Mr. Justice Boswell of the Federal Court (the motions Judge) on June 18, 2015 [2016 FC 436] wherein he dismissed the appellants' appeal from the order of Madam Prothonotary Milczynski (the Prothonotary) rendered on April 17, 2015 pursuant to which she ordered, *inter alia*, that the additional examination of two witnesses by the appellants would be limited to one half day per witness by teleconference.

[2] By order of the Chief Justice, this appeal was heard by a panel of five judges. At issue is the question of whether this Court should revisit the standard of review applicable to discretionary orders made by prothonotaries enunciated in *Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425 (*Aqua-Gem*). The respondents invite us to abandon the standard of review set out in *Aqua-Gem* and to replace it by the standard enunciated by the Supreme Court of Canada in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (*Housen*). For the reasons that follow, it is my view that we should abandon the *Aqua-Gem* standard and adopt the one set out in *Housen*.

II. Facts

[3] The Kennedy Trust for Rheumatology Research (Kennedy), one of the respondents, is the owner of Patent No. 2261630 (the '630 patent) entitled "Anti-TNF Antibodies and Methotrexate in the Treatment of Autoimmune Disease". The two named inventors of this patent, Sir Ravinder Nath Maini (Dr. Maini) and Sir Marc Feldmann (Dr. Feldmann) (the inventors), are

Lenczner Slaght Royce Smith Griffin LLP, Toronto, pour les intimés.

Ce qui suit est la version française des motifs du jugement rendus par

LE JUGE NADON, J.C.A. :

I. Introduction

[1] La Cour est saisie d'un appel d'une ordonnance de la Cour fédérale [2016 CF 436] du 18 juin 2015 par laquelle le juge Boswell (le juge des requêtes) a rejeté l'appel formé par les appelantes à l'encontre d'une ordonnance de la protonotaire Milczynski (la protonotaire) du 17 avril 2015 portant notamment que l'interrogatoire complémentaire de deux témoins par les appelantes serait limité à une demi-journée par témoin et serait tenu par visioconférence.

[2] Par ordre du juge en chef, le présent appel a été instruit par une formation de cinq juges. La question à laquelle il nous faut répondre ici est celle de savoir si notre Cour devrait réexaminer la norme de contrôle applicable aux ordonnances discrétionnaires des protonotaires qui est formulée dans l'arrêt *Canada c. Aqua-Gem Investments Ltd.*, [1993] 2 C.F. 425 (*Aqua-Gem*). Les intimés nous invitent à abandonner la norme de contrôle exposée dans l'arrêt *Aqua-Gem* pour la remplacer par la norme qu'a énoncée la Cour suprême du Canada dans l'arrêt *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235 (*Housen*). Pour les motifs dont l'exposé suit, j'estime que nous devrions abandonner la norme *Aqua-Gem* et adopter la norme *Housen*.

II. Les faits

[3] La Kennedy Trust for Rheumatology Research (Kennedy), l'une des intimées, est la titulaire du brevet n° 2261630 (le brevet '630), intitulé « Anticorps anti-facteur de nécrose tumorale et méthotrexate dans le traitement des maladies auto-immunes ». Les deux inventeurs nommés dans ce brevet, sir Ravinder Nath Maini (M. Maini) et sir Marc Feldmann (M. Feldmann),

2016 FCA 215 (CanLII)

2016 FCA 215 (CanLII)

retired and live in the United Kingdom. They are respectively 79 and 71 years old.

collectivement désignés les « inventeurs », sont à la retraite et habitent le Royaume-Uni. Ils sont respectivement âgés de 79 et de 71 ans.

[4] On March 6, 2013, the appellant Hospira Healthcare Corporation (Hospira) commenced an action against Kennedy seeking, *inter alia*, declarations that the '630 patent was invalid and that Hospira's proposed product did not infringe the '630 patent.

[4] Le 6 mars 2013, l'une des appelantes, la Corporation de soins de la santé Hospira (Hospira), a introduit contre Kennedy une action afin d'obtenir notamment des déclarations que le brevet '630 était invalide et que le produit qu'elle projetait de vendre ne le contrefaisait pas.

[5] On October 4, 2013, Kennedy and the other respondents, namely Janssen Biotech, Inc., Janssen Inc. and Cilag GmbH International counterclaimed against Hospira and the other appellants, namely Celltrion Healthcare Co., Ltd. and Celltrion, Inc. seeking, *inter alia*, declarations that the '630 patent was valid and that the appellants had infringed or induced infringement of the '630 patent.

[5] Le 4 octobre 2013, Kennedy et les autres intimées, à savoir Janssen Biotech, Inc., Janssen Inc. et Cilag GmbH International, ont déposé contre Hospira et les autres appelantes, soit Celltrion Healthcare Co., Ltd. et Celltrion, Inc., une demande reconventionnelle afin d'obtenir notamment des déclarations que le brevet '630 était valide et que les appelantes l'avaient contrefait ou avaient incité à sa contrefaçon.

[6] In May 2014, the appellants conducted a discovery of each of the two inventors—in London for Dr. Maini and in New York for Dr. Feldmann where he happened to be travelling. However, the appellants were unable to complete the examinations. Prior to the examinations, counsel for the appellants had requested two days of discovery for each of the inventors, but that request had been refused by counsel for the respondents whose view was that one day for each inventor was sufficient. Consequently, at the end of the first day, the examination of each inventor was terminated by the respondents.

[6] En mai 2014, les appelantes ont procédé à l'interrogatoire préalable de chacun des deux inventeurs — à Londres dans le cas de M. Maini, et à New York en ce qui concerne M. Feldmann, qui se trouvait alors à y séjourner. Cependant, elles n'ont pu achever ces interrogatoires. Avant ceux-ci, les avocats des appelantes avaient demandé deux journées d'interrogatoire préalable pour chacun des inventeurs, mais les avocats des intimés avaient rejeté cette demande, estimant qu'une journée pour chaque inventeur suffirait. Par conséquent, les intimés ont mis un terme à l'interrogatoire de chacun des inventeurs à la fin de la première journée.

[7] On July 31, 2014, the appellants brought a motion seeking, among other things, to continue the examination of the inventors, at their own expense, for one additional day per inventor. The appellants sought to examine the inventors in Toronto.

[7] Le 31 juillet 2014, les appelantes ont déposé une requête afin d'obtenir notamment l'autorisation de poursuivre l'interrogatoire des inventeurs à leurs propres frais, à raison d'une journée de plus pour chacun d'eux. Elles demandaient en outre à interroger les inventeurs à Toronto.

III. Decisions Below

III. Les décisions des instances inférieures

A. *Order of the Prothonotary*

A. *L'ordonnance de la protonotaire*

[8] The appellants' motion was heard in Toronto on March 10, 2015 by the Prothonotary who had been case

[8] La requête des appelantes a été instruite à Toronto le 10 mars 2015 par la protonotaire chargée de la

managing the action from the outset. On April 17, 2015, she ordered that "Hospira and Celltrion shall complete the examination of each of Dr. Feldmann and Dr. Maini in one-half day (each), which examinations shall be conducted by teleconference, unless otherwise agreed to by the parties" (paragraph 6 of her order).

gestion de l'action depuis le début. Le 17 avril 2015, elle a ordonné, au paragraphe 6 de sa décision : [TRADUCTION] « Hospira et Celltrion achèveront les interrogatoires de M. Feldmann et de M. Maini en une demi-journée chacun et, sauf accord des parties, elles tiendront ces interrogatoires par visioconférence ».

B. *Order of the Motions Judge*

B. *L'ordonnance du juge des requêtes*

[9] On June 18, 2015, the motions Judge dismissed the appellants' appeal from the Prothonotary's order. Applying the standard of review set out in *Aqua-Gem*, the motions Judge stated that the re-attendance of the inventors and their continued examination was not vital to the final issue of the case, and that the Prothonotary's order was not clearly wrong. He emphasized that the Federal Court was reluctant to interfere with case-management decisions made by prothonotaries who were to be given "'elbow room'" in performing "a difficult job" (paragraph 4 of his order).

[9] Le 18 juin 2015, le juge des requêtes a rejeté l'appel formé par les appelantes à l'encontre de l'ordonnance de la protonotaire. Appliquant la norme de contrôle formulée dans l'arrêt *Aqua-Gem*, il a conclu que la nouvelle comparution des inventeurs et la poursuite de leur interrogatoire n'avaient pas d'influence déterminante sur l'issue de la cause, et que l'ordonnance de la protonotaire n'était pas entachée d'erreur flagrante. Il a insisté sur la réticence de la Cour fédérale à infirmer ou à modifier les décisions en matière de gestion des instances rendues par les protonotaires, dont le « travail difficile » exige qu'on leur laisse une « "liberté d'action" » (paragraphe 4 de l'ordonnance du juge des requêtes).

[10] The motions Judge concluded that the Prothonotary had properly exercised her discretion and that she had rendered "not only a focused decision but a reasonable one as well" (paragraph 5 of his order). He further held that the motion before him was of "questionable necessity or merit" and that it "undermine[d] the objectives of the case management system" (paragraph 6 of his order).

[10] Le juge des requêtes a conclu au paragraphe 5 de son ordonnance que la protonotaire avait valablement exercé son pouvoir discrétionnaire et qu'elle avait rendu « non seulement une décision ciblée, mais une décision raisonnable ». Il a ajouté (au paragraphe 6 de son ordonnance) que « la nécessité ou le mérite de la requête [dont il était saisi] étaient pour le moins discutables » et que celle-ci portait atteinte aux « objectifs du système de gestion des instances ».

IV. Issues

IV. Les questions en litige

[11] The appeal raises the two following questions:

[11] Le présent appel soulève les deux questions suivantes :

i. Should this Court reconsider the standard of review applicable to discretionary orders made by prothonotaries, as set out in *Aqua-Gem*?

i. Notre Cour devrait-elle réexaminer la norme de contrôle qui s'applique aux ordonnances discrétionnaires des protonotaires énoncée dans l'arrêt *Aqua-Gem*?

2016 FCA 215 (CanLII)

ii. Was the motions Judge wrong in refusing to interfere with the Prothonotary's order?

ii. Le juge des requêtes a-t-il eu tort de refuser d'infirmer ou de modifier l'ordonnance de la protonotaire?

V. Parties' Submissions

V. Les thèses des parties

A. *Appellants' Submissions*

A. *La thèse des appelantes*

(1) Standard of Review

1) La norme de contrôle

[12] The appellants say that the standard of review applicable to discretionary decisions made by prothonotaries is the one set out by this Court in *Aqua-Gem*, as reiterated by the Supreme Court in *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27, [2003] 1 S.C.R. 450 (*Pompey*), at paragraph 18. The appellants further say that the standard of review on appeal to this Court with respect to questions of law is correctness and palpable and overriding error in regard to findings of fact.

[12] Les appelantes soutiennent que la norme de contrôle applicable aux décisions discrétionnaires des protonotaires est celle que notre Cour a formulée dans l'arrêt *Aqua-Gem* et que la Cour suprême a reprise au paragraphe 18 de l'arrêt *Z.I. Pompey Industrie c. ECU-Line N.V.*, 2003 CSC 27, [2003] 1 R.C.S. 450 (*Pompey*). Elles ajoutent que la norme de contrôle applicable en appel devant notre Cour est celle de la décision correcte pour ce qui concerne les questions de droit, et celle de l'erreur manifeste et dominante relativement aux conclusions de fait.

(2) Merits of the Appeal

2) Le bien-fondé de l'appel

[13] The appellants argue that the motions Judge erred in that he allowed the respondents to thwart their right to examination for discovery under subsection 237(4) of the *Federal Courts Rules*, SOR/98-106 (the Rules) which provides that "[w]here an assignee is a party to the action, the assignor may also be examined for discovery." There is no dispute between the parties that the inventors, as assignors of the patent at issue, can be examined by the appellants under the Rule.

[13] Les appelantes soutiennent que le juge des requêtes a commis une erreur en permettant aux intimés de porter atteinte au droit à l'interrogatoire préalable au paragraphe 237(4) des *Règles des Cours fédérales*, DORS/98-106 (les Règles), qui dispose : « Lorsqu'un cessionnaire est partie à l'action, le cédant peut également être soumis à un interrogatoire préalable. » Les parties conviennent que les inventeurs, en tant que cédants du brevet en litige, peuvent être interrogés par les appelantes en vertu de cette disposition.

[14] Contrary to the motions Judge's view [at paragraph 2] that the "re-attendance [of the inventors] will only serve to provide historical context", the appellants point to the other purposes of inventor discovery and say that there is no requirement that the examining party demonstrate, *a priori*, "any necessity in examining the assignor or specifically set out what the assignor's examination will add to the litigation" (paragraph 39 of the appellants' memorandum). According to the appellants, since there is no limitation to the right of examination of an assignor, the burden of establishing that the

[14] Contestant l'opinion du juge des requêtes selon laquelle [au paragraphe 2] la « nouvelle comparution [des inventeurs] servira au mieux à fournir un contexte historique », les appelantes soulignent les autres objets de l'interrogatoire préalable des inventeurs et avancent que la partie interrogatrice n'est nullement tenue d'établir *a priori* [TRADUCTION] « la nécessité d'interroger un cédant ni de préciser en quoi son interrogatoire sera utile au litige » (paragraphe 39 du mémoire des appelantes). Selon les appelantes, comme le droit d'interroger un cédant n'est pas assorti de limites, la charge d'établir

2016 FCA 215 (CanLII)

examination is "oppressive, vexatious or unnecessary" falls on the person being examined, i.e. in this case the respondents. In the appellants' view, the Prothonotary wrongly shifted the burden in that she required the appellants to justify the necessity of their examination of the inventors.

que l'interrogatoire est « abusif, vexatoire ou inutile » repose sur la partie interrogée, c'est-à-dire, en l'espèce, les intimés. Selon les appelantes, la protonotaire a déplacé à tort la charge en ce qu'elle a exigé qu'elles justifient la nécessité d'interroger les inventeurs.

[15] The appellants contend that "[t]he 'elbow room' of case management does not confer on a prothonotary the ability to disregard the Rules" (paragraph 46 of the appellants' memorandum). Indeed, the deference that ought to be afforded in such a case is not without limits. The appellants are of the view that the decision relied on by the motions Judge, namely *Sawridge Band v. Canada*, 2006 FCA 228, [2006] 4 C.N.L.R. 279 (*Sawridge*), is clearly distinguishable from the case before us because of factual differences. The appellants argue that had the motions Judge performed the same review of the merits of the Prothonotary's order as the Court did in *Sawridge*, he would have concluded that the Prothonotary's order was clearly wrong.

[15] Toujours selon les appelantes, [TRADUCTION] « la "liberté d'action" afférente à la gestion de l'instance ne confère pas aux protonotaires la faculté de ne pas tenir compte des Règles » (paragraphe 46 du mémoire des appelantes). En fait, la déférence qui convient dans un tel cas n'est pas illimitée. Les appelantes estiment que l'on doit établir une distinction avec l'arrêt sur lequel s'est appuyé le juge des requêtes, à savoir *Bande de Sawridge c. Canada*, 2006 CAF 228 (*Sawridge*), en raison de différences dans les faits. Si le juge des requêtes avait effectué le même examen du bien-fondé de l'ordonnance de la protonotaire que notre Cour avait fait dans l'arrêt *Sawridge*, affirment les appelantes, il aurait conclu que l'ordonnance était entachée d'erreur flagrante.

[16] The appellants further submit that "a case management prothonotary cannot prioritize expedience over a right conferred by the Rules" (paragraph 59 of the appellants' memorandum), and say that this is what the Prothonotary did by limiting the duration and manner of the discovery sought by them without a determination that the examination was abusive or otherwise improper. The Prothonotary erred, say the appellants, by permitting the respondents to arbitrarily end their examination of the inventors and thus the motions Judge ought to have intervened.

[16] Les appelantes font en outre valoir, au paragraphe 59 de leur mémoire, que [TRADUCTION] « le protonotaire chargé de la gestion d'une instance ne peut préférer ce qui est pratique à un droit que prévoient les Règles »; or, affirment-elles, c'est précisément ce que la protonotaire a fait en restreignant la durée et la forme de l'interrogatoire préalable qu'elles demandaient sans conclure d'abord que celui-ci était abusif ou irrégulier pour une autre raison. La protonotaire, soutiennent les appelantes, a commis une erreur en permettant aux intimés de mettre arbitrairement fin à leur interrogatoire des inventeurs, de sorte que le juge des requêtes aurait dû intervenir.

[17] Turning to the manner in which examinations for discovery ought to be conducted, the appellants insist that the default rule is that examinations are done in person, and that an order that examinations be conducted by video-conference is an exceptional remedy that must be justified by the party seeking it. The appellants contend that the Prothonotary also prejudged the relevance of questions that had yet to be asked by limiting the examinations of the inventors to one half day each.

[17] Pour ce qui est de la façon dont les interrogatoires préalables devraient avoir lieu, les appelantes maintiennent que la règle exige en principe la présence physique des témoins, et qu'une ordonnance prescrivant la tenue de tels interrogatoires par visioconférence constitue une mesure exceptionnelle et qu'il incombe à la partie qui la demande de la justifier. La protonotaire, ajoutent les appelantes, a également préjugé de la pertinence des questions qu'il restait à poser en limitant à une demi-journée chacun les interrogatoires des inventeurs.

2016 FCA 215 (CanLII)

2016 FCA 215 (CanLII)

[18] The appellants further say that the Prothonotary misapprehended the facts of the case, because there was no evidence that the examinations were abusive or that the inventors were unable to attend in person for one day each. In addition, the issues for discovery were too vast, in the appellant's opinion, to be covered in the timeframe ordered by the Prothonotary.

B. *Respondents' Submissions*

(1) Standard of Review

[19] The respondents invite this Court to reconsider the standard of review applicable to discretionary orders made by prothonotaries. They say that such orders should be reviewed according to the *Housen* standard rather than the prevailing *Aqua-Gem*/*Pompey* standard which, in their view, is manifestly wrong and should be abandoned.

[20] The respondents argue that the *de novo* review of prothonotaries' decisions that are vital to the final outcome of the case is irreconcilable with the presumption of fitness and that there is "no compelling reason for adopting differing standards of review on appeal depending solely on the place in the judicial hierarchy occupied by the first-instance decision maker" (paragraphs 33 and 34 of the respondents' memorandum).

[21] The respondents also point out that, in *Pompey*, the Supreme Court merely reiterated the standard enunciated by this Court in *Aqua-Gem* without further explanation. According to the respondents, *Housen* is the Supreme Court's definitive word on the standard of review and is binding on this Court.

[22] Moreover, the respondents assert that the *Aqua-Gem*/*Pompey* standard is fraught with uncertainty because the question of whether an issue is vital or not is difficult to answer and requires a case-by-case assessment. Conversely, the respondents say that the *Housen* standard is easy to apply. Finally, the respondents say that decisions made by prothonotaries with respect to the merits of actions of less than $50 000 are already

[18] La protonotaire a mal apprécié les faits de l'espèce, soutiennent en outre les appelantes, puisqu'aucun élément de preuve ne démontrait que les interrogatoires étaient abusifs ou que les inventeurs étaient incapables de se présenter en personne pour une séance d'une journée chacun. Enfin, les questions devant faire l'objet des interrogatoires étaient trop vastes, selon les appelantes, pour qu'on puisse les couvrir dans le peu de temps accordé par la protonotaire.

B. *La thèse des intimés*

1) La norme de contrôle

[19] Les intimés invitent notre Cour à réexaminer la norme de contrôle des ordonnances discrétionnaires des protonotaires. Ils affirment que la norme énoncée dans l'arrêt *Housen* devrait s'appliquer plutôt que la norme *Aqua-Gem*/*Pompey* en usage, qui, selon eux, est manifestement erronée et devrait être abandonnée.

[20] Les intimés avancent que l'examen *de novo* des décisions des protonotaires ayant une influence déterminante sur l'issue de la cause est incompatible avec la présomption d'aptitude et qu'il n'existe [TRADUCTION] « aucune raison convaincante d'adopter pour le contrôle en appel des normes différentes selon la place qu'occupe le décideur de première instance dans la hiérarchie judiciaire » (paragraphes 33 et 34 du mémoire des intimés).

[21] Les intimés font également observer que la Cour suprême, dans l'arrêt *Pompey*, s'est contentée de répéter sans autre explication la norme formulée par notre Cour dans l'arrêt *Aqua-Gem*. Selon eux, c'est l'arrêt *Housen* qui constitue le dernier mot de la Cour suprême sur la norme de contrôle et qui est contraignant pour notre Cour.

[22] De plus, soutiennent les intimés, la norme *Aqua-Gem*/*Pompey* se révèle génératrice d'incertitude, étant donné que la question de savoir si une question a ou non une influence déterminante est difficile à trancher et exige un examen au cas par cas. En revanche, ajoutent-ils, la norme *Housen* est d'application facile. Enfin, les intimés font valoir qu'on applique déjà la norme *Housen* aux décisions rendues par les protonotaires sur le

reviewed on the *Housen* standard. In any event, the respondents say that, other than in respect of the *de novo* review for vital issues, the *Aqua-Gem*/*Pompey* and the *Housen* standards are, in effect, the same.

bien-fondé d'actions mettant en jeu au plus 50 000 $. Quoi qu'il en soit, disent les intimés, mis à part l'examen *de novo* des questions ayant une influence déterminante, les normes *Aqua-Gem*/*Pompey* et *Housen* sont en fait identiques.

(2) Merits of the Appeal

2) Le bien-fondé de l'appel

[23] With respect to the merits of the appeal, the respondents say that the appellants are simply re-arguing in this appeal what they have already argued before the Prothonotary and the motions Judge. As the issue before us is not one that is vital to the outcome of the case, the respondents say that the appellants are in error when they argue that the motions Judge should have substituted his discretion for that of the Prothonotary.

[23] Concernant le bien-fondé du présent appel, les intimés affirment que les appelantes ne font qu'avancer devant notre Cour les arguments qu'elles ont déjà exposés à la protonotaire et au juge des requêtes. Comme la question portée devant nous n'a pas d'influence déterminante sur l'issue de la cause, soutiennent-ils, les appelantes se trompent en faisant valoir que le juge des requêtes aurait dû substituer son pouvoir discrétionnaire à celui de la protonotaire.

[24] Relying on rule 3 of the Rules, the respondents say that discovery "is not a never ending process" and that it should be proportionate. The respondents further say that the Federal Court properly managed its process according to this principle. In addition, the respondents assert that a case management judge has the power to make any order that is necessary for the just determination of the proceedings, including by dispensing compliance with a Rule. By granting the Prothonotary some "elbow room", the motions Judge deferred to her factually-based decision in accordance with *Sawridge*.

[24] Se référant à la règle 3 des Règles, les intimés font observer que la communication préalable [TRADUCTION] « n'est pas une procédure de durée illimitée » et doit être proportionnée. La Cour fédérale, ajoutent-ils, a fixé avec raison sa procédure suivant ce principe. En outre, les intimés font valoir que le juge responsable de la gestion d'une instance dispose du pouvoir de rendre toute ordonnance nécessaire au juste règlement de l'instance, y compris en dérogeant aux Règles. En accordant à la protonotaire une certaine « liberté d'action », le juge des requêtes a fait preuve de retenue à l'égard de sa décision fondée sur des faits, conformément à l'arrêt *Sawridge*.

[25] The respondents also say that the purposes of examining an inventor for discovery are limited and that restricting inventor discovery in this case to one-and-a-half day per inventor does not cause prejudice to the appellants. Finally, the respondents emphasize that, absent the issuance of letters rogatory, they do not have the power to compel the two inventors to re-attend because they are residents of the United Kingdom. In this context, they submit that it was appropriate for the Prothonotary to order that they should be examined by way of teleconference.

[25] Les intimés font également valoir que l'interrogatoire préalable d'un inventeur a un objet limité et que le fait de limiter l'interrogatoire préalable en l'espèce à une journée et demie par inventeur ne porte pas préjudice aux appelantes. Enfin, ils soulignent que, sauf commission rogatoire, ils n'ont pas le pouvoir de contraindre les deux inventeurs à se présenter de nouveau, puisqu'ils habitent le Royaume-Uni. Pour cette raison, il était légitime de la part de la protonotaire d'ordonner que leur interrogatoire se tienne par visioconférence.

2016 FCA 215 (CanLII)

VI. Analysis

A. *Should this Court Reconsider the Standard of Review of Discretionary Decisions Made by Prothonotaries?*

[26] At the outset, I must say that as the order made by the Prothonotary that gives rise to the present appeal is not one that is vital to the final outcome of the case, a determination of whether or not the standard of review should be revisited is in no way determinative of this case. As the respondents have argued, there does not appear to be, other than in respect of the *de novo* review when the issue is vital, any substantial difference between the *Aqua-Gem*/*Pompey* standard and the *Housen* standard. Both standards, in my respectful opinion, simply formulate the same principles through the use of different language.

[27] In effect, under the *Aqua-Gem*/*Pompey* standard, a discretionary decision made by a prothonotary is clearly wrong, and thus reviewable on appeal by a judge, where it is based: (1) upon a wrong principle—which implies that correctness is required for legal principles—and (2) upon a misapprehension of facts—which seems to be the equivalent of the "overriding and palpable error" criterion of the *Housen* standard if it caused the Prothonotary's decision to be "clearly wrong".

[28] Notwithstanding, I have no doubt that the question of the standard of review applicable to discretionary decisions of prothonotaries is one that needs to be revisited. It is my opinion that we should now adopt the *Housen* standard with regard to discretionary decisions made by prothonotaries as we have done in respect of similar decisions made by judges of first instance (in *Decor Grates Incorporated v. Imperial Manufacturing Group Inc.*, 2015 FCA 100, [2016] 1 F.C.R. 246 (*Imperial Manufacturing*), to which I will return later). Needless to say, the issue of the standard of review applicable to orders of both judges and prothonotaries has been one of the most contentious issues before our Court and before all courts of appeal, including before the Supreme Court of Canada, in the last 10 to 15 years. It is my respectful view that it is not in the interests of justice to

VI. Analyse

A. *Notre Cour devrait-elle réexaminer la norme de contrôle applicable aux ordonnances discrétionnaires des protonotaires?*

[26] Il faut noter dès l'abord que, l'ordonnance de la protonotaire visée par le présent appel ne tranchant pas une question déterminante sur l'issue de la cause, le fait de décider s'il convient ou non de réexaminer la norme de contrôle ne réglera nullement le sort de l'affaire. Comme l'ont constaté les intimés, il ne semble pas y avoir, hormis l'examen *de novo* lorsque la question en litige a une influence déterminante, de différence substantielle entre la norme *Aqua-Gem*/*Pompey* et la norme *Housen*. Les deux normes, à mon avis, ne font que formuler en termes différents les mêmes principes.

[27] En fait, suivant la norme *Aqua-Gem*/*Pompey*, la décision discrétionnaire d'un protonotaire est entachée d'erreur flagrante, et ouvre donc droit à l'intervention d'un juge en appel, lorsqu'elle se fonde 1) sur un mauvais principe — d'où il suit qu'elle doit être correcte en ce qui concerne les questions de droit — ou 2) sur une mauvaise appréciation des faits — critère qui semble correspondre à celui de l'« erreur manifeste et dominante » de la norme *Housen* si cette mauvaise appréciation a eu pour effet d'entacher la décision d'une « erreur flagrante ».

[28] Néanmoins, il ne fait pour moi aucun doute qu'il convient de réexaminer la question de la norme de contrôle applicable aux décisions discrétionnaires des protonotaires. J'estime que nous devrions maintenant adopter la norme *Housen* à l'égard des décisions discrétionnaires rendues par les protonotaires comme nous l'avons fait relativement aux décisions de même nature prononcées par les juges de première instance (dans l'arrêt *Decor Grates Incorporated c. Imperial Manufacturing Group Inc.*, 2015 CAF 100, [2016] 1 R.C.F. 246 (*Imperial Manufacturing*), auquel je reviendrai plus loin). Inutile de dire que la question de la norme de contrôle applicable aux ordonnances des juges et des protonotaires est l'une des plus contestées devant notre Cour et devant toutes les cours d'appel, y compris la Cour suprême du Canada, depuis 10 ou 15 ans. À mon

2016 FCA 215 (CanLII)

continue with a plurality of standards when one standard, i.e. the *Housen* standard, is sufficient to deal with the review of first instance decisions.

(1) The *Aqua-Gem* Test and Why It Should Be Changed

[29] In *Aqua-Gem*, decided in 1993, our Court enunciated the standard which, until now, has been applied to review discretionary decisions made by prothonotaries. Until this appeal, *Aqua-Gem* was the last time when a panel of five judges of this Court heard an appeal. It was an important issue then and remains so today.

[30] The matter giving rise to the appeal in *Aqua-Gem* was a motion brought by the respondent for an order staying the proceedings under paragraph 50(1)(b) of the *Federal Courts Act*, R.S.C., 1985, c. F-7 or, in the alternative, dismissing the proceedings for want of prosecution pursuant to then rule 440. The motion was heard by the Associate Senior Prothonotary (the Senior Prothonotary) who dismissed it. The Senior Prothonotary's decision was appealed to a motions judge who disagreed with him and, who, as a result, set his order aside, with costs.

[31] The issue before our Court in *Aqua-Gem* was whether all discretionary decisions made by prothonotaries should be reviewed by way of *de novo* hearings, which our Court's decision in *Canada v. Jala Godavari (The)* (1991), 40 C.P.R. (3d) 127 (*The Jala Godavari*) seemed to suggest, or whether such decisions should be reviewed for error only in some or all cases.

[32] Three opinions were given in *Aqua-Gem*. Chief Justice Isaac (the Chief Justice) opined both on the standard of review and with regard to the merits of the appeal. Robertson J.A. opined on the merits only and MacGuigan J.A., with whom Mahoney J.A. and

avis, il ne serait pas dans l'intérêt de la justice de maintenir plusieurs normes pour le contrôle des décisions de première instance alors qu'une seule, à savoir celle de l'arrêt *Housen*, suffit à cette fin.

1) Le critère *Aqua-Gem* et la raison pour laquelle il devrait être changé

[29] Notre Cour a formulé dans son arrêt *Aqua-Gem*, prononcé en 1993, la norme appliquée jusqu'à maintenant au contrôle des décisions discrétionnaires des protonotaires. L'arrêt *Aqua-Gem* était jusqu'au présent appel la dernière occasion où une formation de cinq juges de notre Cour avait instruit un appel. La question examinée était importante alors et elle l'est encore aujourd'hui.

[30] L'appel *Aqua-Gem* trouvait son origine dans une requête de l'intimée afin d'obtenir une ordonnance portant suspension de l'instance en vertu de l'alinéa 50(1)b) de la *Loi sur les Cours fédérales*, L.R.C. (1985), ch. F-7, ou, subsidiairement, une ordonnance portant rejet de l'action pour défaut de poursuivre sous le régime de la règle 440 des Règles de l'époque. Cette requête a été instruite par le protonotaire adjoint, qui l'a rejetée. La décision du protonotaire adjoint a été portée en appel devant un juge des requêtes, qui s'est trouvé en désaccord avec lui et qui a par conséquent annulé son ordonnance, avec dépens.

[31] La question que notre Cour devait trancher dans l'affaire *Aqua-Gem* était celle de savoir s'il convenait de contrôler par voie d'instruction *de novo* toutes les décisions discrétionnaires rendues par les protonotaires, ce que semblait donner à penser l'arrêt *Canada c. Jala Godavari (Le)*, [1991] A.C.F. nº 1047 (C.A.) (QL) (*Jala Godavari*), ou si ces décisions n'étaient susceptibles de contrôle que pour erreur, dans certains cas ou dans tous les cas.

[32] Trois séries de motifs ont été rendus dans l'arrêt *Aqua-Gem*. Le juge en chef Isaac (le juge en chef) s'est prononcé aussi bien sur la norme de contrôle que sur le bien-fondé de l'appel. Le juge Robertson s'est exprimé sur le bien-fondé seulement, tandis que le

2016 FCA 215 (CanLII)

Décary J.A. agreed, addressed both the standard of review and the merits of the appeal.

[33] The first opinion, given by the Chief Justice, concluded that the standard of review enunciated in *The Jala Godavari* was incomplete and that, in relying on that decision, the motions Judge had erred in interfering with the Senior Prothonotary's decision. In coming to this view, the Chief Justice carefully examined the legislative underpinnings of the role of prothonotaries and the nature of the functions which they were expected to perform. This led him to say, at page 441, that:

> 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.

[34] The Chief Justice then proceeded to consider the history and evolution of the law concerning the office of master in Canada and in England. More particularly, he examined both English and Ontario cases with regard to the standard of review pursuant to which decisions made by masters were to be reviewed. That examination led him to conclude that the approach taken by the Ontario Court of Appeal in *Stoicevski v. Casement* (1983), 43 O.R. (2d) 436 (*Stoicevski*) was the proper approach and the one that this Court should follow. At page 454 of his reasons, the Chief Justice formulated the standard which, in his view, this Court should adopt in reviewing discretionary decisions of prothonotaries. He put it as follows:

> I am in agreement with counsel for the appellant that the proper standard of review of discretionary orders of prothonotaries in this Court should be the same as that which was laid down in *Stoicevski* for masters in Ontario. I am of the opinion that such orders ought to be disturbed on appeal only where it has been made to appear that
>
> (a) they are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts, or

juge MacGuigan, à l'opinion duquel ont souscrit les juges Mahoney et Décary, a examiné à la fois la question de la norme de contrôle et le bien-fondé de l'appel.

[33] Selon les premiers motifs, ceux du juge en chef, la norme de contrôle formulée dans l'arrêt *Jala Godavari* était incomplète, et le juge des requêtes, s'étant fondé sur elle, avait commis une erreur en annulant la décision du protonotaire adjoint. Dans l'analyse qui l'a mené à cette conclusion, le juge en chef a soigneusement examiné les assises légales du rôle des protonotaires et la nature des fonctions qui leur sont confiées. Il a formulé à ce propos les observations suivantes, à la page 441 :

> Il est hors de doute qu'en créant les fonctions de registraire ou protonotaire de la Cour de l'Échiquier et de protonotaire de notre Cour, le législateur avait à l'esprit le soutien que les protonotaires assuraient aux juges des cours supérieures, avant et après le jugement, dans les systèmes judiciaires d'Angleterre et de l'Ontario, lesquels faisaient un large usage de ces auxiliaires de la justice.

[34] Le juge en chef a ensuite étudié l'histoire et l'évolution du droit relatif à la fonction de protonotaire au Canada et en Angleterre. Il a ainsi notamment examiné des affaires aussi bien anglaises qu'ontariennes au sujet de la norme de contrôle applicable aux décisions des protonotaires. Il a conclu de cet examen que le point de vue le plus juste était celui qu'avait exposé la Cour d'appel de l'Ontario dans l'arrêt *Stoicevski v. Casement* (1983), 43 O.R. (2d) 436 (*Stoicevski*), et il invitait notre Cour à l'adopter. Le juge en chef a formulé dans les termes suivants, à la page 454 de ses motifs, la norme qu'il convenait selon lui que notre Cour applique au contrôle des décisions discrétionnaires des protonotaires :

> Je conviens avec l'avocat de l'appelante que la norme de révision des ordonnances discrétionnaires des protonotaires de cette Cour doit être la même que celle qu'a instituée la décision *Stoicevski* pour les protonotaires de l'Ontario. J'estime que ces ordonnances ne doivent être révisées en appel que dans les deux cas suivants :
>
> a) elles sont manifestement erronées, en ce sens que l'exercice du pouvoir discrétionnaire par le protonotaire a été fondé sur un mauvais principe ou sur une fausse appréciation des faits,

2016 FCA 215 (CanLII)

(b) in making them, the prothonotary improperly exercised his discretion on a question vital to the final issue of the case.

[35] On the basis of this standard of review, the Chief Justice concluded that there were no grounds justifying the motions Judge's interference with the order of the Senior Prothonotary. Hence, the Chief Justice would have allowed the appeal.

[36] The second opinion, the majority opinion, was that of MacGuigan J.A. who accepted the Chief Justice's recitation of the facts and agreed, in part, with his opinion concerning the standard of review. He reformulated the standard of review which this Court ought to apply to discretionary orders made by prothonotaries in the following way at pages 462 and 463:

I also agree with the Chief Justice in part as to the standard of review to be applied by a motions judge to a discretionary decision of a prothonotary. Following in particular Lord Wright in *Evans v. Bartlam*, [1937] A.C. 473 (H.L.) at page 484, and Lacourciere J.A. in *Stoicevski v. Casement* (1983), 43 O.R. (2d) 436 (Div. Ct.), discretionary orders of prothonotaries ought not to be disturbed on appeal to a judge unless:

(a) they are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts, or

(b) they raise questions vital to the final issue of the case.

Where such discretionary orders are clearly wrong in that the prothonotary has fallen into error of law (a concept in which I include a discretion based upon a wrong principle or upon a misapprehension of the facts), or where they raise questions vital to the final issue of the case, a judge ought to exercise his own discretion *de novo*. [Footnote omitted.]

[37] After explaining that *The Jala Godavari* should not be understood as having decided that judges should never defer to a prothonotary's discretion, but rather that whenever the question at issue was vital to the final issue of the case, the Prothonotary's discretion was subject

b) le protonotaire a mal exercé son pouvoir discrétionnaire sur une question ayant une influence déterminante sur la solution des questions en litige dans la cause.

[35] Se fondant sur cette norme de contrôle, le juge en chef a conclu que rien ne justifiait l'annulation de l'ordonnance du protonotaire adjoint par le juge des requêtes, de sorte qu'il aurait accueilli l'appel.

[36] Les deuxièmes motifs, majoritaires, étaient ceux du juge MacGuigan, qui a souscrit au rappel des faits donné par le juge en chef et, en partie, à son avis sur la norme de contrôle. Il a reformulé dans les termes suivants, aux pages 462 et 463, la norme de contrôle à appliquer par notre Cour aux ordonnances discrétionnaires des protonotaires :

Je souscris aussi en partie à l'avis du juge en chef au sujet de la norme de révision à appliquer par le juge des requêtes à l'égard des décisions discrétionnaires de protonotaire. Selon en particulier la conclusion tirée par lord Wright dans *Evans v. Bartlam*, [1937] A.C. 473 (H.L.) à la page 484, et par le juge Lacourcière, J.C.A., dans *Stoicevski v. Casement* (1983), 43 O.R. (2d) 436 [C.A. Ont.], le juge saisi de l'appel contre l'ordonnance discrétionnaire d'un protonotaire ne doit pas intervenir sauf dans les deux cas suivants :

a) l'ordonnance est entachée d'erreur flagrante, en ce sens que le protonotaire a exercé son pouvoir discrétionnaire en vertu d'un mauvais principe ou d'une mauvaise appréciation des faits,

b) l'ordonnance porte sur des questions ayant une influence déterminante sur l'issue du principal.

Si l'ordonnance discrétionnaire est manifestement erronée parce que le protonotaire a commis une erreur de droit (concept qui, à mon avis, embrasse aussi la décision discrétionnaire fondée sur un mauvais principe ou sur une mauvaise appréciation des faits) ou si elle porte sur des questions ayant une influence déterminante sur l'issue du principal, le juge saisi du recours doit exercer son propre pouvoir discrétionnaire en reprenant l'affaire depuis le début. [Note en bas de page omise.]

[37] Après avoir expliqué qu'il ne fallait pas interpréter l'arrêt *Jala Godavari* comme ayant établi que les juges ne devraient jamais faire preuve de retenue à l'égard d'une décision discrétionnaire d'un protonotaire, mais plutôt que, lorsque la question en cause avait une

2016 FCA 215 (CanLII)

to an overriding discretion on the part of a judge, adding that error of law on the part of a prothonotary was always a ground of intervention, MacGuigan J.A., then addressed the question as to when an order made by a prothonotary was vital to the final issue of a case. At pages 464 and 465, he said:

> The question before the prothonotary in the case at bar can be considered interlocutory only because the prothonotary decided it in favour of the appellant. If he had decided it for the respondent, it would itself have been a final decision of the case: *A-G of Canada v. S.F. Enterprises Inc. et al.* (1990), 90 DTC 6195 (F.C.A.) at pages 6197-6198; *Ainsworth v. Bickersteth et al.*, [1947] O.R. 525 (C.A.). It seems to me that a decision which can thus be either interlocutory or final depending on how it is decided, even if interlocutory because of the result, must nevertheless be considered vital to the final resolution of the case. Another way of putting the matter would be to say that for the test as to relevance to the final issue of the case, the issue to be decided should be looked to <u>before</u> the question is answered by the prothonotary, whereas that as to whether it is interlocutory or final (which is purely a *pro forma* matter) should be put after the prothonotary's decision. Any other approach, it seems to me, would reduce the more substantial question of "vital to the issue of the case" to the merely procedural issue of interlocutory or final, and preserve all interlocutory rulings from attack (except in relation to errors of law). [Emphasis in original.]

[38] Thus, in MacGuigan J.A.'s view, whether a question is vital or not to the final issue of the case depends on what was sought by the motion before the Prothonotary. A question vital to the final issue of the case does not depend on how the Prothonotary determines the issue.

[39] With respect to the merits of the appeal, MacGuigan J.A. was of the view that the motions Judge had made no error in setting aside the Senior Prothonotary's order.

[40] The third opinion was that of Robertson J.A. who shared the Chief Justice's opinion that the appeal should be allowed.

influence déterminante sur l'issue du principal, le pouvoir discrétionnaire du protonotaire était assujetti au pouvoir discrétionnaire supérieur du juge, et après avoir précisé qu'une erreur de droit de la part d'un protonotaire était toujours un motif d'intervention, le juge MacGuigan a examiné la question de savoir quand on peut dire que l'ordonnance d'un protonotaire avait une influence déterminante sur l'issue du principal. Il a ainsi fait observer ce qui suit aux pages 464 et 465 :

> La matière soumise en l'espèce au protonotaire peut être considérée comme interlocutoire seulement parce qu'il a prononcé en faveur de l'appelante. Eût-il prononcé en faveur de l'intimée, sa décision aurait résolu définitivement la cause; Voir *P-G du Canada c. S.F. Enterprises Inc. et autre* (1990), 90 DTC 6195 (C.A.F.) aux pages 6197 et 6198; *Ainsworth v. Bickersteth et al.*, [1947] O.R. 525 (C.A.). Il me semble qu'une décision qui peut être ainsi soit interlocutoire soit définitive selon la manière dont elle est rendue, même si elle est interlocutoire en raison du résultat, doit néanmoins être considérée comme déterminante pour la solution définitive de la cause principale. Autrement dit, pour savoir si le résultat de la procédure est un facteur déterminant de l'issue du principal, il faut examiner le point à trancher <u>avant</u> que le protonotaire ne réponde à la question, alors que pour savoir si la décision est interlocutoire ou définitive (ce qui est purement une question de forme), la question doit se poser après la décision du protonotaire. Il me semble que toute autre approche réduirait la question de fond de « l'influence déterminante sur l'issue du principal » à une question purement procédurale de distinction entre décision interlocutoire et décision définitive, et protégerait toutes les décisions interlocutoires contre les attaques (sauf le cas d'erreur de droit). [Souligné dans l'original.]

[38] Donc, selon le juge MacGuigan, la question de savoir si une question a ou non une influence déterminante sur l'issue du principal dépend de l'objet de la requête dont le protonotaire était saisi, et non de la manière dont il a tranché la requête.

[39] En ce qui concerne le bien-fondé de l'appel, le juge MacGuigan estimait que le juge des requêtes n'avait pas commis d'erreur en annulant l'ordonnance du protonotaire adjoint.

[40] Les troisièmes motifs étaient ceux du juge Robertson, qui pensait comme le juge en chef qu'il convenait d'accueillir l'appel.

2016 FCA 215 (CanLII)

[41] Thus, in *Aqua-Gem*, our Court made it clear that not all decisions made by prothonotaries were subject to *de novo* review. On the basis of a thorough review of the historical evolution of the role of masters and prothonotaries in the Canadian judicial system, the Court concluded that only decisions that decided questions vital to the final issue of a case should be reviewed *de novo* by a judge of the Federal Court. In the Court's view, that framework recognized the intention expressed by Parliament in the *Federal Court Act* [R.S.C., 1985, c. F-7] to grant prothonotaries certain powers in order to further the efficient performance of the work of the Court. In coming to this view, the Court traced the origins of the master system to deal with pre-trial matters back to the 19th century in England, and described the evolution of the standard of review in Canada since Confederation. This narrative is suffused with the tension between the need to give effect to the powers granted to judicial officers, and the protection of the powers given to judges to decide cases without interference.

[42] To conclude on the standard adopted by our Court in *Aqua-Gem*, I should say that in paragraph 19 of *Merck & Co., Inc. v. Apotex Inc.*, 2003 FCA 488, [2004] 2 F.C.R. 459 (*Merck*), Décary J.A., writing for a unanimous court, after referring to pages 464 and 465 of MacGuigan J.A.'s reasons in *Aqua-Gem*, reformulated the test in the following terms:

> To avoid the confusion which we have seen from time to time arising from the wording used by MacGuigan J.A., I think it is appropriate to slightly reformulate the test for the standard of review. I will use the occasion to reverse the sequence of the propositions as originally set out, for the practical reason that a judge should logically determine first whether the questions are vital to the final issue: it is only when they are not that the judge effectively needs to engage in the process of determining whether the orders are clearly wrong. The test would now read: "Discretionary orders of prothonotaries ought not be disturbed on appeal to a judge unless: (a) the questions raised in the motion are vital to the final issue of the case, or (b) the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts."

[41] Ainsi, notre Cour a bien précisé dans l'arrêt *Aqua-Gem* que ce n'étaient pas toutes les décisions des protonotaires qui pouvaient donner lieu à un examen *de novo*. Se fondant sur une étude approfondie de l'évolution historique du rôle des protonotaires dans le système judiciaire canadien, la Cour a conclu que seules les décisions qui tranchaient des questions ayant une influence déterminante sur l'issue du principal devaient être examinées *de novo* par un juge de la Cour fédérale. Selon notre Cour, cette conclusion tenait compte de l'intention exprimée par le législateur dans la *Loi sur la Cour fédérale* [L.R.C. (1985), ch. F-7] de conférer des pouvoirs aux protonotaires dans le but de favoriser le bon fonctionnement de la Cour. Notre Cour a formulé ce point de vue après avoir retrouvé dans l'Angleterre du XIXe siècle les origines du système recourant à des protonotaires pour régler les questions préalables à l'instruction et après avoir décrit l'évolution de la norme de contrôle au Canada depuis la Confédération. Cette histoire se révèle marquée d'une tension entre la nécessité de donner effet aux pouvoirs conférés aux juges et aux protonotaires et celle de protéger les pouvoirs permettant aux juges de statuer sans ingérence.

[42] Pour conclure au sujet de la norme adoptée par notre Cour dans l'arrêt *Aqua-Gem*, je dois ajouter que le juge Décary, après avoir fait référence aux pages 464 et 465 des motifs exposés par le juge MacGuigan dans cet arrêt, a reformulé le critère applicable comme suit, au nom d'une formation unanime, au paragraphe 19 de l'arrêt *Merck & Co., Inc. c. Apotex Inc.*, 2003 CAF 488, [2004] 2 R.C.F. 459 (*Merck*) :

> Afin d'éviter la confusion que nous voyons parfois découler du choix des termes employés par le juge MacGuigan, je pense qu'il est approprié de reformuler légèrement le critère de la norme de contrôle. Je saisirai l'occasion pour renverser l'ordre des propositions initiales pour la raison pratique que le juge doit logiquement d'abord trancher la question de savoir si les questions sont déterminantes pour l'issue de l'affaire. Ce n'est que quand elles ne le sont pas que le juge a effectivement besoin de se demander si les ordonnances sont clairement erronées. J'énoncerais le critère comme suit : « Le juge saisi de l'appel contre l'ordonnance discrétionnaire d'un protonotaire ne doit pas intervenir sauf dans les deux cas suivants : a) l'ordonnance porte sur des questions ayant une influence déterminante sur l'issue du principal, b) l'ordonnance est entachée d'erreur flagrante, en ce sens que le protonotaire a exercé son pouvoir

2016 FCA 215 (CanLII)

2016 FCA 215 (CanLII)

discrétionnaire en vertu d'un mauvais principe ou d'une mauvaise appréciation des faits. »

[43] To this it is important to add that in 2003, the Supreme Court in *Pompey* approved the *Aqua-Gem* standard and formulated, at paragraph 18 of its reasons, its approval in the following terms:

> Discretionary orders of prothonotaries ought to be disturbed by a motions judge only where (a) they are clearly wrong, in the sense that the exercise of discretion was based upon a wrong principle or a misapprehension of the facts, or (b) in making them, the prothonotary improperly exercised his or her discretion on a question vital to the final issue of the case: *Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425 (C.A.), *per* MacGuigan J.A., at pp. 462-63. An appellate court may interfere with the decision of a motions judge where the motions judge had no grounds to interfere with the prothonotary's decision or, in the event such grounds existed, if the decision of the motions judge was arrived at on a wrong basis or was plainly wrong: *Jian Sheng Co. v. Great Tempo S.A.*, [1998] 3 F.C. 418 (C.A.), *per* Décary J.A., at pp. 427-28, leave to appeal refused, [1998] 3 S.C.R. vi.

[43] Il est important d'ajouter à cela que la Cour suprême, dans son arrêt *Pompey*, rendu en 2003, a approuvé la norme *Aqua-Gem* et a formulé cette approbation dans les termes suivants, au paragraphe 18 de ses motifs :

> Le juge des requêtes ne doit modifier l'ordonnance discrétionnaire d'un protonotaire que dans les cas suivants : a) l'ordonnance est entachée d'une erreur flagrante, en ce sens que le protonotaire a exercé son pouvoir discrétionnaire sur le fondement d'un mauvais principe ou d'une mauvaise appréciation des faits, ou b) le protonotaire a mal exercé son pouvoir discrétionnaire relativement à une question ayant une influence déterminante sur la décision finale quant au fond : *Canada c. Aqua-Gem Investments Ltd.*, [1993] 2 C.F. 425 (C.A.), le juge MacGuigan, p. 462-463. Une cour d'appel ne peut intervenir que si le juge des requêtes n'avait aucun motif de modifier la décision du protonotaire ou, advenant l'existence d'un tel motif, si la décision du juge des requêtes était mal fondée ou manifestement erronée : *Jian Sheng Co. c. Great Tempo S.A.*, [1998] 3 C.F. 418 (C.A.), le juge Décary, p. 427-428, autorisation de pourvoi refusée, [1998] 3 R.C.S. vi.

[44] As appears from the above remarks made by Mr. Justice Bastarache, who wrote the Supreme Court's reasons in *Pompey*, the Supreme Court also formulated the standard of review pursuant to which decisions of motions judges in appeal of discretionary decisions of prothonotaries were to be reviewed.

[44] Comme on le voit de ce passage du juge Bastarache, qui a rédigé les motifs de l'arrêt *Pompey*, la Cour suprême a aussi formulé la norme de contrôle applicable aux décisions des juges des requêtes statuant en appel de décisions discrétionnaires des protonotaires.

[45] The respondents argue that discretionary decisions made by prothonotaries, vital or not to the final issue of the case, should not be subject to *de novo* review, but rather to the test adopted by the Supreme Court in *Housen*. The respondents say that the compromise reached in *Aqua-Gem* to resolve the tension between the powers given to prothonotaries and those given to judges is no longer adequate in the present context and that we should follow the practice now prevailing in Ontario. More particularly, the respondents submit that we should follow the decision of the Ontario Court of Appeal in *Zeitoun v. Economical Insurance Group*, 2009 ONCA 415, 96 O.R. (3d) 639 (*Zeitoun*) where the Ontario Court of Appeal abandoned the Ontario equivalent of the *Aqua-Gem* standard and held that the standard to be used

[45] Les intimés soutiennent que les décisions discrétionnaires rendues par les protonotaires, qu'elles aient ou non une influence déterminante sur l'issue du principal, ne devraient pas être soumises à un examen *de novo*, mais plutôt au critère adopté par la Cour suprême dans l'arrêt *Housen*. Le compromis par lequel l'arrêt *Aqua-Gem* a voulu résoudre la tension entre les pouvoirs conférés aux protonotaires et ceux des juges ne répond plus aux besoins actuels, expliquent-ils, et nous devrions adopter la pratique maintenant en vigueur en Ontario. Plus précisément, nous devrions, selon les intimés, nous aligner sur l'arrêt *Zeitoun v. Economical Insurance Group*, 2009 ONCA 415, 96 O.R. (3d) 639 (*Zeitoun*), où la Cour d'appel de l'Ontario a abandonné l'équivalent ontarien de la norme *Aqua-Gem* et a établi que la norme

in reviewing discretionary orders of masters in Ontario should be the one enunciated by the Supreme Court in *Housen*.

[46] In my view, there are a number of reasons why we should follow the lead given by the Ontario Court of Appeal in *Zeitoun*. First, there is continuing confusion in the Federal Court as to what constitutes an order that raises questions vital to the final issue of the case. In *Winnipeg Enterprises Corporation v. Fieldturf (IP) Inc.*, 2007 FCA 95, 58 C.P.R. (4th) 15, a panel of this Court held, relying on the majority opinion of MacGuigan J.A. in *Aqua-Gem*, that what rendered a prothonotary's order vital to the final issue of the case was the nature of the question before him or her. Thus, the manner in which a prothonotary deals with the question before him is irrelevant in determining whether his order is one that raises questions vital to the final issue of the case.

[47] Unfortunately, this approach has been clearly misunderstood by a number of judges of the Federal Court where a line of jurisprudence, also relying on *Aqua-Gem*, has taken the view that "it is not what was sought but what was ordered by the Prothonotary which must be determinative of the final issues in order for the judge to be required to undertake *de novo* review" (*Peter G. White Management Ltd. v. Canada*, 2007 FC 686, 314 F.T.R. 284, at paragraph 2 (Hugessen J.). Also see *Scheuer v. Canada*, 2015 FC 74, [2015] 2 C.T.C. 135, at paragraph 12 (Diner J.); *Teva Canada Limited v. Pfizer Canada Inc.*, 2013 FC 1066, 441 F.T.R. 130, at paragraph 10 (Campbell J.); *Gordon v. Canada*, 2013 FC 597, 2013 D.T.C. 5112, at paragraph 11 (Hughes J.); *Chrysler Canada Inc. v. Canada*, 2008 FC 1049, [2009] 1 C.T.C. 145, at paragraph 4 (Hughes J.)).

[48] I note that in his recent judgment in *Alcon Canada Inc. v. Actabis Pharma Company*, 2015 FC 1323, at paragraphs 9–19, Mr. Justice Locke of the Federal Court deplored the ongoing confusion prevailing in the Federal Court with regard to this issue.

de contrôle qu'il convenait dorénavant d'appliquer aux ordonnances discrétionnaires des protonotaires ontariens était celle que la Cour suprême a formulée dans l'arrêt *Housen*.

[46] Je vois plusieurs raisons pour lesquelles nous devrions suivre l'exemple donné par la Cour d'appel de l'Ontario dans son arrêt *Zeitoun*. Premièrement, il continue d'y avoir à la Cour fédérale de la confusion à propos du critère permettant d'établir si une ordonnance soulève des questions à influence déterminante sur l'issue du principal. Dans l'arrêt *Winnipeg Enterprises Corporation c. Fieldturf (IP) Inc.*, 2007 CAF 95, une formation de notre Cour, s'appuyant sur l'opinion majoritaire du juge MacGuigan dans l'arrêt *Aqua-Gem*, a établi que le facteur qui confère à l'ordonnance d'un protonotaire une influence déterminante sur l'issue du principal est la nature de la question portée devant lui. Par conséquent, la manière dont le protonotaire règle la question dont il est saisi n'est pas pertinente pour savoir si son ordonnance soulève des questions ayant une influence déterminante sur l'issue du principal.

[47] Malheureusement, ce point de vue a manifestement été mal compris par un certain nombre de juges de la Cour fédérale, où un courant jurisprudentiel, qui s'appuie aussi sur l'arrêt *Aqua-Gem*, part du principe que « ce n'est pas le recours présenté, mais plutôt l'ordonnance que le protonotaire rend qui doit avoir une influence déterminante sur l'issue du principal pour que le juge ait à examiner l'affaire *de novo* »; voir le paragraphe 2 de *Peter G. White Management Ltd. c. Canada*, 2007 CF 686 (le juge Hugessen). Voir aussi *Scheuer c. Canada*, 2015 CF 74, au paragraphe 12 (le juge Diner); *Teva Canada Limited c. Pfizer Canada Inc.*, 2013 CF 1066, au paragraphe 10 (le juge Campbell); *Gordon c. Canada*, 2013 CF 597, au paragraphe 11 (le juge Hughes); *Chrysler Canada Inc. c. Canada*, 2008 CF 1049, au paragraphe 4 (le juge Hughes).

[48] Je note que le juge Locke de la Cour fédérale a récemment déploré, aux paragraphes 9 à 19 de la décision *Alcon Canada Inc. c. Actavis Pharma Company*, 2015 CF 1323, la confusion qui règne actuellement à la Cour fédérale sur cette question.

2016 FCA 215 (CanLII)

[49] In my view, the effectiveness of the process of appeals to a Federal Court judge from an order of a prothonotary has been tainted by the language used in *Aqua-Gem*. I am obviously not to be taken as criticizing the panel that decided *Aqua-Gem*, but simply note that confusion has crept in the process and has detracted from the effective review of discretionary orders made by prothonotaries.

[49] À mon avis, le libellé employé dans l'arrêt *Aqua-Gem* a compromis l'efficacité de la procédure d'appel des ordonnances des protonotaires devant les juges de la Cour fédérale. Je ne veux évidemment pas critiquer ici la formation qui a rendu l'arrêt *Aqua-Gem*; je fais simplement remarquer que s'est glissée dans la procédure une confusion qui nuit à l'efficacité du contrôle des ordonnances discrétionnaires rendues par les protonotaires.

[50] Because of the *Aqua-Gem* standard, the question of whether a prothonotary's discretionary order is vital or not to the final issue of the case is one that is recurrent. Thus a high number of appeals taken to motions judges from discretionary orders or prothonotaries require the motions judge to ask himself whether it is appropriate or not to conduct a *de novo* review. The question has proven difficult to answer. Some issues, for example motions for leave to amend pleadings, have given much difficulty to decision makers (see for instance *Merck & Co., Inc. v. Apotex Inc.*, 2003 FCA 488, [2004] 2 F.C.R. 459 [cited above] (Richard C.J. dissenting, Décary and Létourneau JJ.A.); *Merck & Co., Inc. v. Apotex Inc.*, 2012 FC 454, 106 C.P.R. (4th) 325, at paragraphs 8–10 (Rennie J. as he then was)).

[50] À cause de la norme *Aqua-Gem*, la question de savoir si l'ordonnance discrétionnaire du protonotaire a ou non une influence déterminante sur l'issue du principal ne cesse de se poser. Par conséquent, un grand nombre des appels formés devant un juge des requêtes contre des ordonnances discrétionnaires des protonotaires exigent du juge qu'il se demande s'il y a lieu ou non de procéder à un examen *de novo*. Or, cette question s'est révélée difficile à trancher. Certaines catégories de requêtes, par exemple les requêtes en autorisation de modifier des actes de procédure, ont donné beaucoup de mal aux juges; voir, par exemple, *Merck & Co., Inc. c. Apotex Inc.*, 2003 CAF 488, [2004] 2 R.C.F. 459 [précité] (le juge en chef Richard, dissident, et les juges Décary et Létourneau), et *Merck & Co., Inc. c. Apotex Inc.*, 2012 CF 454, aux paragraphes 8 à 10 (le juge Rennie, alors juge à la Cour fédérale).

[51] A second reason for moving away from the *Aqua-Gem* standard is the persuasiveness of the reasons [*Zeitoun v. Economical Insurance Group*, 2008 CanLII 20996, 91 O.R. (3d) 131] of the Divisional Court of the Ontario Superior Court of Justice (the Divisional Court) with regard to the appropriate standard of review that should be applied by a motions judge hearing an appeal from an Ontario master, which a unanimous Ontario Court of Appeal endorsed in *Zeitoun*. More particularly, the Ontario Court of Appeal agreed with the Divisional Court that the prevailing standard, for all intents and purposes identical to the *Aqua-Gem* standard, should be abandoned and replaced by the standard enunciated by the Supreme Court in *Housen*. In concluding that there was no principled basis for distinguishing between the decisions of masters and those of judges for the purpose of standard of review, the Ontario Court of Appeal made specific reference to paragraphs 26, 36, 40 and 41 of the reasons given by Low J. of the Divisional Court. The

[51] Une deuxième raison de s'écarter de la norme *Aqua-Gem* est la force de persuasion des motifs exposés par la Cour divisionnaire de la Cour supérieure de justice de l'Ontario concernant la norme de contrôle que devrait appliquer le juge des requêtes saisi d'un appel d'une ordonnance d'un protonotaire de l'Ontario [*Zeitoun v. Economical Insurance Group*, 2008 CanLII 20996, 91 O.R. (3d) 131], décision à laquelle la Cour d'appel de l'Ontario a unanimement souscrit dans l'arrêt *Zeitoun*. La Cour d'appel de l'Ontario a notamment exprimé son accord avec la Cour divisionnaire sur le fait que la norme en vigueur, pratiquement identique à celle de l'arrêt *Aqua-Gem*, devrait être abandonnée et remplacée par la norme qu'a formulée la Cour suprême dans l'arrêt *Housen*. En affirmant qu'aucun principe ne justifiait d'établir une distinction entre les décisions des protonotaires et celles des juges quant à la norme de contrôle, la Cour d'appel [de l'Ontario] a renvoyé explicitement aux paragraphes 26, 36, 40 et 41 des motifs du juge Low

2016 FCA 215 (CanLII)

reasons of Low J., as they are expressed in these paragraphs, in my respectful view, go to the heart of the matter and are worth repeating.

de la Cour divisionnaire. À mon avis, les motifs que le juge Low a exposés dans ces paragraphes touchent à l'essence de la question et méritent d'être répétés.

[52] First, Low J. made the point that Ontario's prevailing standard in regard to discretionary decision of masters, which allowed for *de novo* hearings in certain situations, was the result of historical notions of hierarchy which merited reconsideration because (i) of the evolution and rationalization of standards of review in the case law, (ii) the expansion of the role of masters in the Ontario's civil system, (iii) the concepts of economy and expediency which pervade the Ontario rules of civil procedure and, finally (iv) the difficulties which had arisen in determining whether discretionary orders of masters were vital or not to the final issue of the case.

[52] Premièrement, le juge Low a fait remarquer que la norme de contrôle en vigueur en Ontario concernant les décisions des protonotaires, qui permettait l'instruction *de novo* dans certains cas, découlait de notions historiques sur la hiérarchie qu'il convenait de réexaminer pour les raisons suivantes : i) l'évolution et la rationalisation des normes de contrôle dans la jurisprudence, ii) l'extension du rôle des protonotaires dans la justice civile ontarienne, iii) les principes d'économie et de célérité qui imprègnent les règles ontariennes de procédure civile, et enfin iv) les difficultés qui avaient surgi sur la question de savoir si les ordonnances discrétionnaires des protonotaires avaient ou non une influence déterminante sur l'issue du principal.

[53] Second, Low J. took the view that the reviewing court should proceed on the basis of a presumption of fitness that both judges and masters were capable of carrying out the mandates which the legislator had assigned to them. Thus, there was no principled basis justifying, on the sole ground of his place in the hierarchy, interference by a motions judge in regard to a matter assigned by the legislator to a master, other than when it had been shown that the master's decision was incorrect in law or that the master had misapprehended the facts or the evidence.

[53] Deuxièmement, le juge Low a exprimé l'avis que la cour de révision devait supposer l'aptitude des juges et des protonotaires à remplir les fonctions que leur a attribuées le législateur. Par conséquent, aucun principe ne justifiait qu'un juge des requêtes, au seul motif de sa place dans la hiérarchie, intervienne à l'égard d'une question confiée par le législateur à un protonotaire, si ce n'est dans le cas où il aurait été établi que la décision du protonotaire était erronée en droit, ou qu'il avait mal apprécié les faits ou la preuve.

[54] Third, Low J. opined that the same approach taken in reviewing discretionary decisions made by motions judges should also be taken in reviewing discretionary decisions of masters. In other words, intervention would be justified only where a master had made an error of law or had exercised his discretion on wrong principles or where he had misapprehended the evidence such that there was a palpable and overriding error. In Low J.'s opinion, the *Housen* standard should be applied to discretionary decisions of masters.

[54] Troisièmement, le juge Low a affirmé qu'il convenait d'aborder le contrôle des décisions discrétionnaires des protonotaires de la même façon que le contrôle des décisions discrétionnaires des juges des requêtes. Autrement dit, l'intervention du juge ne se justifierait que dans le cas où le protonotaire aurait commis une erreur de droit, exercé son pouvoir discrétionnaire en se fondant sur des principes erronés, ou mal apprécié la preuve de manière à commettre une erreur manifeste et dominante. D'après le juge Low, c'était la norme *Housen* qu'il convenait d'appliquer aux décisions discrétionnaires des protonotaires.

[55] In my view, the arguments which the Ontario Court of Appeal found convincing in *Zeitoun* are as compelling for the Federal Courts.

[55] À mon sens, les arguments que la Cour d'appel de l'Ontario a déclarés convaincants dans l'arrêt *Zeitoun* le sont tout autant pour les Cours fédérales.

2016 FCA 215 (CanLII)

[56] I wish to point out that the question now before us has already been raised on a number of occasions before our Court, *Pfizer Canada Inc. v. Teva Canada Limited*, 2014 FCA 244, 466 N.R. 55, at paragraph 3; *Bayer Inc. v. Fresenius Kabi Canada Ltd.*, 2016 FCA 13 (*Bayer*), at paragraph 7 and *Apotex Inc. v. Bristol-Myers Squibb Company*, 2011 FCA 34, 91 C.P.R. (4th) 307 (*Apotex*), at paragraph 9. I note, in particular, that in *Apotex*, at paragraph 9, my colleague, Mr. Justice Stratas, referred to the Ontario Court of Appeal's decision in *Zeitoun* and indicated that he was "attracted" to the argument that *Aqua-Gem* should be reassessed. However, he was of the view that it was not necessary in the case before him to determine that issue.

[57] I should also say that I see nothing in the legislation which would prevent us from moving away from the *Aqua-Gem* standard and doing away with *de novo* review of discretionary orders made by prothonotaries in regard to questions vital to the final issue of the case. Pursuant to the enabling power conferred by subsection 12(3) of the *Federal Courts Act*, R.S.C., 1985, c. F-7, subsection 50(1) [of the Rules] allows prothonotaries to hear—and make any necessary orders relating to—any motion unless specified otherwise. Subsection 51(1) [of the Rules] ensures that there is judicial oversight of those decisions by providing for a right of appeal to a judge of the Federal Court for all orders made by prothonotaries. I also note that subsection 50(2) [of the Rules] allows prothonotaries to render decisions with regard to the merits of actions for monetary relief not exceeding $50 000. In such instances, prothonotaries act, for all practical purposes, as trial judges and their decisions are reviewable pursuant to the *Housen* standard. I therefore see no legislative impediment to the abandonment of the *Aqua-Gem* standard of review. There appears to be no principled reason why there should be a different and, in effect, more stringent standard of review for discretionary orders made by prothonotaries.

(2) Can We Abandon the *Aqua-Gem*/*Pompey* Standard?

[58] Although I am satisfied that we should abandon the *Aqua-Gem* standard, is it open for us to do so in the

[56] Il est à noter que la question dont nous sommes ici saisis a été soulevée à quelques reprises devant notre Cour : voir *Pfizer Canada inc. c. Teva Canada limitée*, 2014 CAF 244, au paragraphe 3; *Bayer Inc. c. Fresenius Kabi Canada Ltd.*, 2016 CAF 13 (*Bayer*), au paragraphe 7; *Apotex Inc. c. Bristol-Myers Squibb Company*, 2011 CAF 34 (*Apotex*), au paragraphe 9. Je remarque en particulier qu'au paragraphe 9 de l'arrêt *Apotex*, mon collègue le juge Stratas a fait référence à l'arrêt *Zeitoun* de la Cour d'appel de l'Ontario et a noté que l'argument voulant qu'il faille examiner à nouveau la norme *Aqua-Gem* avait « quelque chose de séduisant ». Cependant, il n'était pas selon lui nécessaire de trancher cette question dans l'appel porté devant lui.

[57] En outre, dois-je ajouter, je n'ai connaissance d'aucune disposition légale qui nous interdirait de nous écarter de la norme *Aqua-Gem* et de supprimer l'examen *de novo* des ordonnances discrétionnaires des protonotaires qui portent sur des questions ayant une influence déterminante sur l'issue du principal. En vertu de la disposition d'habilitation du paragraphe 12(3) de la *Loi sur les Cours fédérales*, L.R.C. (1985), ch. F-7, le paragraphe 50(1) des Règles autorise les protonotaires à entendre toute requête et à rendre les ordonnances nécessaires s'y rapportant, sauf disposition contraire. Le paragraphe 51(1) des Règles assure la surveillance judiciaire de ces décisions en prévoyant le droit de porter en appel toute ordonnance d'un protonotaire à un juge de la Cour fédérale. Je note aussi que le paragraphe 50(2) [des Règles] autorise les protonotaires à statuer au fond sur les actions visant une réparation pécuniaire qui ne dépasse pas 50 000 $. Dans de telles actions, les protonotaires agissent de fait comme juges de première instance, et le contrôle de leurs décisions relève de la norme de contrôle *Housen*. Je ne vois donc aucun obstacle légal à l'abandon de la norme de contrôle de l'arrêt *Aqua-Gem*. Il ne paraît exister aucun motif fondé sur des principes d'appliquer une norme de contrôle différente et, en fait, plus rigoureuse aux ordonnances discrétionnaires des protonotaires.

2) Pouvons-nous abandonner la norme *Aqua-Gem*/*Pompey*?

[58] Tout convaincu que je sois de l'opportunité d'abandonner la norme *Aqua-Gem*, je dois encore me

2016 FCA 215 (CanLII)

present matter? In inviting us to revisit the *Aqua-Gem* standard, the respondents say that on the basis of this Court's decision in *Miller v. Canada (Attorney General)*, 2002 FCA 370, 220 D.L.R. (4th) 149 (*Miller*), and of the Supreme Court's decision in *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331 (*Carter*), we can do so.

demander s'il nous est permis de le faire dans la présente espèce. Les intimés soutiennent que nous pouvons réexaminer cette norme, comme ils nous y invitent, sur le fondement de l'arrêt de notre Cour *Miller c. Canada (Procureur général)*, 2002 CAF 370 (*Miller*), et de l'arrêt de la Cour suprême *Carter c. Canada (Procureur général)*, 2015 CSC 5, [2015] 1 R.C.S. 331 (*Carter*).

[59] First, I wish to say that I agree entirely with the respondents when they say that in *Pompey*, the Supreme Court simply gave effect to the *Aqua-Gem* standard. In other words, other than adopting the standard enunciated by MacGuigan J.A., the Supreme Court was silent. It is quite clear from the Supreme Court's reasons in *Pompey* that the true issue before the Court in that case was the correctness of the legal determinations made below and not the applicable standard of review.

[59] Premièrement, je voudrais exprimer mon complet accord avec les intimés lorsqu'ils affirment que la Cour suprême, dans l'arrêt *Pompey*, a simplement donné effet à la norme *Aqua-Gem*. Autrement dit, hormis son adoption de la norme formulée par le juge MacGuigan, la Cour suprême est restée muette sur le sujet. Il ressort à l'évidence des motifs de l'arrêt *Pompey* que la véritable question que la Cour suprême avait à trancher dans cette affaire était celle de savoir si les instances inférieures avaient commis des erreurs de droit et non celle de savoir quelle était la norme de contrôle applicable.

[60] The respondents say that pursuant to *Miller*, we can reconsider our decisions "if they are manifestly wrong in the sense that they overlook relevant authority" (paragraph 31 of the respondents' memorandum). In making that assertion, the respondents rely on paragraph 10 of Rothstein J.'s (as he then was) reasons in *Miller* where he says:

> The test used for overruling a decision of another panel of this Court is that the previous decision is manifestly wrong, in the sense that the Court overlooked a relevant statutory provision, or a case that ought to have been followed …. [Emphasis added.]

[60] Les intimés soutiennent que, suivant l'arrêt *Miller*, il nous est permis de réexaminer nos décisions [TRADUCTION] « dans le cas où elles sont manifestement erronées, au sens où elles auraient négligé de tenir compte d'une loi ou d'une décision pertinente » (paragraphe 31 du mémoire des intimés). Ils fondent cette affirmation sur le paragraphe 10 des motifs de l'arrêt *Miller*, où le juge Rothstein (alors membre de notre Cour) formulait l'observation suivante :

> Le critère utilisé pour renverser la décision d'une autre formation de notre Cour exige que la décision en cause soit manifestement erronée, du fait que la Cour n'aurait pas tenu compte de la législation applicable ou d'un précédent qui aurait dû être respecté […] [Non souligné dans l'original.]

[61] In my respectful view, this is not a situation where *Miller* finds application. It cannot be said that *Aqua-Gem* "is manifestly wrong" in the sense explained by Rothstein J. in *Miller*. In my view, *Miller* is not relevant to the present matter.

[61] Soit dit en tout respect, je ne pense pas que l'arrêt *Miller* s'applique au cas qui nous occupe. On ne peut en effet dire que l'arrêt *Aqua-Gem* soit « manifestement erroné » au sens où l'entendait le juge Rothstein dans l'arrêt *Miller*. À mon sens, l'arrêt *Miller* n'est pas pertinent quant à la présente espèce.

[62] However, I am satisfied that the respondents are correct in invoking the Supreme Court's decision in *Carter* where the Court, at paragraph 44, stated an exception to the principle of *stare decisis* which allows

[62] Cependant, j'estime que les intimés ont raison d'invoquer l'arrêt *Carter*, au paragraphe 44 duquel la Cour suprême a prévu au principe du *stare decisis* une exception qui permet aux tribunaux d'instance

2016 FCA 215 (CanLII)

lower courts, in certain circumstances, not to follow the decisions of higher courts and, in particular, decisions rendered by the Supreme Court. At paragraph 44 of its reasons in *Carter*, the Supreme Court said as follows:

> The doctrine that lower courts must follow the decisions of higher courts is fundamental to our legal system. It provides certainty while permitting the orderly development of the law in incremental steps. However, *stare decisis* is not a straitjacket that condemns the law to stasis. Trial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that "fundamentally shifts the parameters of the debate" (*Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 42).

[63] Although the issue of the standard of review applicable to discretionary decisions of prothonotaries is not a new legal issue, there has been "a change in the circumstances or evidence that 'fundamentally shifts the parameters of the debate'". In my view, the standard of review set out in *Aqua-Gem* has been overtaken by a significant evolution and rationalization of standards of review in Canadian jurisprudence. In this context it is important to emphasize that the Chief Justice's review in *Aqua-Gem* of the role of masters in England and in Canada showed that their role was one that evolved from assistants to judges to that of independent judicial officers. It is also worthy of note that the role of prothonotaries of the Federal Court has continued to evolve since *Aqua-Gem* was decided in 1993. In particular, their role, as the respondents submit, includes the task of hearing and determining the merits of actions where the monetary value at issue is less than $50 000. Needless to say, prothonotaries are no longer, if they ever were, viewed by the legal community as inferior or second class judicial officers. Other than in regard to the type of matters assigned to them by Parliament, they are, for all intents and purposes, performing the same task as Federal Court judges.

[64] These circumstances "fundamentally shift the parameters of the debate" regarding the standard applicable to discretionary orders of prothonotaries. In my respectful opinion, the supervisory role of judges over prothonotaries enunciated in rule 51 no longer requires

inférieure, dans certains cas, de s'écarter des décisions de juridictions supérieures, notamment des arrêts de la Cour suprême. Ce paragraphe est ainsi rédigé :

> La doctrine selon laquelle les tribunaux d'instance inférieure doivent suivre les décisions des juridictions supérieures est un principe fondamental de notre système juridique. Elle confère une certitude tout en permettant l'évolution ordonnée et progressive du droit. Cependant, le principe du *stare decisis* ne constitue pas un carcan qui condamne le droit à l'inertie. Les juridictions inférieures peuvent réexaminer les précédents de tribunaux supérieurs dans deux situations : (1) lorsqu'une nouvelle question juridique se pose; et (2) lorsqu'une modification de la situation ou de la preuve « change radicalement la donne » (*Canada (Procureur général) c. Bedford*, 2013 CSC 72, [2013] 3 R.C.S. 1101, par. 42).

[63] Bien que la question de la norme de contrôle applicable aux décisions discrétionnaires des protonotaires ne soit pas une nouvelle question juridique, « une modification de la situation ou de la preuve "change radicalement la donne" ». À mon avis, la norme de contrôle établie dans l'arrêt *Aqua-Gem* est maintenant dépassée par une évolution et une rationalisation marquées des normes de contrôle dans la jurisprudence canadienne. À ce propos, il est important de souligner que l'examen du rôle des protonotaires en Angleterre et au Canada effectué par le juge en chef dans l'arrêt *Aqua-Gem* montrait que ce rôle était passé de celui d'auxiliaires des juges à celui de juges en titre indépendants. Il est aussi à noter que le rôle des protonotaires de la Cour fédérale a continué à évoluer depuis le prononcé de l'arrêt *Aqua-Gem* en 1993. Ce rôle comprend notamment, comme le font valoir les intimés, la tâche d'instruire et de juger au fond les actions mettant en jeu une somme qui ne dépasse pas 50 000 $. Inutile de dire que la communauté juridique ne considère plus les protonotaires, si elle l'a jamais fait, comme des juges inférieurs ou de seconde classe. Exception faite des questions que leur confie le législateur, ils remplissent en fait les mêmes fonctions que les juges de la Cour fédérale.

[64] Cette situation « change radicalement la donne » pour ce qui concerne la norme de contrôle applicable aux ordonnances discrétionnaires des protonotaires. À mon avis, le rôle de surveillance des protonotaires que confère aux juges la règle 51 des Règles n'exige plus

2016 FCA 215 (CanLII)

that discretionary orders of prothonotaries be subject to *de novo* hearings. That approach, as made clear by Low J. in *Zeitoun*, is one that has been overtaken by the evolution and rationalization of standards of review and by the presumption of fitness that both judges and masters are capable of carrying out the mandates which the legislator has assigned to them. In other words, discretionary orders of prothonotaries should only be interfered with when such decisions are incorrect in law or are based on a palpable and overriding error in regard to the facts.

[65] I therefore conclude that it is entirely open to us to move away from the *Aqua-Gem* standard. In my respectful opinion, we should replace that standard by the one set out by the Supreme Court in *Housen*.

(3) The *Housen* Standard and Why It Should Replace the *Aqua-Gem* Standard

[66] In *Housen*, the Supreme Court enunciated the standard of review applicable to decisions of trial judges. More particularly, it concluded that with respect to factual conclusions reached by a trial judge, the applicable standard was that of palpable and overriding error. It also stated that with respect to questions of law and questions of mixed fact and law, where there was an extricable legal principle at issue, the applicable standard was that of correctness (paragraphs 19 to 37 of *Housen*).

[67] I begin by saying that it is clear to me that in enunciating the standard of review which it did in *Housen*, the Supreme Court did not intend to apply that standard to discretionary decisions of motions judges and, obviously, to similar decisions made by prothonotaries. Of that, I am entirely satisfied. Recently, in *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60, [2015] 3 S.C.R. 801 (*Green*), Madame Justice Côté, writing for a unanimous Supreme Court, indicated that the standard which normally applied to a discretionary decision made by a Judge, i.e. in the case before her an order *nunc pro tunc*, were the standards which had been enunciated by the Supreme Court in *Reza v. Canada*, [1994] 2 S.C.R. 394 (*Reza*), at page 404 and in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 (*Soulos*), at paragraph 54. Madam Justice Côté, at paragraph 95

que les ordonnances discrétionnaires des protonotaires donnent lieu à des instructions *de novo*. Ce point de vue, comme le juge Low l'a bien fait comprendre dans la décision *Zeitoun*, est maintenant dépassé par l'évolution et la rationalisation des normes de contrôle, ainsi que par la présomption d'aptitude, tant des juges que des protonotaires, à remplir les fonctions que le législateur leur a attribuées. Autrement dit, les ordonnances discrétionnaires des protonotaires ne devraient être infirmées que lorsqu'elles sont erronées en droit, ou fondées sur une erreur manifeste et dominante quant aux faits.

[65] Je conclus donc qu'il nous est tout à fait permis de nous écarter de la norme *Aqua-Gem*. À mon avis, nous devrions remplacer cette norme par celle que la Cour suprême a formulée dans l'arrêt *Housen*.

3) La norme *Housen* et la raison pour laquelle elle devrait remplacer la norme *Aqua-Gem*

[66] La Cour suprême a exposé dans l'arrêt *Housen* la norme de contrôle applicable aux décisions des juges de première instance. Elle y a notamment établi que la norme de contrôle applicable aux conclusions de fait d'un juge de première instance est celle de l'erreur manifeste et dominante. Quant à la norme applicable aux questions de droit, et aux questions mixtes de fait et de droit lorsqu'il y a une question de droit isolable, la Cour suprême a conclu que c'est celle de la décision correcte (paragraphes 19 à 37 de l'arrêt *Housen*).

[67] Je précise tout d'abord qu'il est pour moi évident que la Cour suprême, en formulant la norme de contrôle qu'elle a exposée dans l'arrêt *Housen*, n'avait pas l'intention de l'appliquer aux décisions discrétionnaires des juges des requêtes ni, bien sûr, aux décisions discrétionnaires des protonotaires. Je suis entièrement convaincu de ce fait. Récemment, dans l'arrêt *Banque Canadienne Impériale de Commerce c. Green*, 2015 CSC 60, [2015] 3 R.C.S. 801 (*Green*), la juge Côté, au nom de la Cour suprême unanime, a expliqué que la norme ordinairement applicable à la décision discrétionnaire d'un juge, qui était en l'espèce une ordonnance *nunc pro tunc*, était celle qu'avait formulée la Cour suprême à la page 404 de l'arrêt *Reza c. Canada*, [1994] 2 R.C.S. 394 (*Reza*), et au paragraphe 54 de l'arrêt *Soulos c. Korkontzilas*, [1997] 2 R.C.S. 217 (*Soulos*). La juge Côté a exposé la

2016 FCA 215 (CanLII)

of her reasons, explained the applicable standard as follows:

> I must now decide whether the doctrine applies to the cases at bar. Before doing so, I should briefly outline the applicable standard of review. The standard that ordinarily applies to a judge's discretionary decision on whether to grant an order *nunc pro tunc* is that of deference: if the judge has given sufficient weight to all the relevant considerations, an appellate court must defer to his or her exercise of discretion (*Reza v. Canada*, [1994] 2 S.C.R. 394, at p. 404). However, if the judge's discretion is exercised on the basis of an erroneous principle, an appellate court is entitled to intervene: *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, at para. 54.

[68] As I indicated earlier, at paragraph 26 of these reasons, it is my view that the *Aqua-Gem*/*Pompey* standard and the *Housen* standard, notwithstanding the different language used to convey the ideas behind the standards, are, in effect, the same standards. To this, I would add that I see no substantial difference between these standards and those applied by the Supreme Court in *Reza* and *Soulos*. In other words, if the decision maker has made an error of law, the reviewing court is entitled to intervene and substitute its own discretion or decision. With respect to factual conclusions, the reviewing court must defer unless, in the case of the *Reza* standard, the motions Judge has failed to give sufficient weight to the relevant circumstances or, in the case of the *Aqua-Gem*/*Pompey* standard, the Prothonotary has misapprehended the facts. In my respectful opinion, there is, in the end, no substantial difference between these standards.

[69] I am therefore of the view that there is no reason why we should not apply to discretionary orders of prothonotaries the standard applicable to similar orders by motions judges. I am supported in this view by our decision in *Imperial Manufacturing*, where we applied the *Housen* standard in reviewing the discretionary decision of a motions judge, namely her determination of a motion for particulars regarding certain allegations made in the plaintiff's statement of claim.

norme applicable dans les termes suivants au paragraphe 95 de ses motifs :

> Je dois maintenant décider si la doctrine *nunc pro tunc* s'applique en l'espèce. Avant de ce faire, j'exposerai brièvement la norme d'intervention applicable. La norme qui s'applique en temps normal à la décision discrétionnaire du juge de rendre ou non une ordonnance *nunc pro tunc* est celle de la déférence : si le juge de première instance a accordé suffisamment d'importance à toutes les considérations pertinentes, une cour d'appel doit s'en remettre à l'exercice du pouvoir discrétionnaire du juge (*Reza c. Canada*, [1994] 2 R.C.S. 394, p. 404). Cependant, si le juge de première instance a exercé son pouvoir discrétionnaire en se fondant sur un principe erroné, une cour d'appel peut intervenir : *Soulos c. Korkontzilas*, [1997] 2 R.C.S. 217, par. 54.

[68] Comme je le disais plus haut au paragraphe 26 des présents motifs, la norme *Aqua-Gem*/*Pompey* et la norme *Housen*, malgré les différences dans l'expression des idées sous-jacentes, me paraissent en fait identiques. J'ajouterai que je ne discerne pas de différence substantielle entre ces normes et celles qu'a appliquées la Cour suprême dans les arrêts *Reza* et *Soulos*. Autrement dit, la cour de révision a le droit d'intervenir et de substituer son propre pouvoir discrétionnaire ou sa propre décision à celui du décideur s'il a commis une erreur de droit. En ce qui concerne les conclusions de fait, la cour de révision doit s'abstenir d'intervenir à moins que, s'agissant de la norme *Reza*, le juge des requêtes n'ait pas accordé suffisamment de poids aux circonstances pertinentes, ou que, dans le cas de la norme *Aqua-Gem*/*Pompey*, le protonotaire n'ait mal apprécié les faits. À mon avis, il n'y a pas en fin de compte de différence importante entre ces normes.

[69] Je ne vois par conséquent aucune raison de ne pas appliquer aux ordonnances discrétionnaires des protonotaires la norme applicable aux ordonnances de même nature rendues par des juges des requêtes. Je suis conforté dans cette opinion par notre arrêt *Imperial Manufacturing*, où nous avons appliqué la norme *Housen* au contrôle de la décision discrétionnaire d'une juge des requêtes, lors d'une requête afin d'obtenir des précisions sur certaines allégations contenues dans la déclaration de la demanderesse.

2016 FCA 215 (CanLII)

[70] In abandoning the authority of our decision in *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 (C.A.) (*David Bull*), at page 594, and those cases which had continued to hold *David Bull* as authority for the standard of review applicable to discretionary orders made by motions judges, i.e. that the Court would not interfere unless the decision was arrived at "on a wrong principle" (in effect, the standard enunciated by the Supreme Court in *Soulos*) or that the decision maker had given "insufficient weight to relevant factors, misapprehended the facts or where an obvious injustice would result" (in effect, the standards enunciated by the Supreme Court in *Reza* and *Pompey*), our Court explained why the *Housen* standard should be applied.

[71] First, Mr. Justice Stratas, who wrote the Court's reasons, stated that there was a question of *stare decisis* in that *Housen*, a decision of the Supreme Court, was binding. Second, he indicated that the *David Bull* line of authority was now redundant because of *Housen*. Third, he indicated that the *David Bull* line of authority was not easily understood in that it seemed to constitute "an invitation to this Court to reweigh the evidence before the Federal Court and substitute our own opinion for it" (paragraph 26 of *Imperial Manufacturing*). Fourth, he was satisfied that the *David Bull* line of authority, if properly understood, was to the same effect as the *Housen* standard (paragraph 25 of the *Imperial Manufacturing*). Fifth, he indicated that in the interest of simplicity and coherency, all jurisdictions, other than the Federal Court and Federal Court of Appeal, applied the *Housen* standard to review decisions of lower courts "across the board" and that we should also do so (paragraph 27 of *Imperial Manufacturing*). Mr. Justice Stratas concluded his discussion on the standard of review by saying, at paragraph 29 of his reasons, that:

> To eliminate these problems and in the interests of simplicity and coherency, only the *Housen* articulation of the standard of review — binding upon us — should be used when we review discretionary, interlocutory orders. In accordance with *Housen*, absent error on a question

[70] En abandonnant l'arrêt *David Bull Laboratories (Canada) Inc. c. Pharmacia Inc.*, [1995] 1 C.F. 588 (C.A.) (*David Bull*), à la page 594, ainsi que la jurisprudence subséquente qui avait continué à appliquer la norme de contrôle énoncée dans l'arrêt *David Bull* aux ordonnances discrétionnaires des juges des requêtes, c'est-à-dire que la Cour ne devait intervenir que si la décision reposait sur « un principe erroné » (ce qui était en fait la norme formulée par la Cour suprême dans l'arrêt *Soulos*) ou si le décideur « n'a pas donné suffisamment d'importance à des facteurs pertinents, a mal apprécié les faits ou encore si une injustice évidente serait autrement causée » (ce qui était en fait la norme exposée par la Cour suprême dans les arrêts *Reza* et *Pompey*), notre Cour a expliqué pourquoi il convenait d'appliquer plutôt la norme *Housen*.

[71] Le juge Stratas, qui a rédigé les motifs de la Cour, a d'abord fait observer que se posait une question de *stare decisis*, en ce que *Housen*, un arrêt de la Cour suprême, liait notre Cour. Deuxièmement, il a constaté que la jurisprudence issue de l'arrêt *David Bull* était maintenant devenue redondante du fait de l'arrêt *Housen*. Troisièmement, il a fait remarquer que la jurisprudence issue de l'arrêt *David Bull* prêtait à malentendu au sens où l'on pouvait « y voir une invitation faite à notre Cour d'apprécier à nouveau la preuve dont disposait la Cour fédérale et de substituer son opinion à celle de la Cour fédérale » (*Imperial Manufacturing*, au paragraphe 26). Quatrièmement, il s'est déclaré convaincu que la jurisprudence issue de l'arrêt *David Bull*, bien comprise, allait dans le même sens que la norme *Housen* (*Imperial Manufacturing*, au paragraphe 25). Cinquièmement, il a expliqué que, par souci de simplicité et de cohérence, toutes les juridictions, sauf la Cour fédérale et la Cour d'appel fédérale, appliquaient « systématiquement » la norme de contrôle *Housen* aux décisions d'instances inférieures, et que nous devrions faire de même (*Imperial Manufacturing*, au paragraphe 27). Le juge Stratas a conclu son analyse de la norme de contrôle dans les termes suivants au paragraphe 29 de ses motifs :

> Pour éliminer ces problèmes et par souci de cohérence et de simplicité, j'estime que seule la formulation de la norme de contrôle figurant dans l'arrêt *Housen* — qui nous lie — devrait être utilisée lorsque nous sommes saisis d'une demande de contrôle d'une ordonnance

2016 FCA 215 (CanLII)

2016 FCA 215 (CanLII)

of law or an extricable legal principle, intervention is warranted only in cases of palpable and overriding error.

interlocutoire discrétionnaire. Conformément à l'arrêt *Housen*, à défaut d'erreur sur une question de droit ou un principe juridique isolable, notre intervention n'est justifiée que dans les cas d'erreurs manifestes et dominantes.

[72] I am in complete agreement with the remarks made by Mr. Justice Stratas in *Imperial Manufacturing* as to why we should apply the *Housen* standard to discretionary orders of motions judges. Further, his remarks clearly support the view that the *Housen* standard should also be applied to discretionary orders made by prothonotaries. Whether a motion is determined by a prothonotary or a motions judge is, in my view, irrelevant. The same standard should apply to the review of all discretionary orders.

[72] Je souscris entièrement aux observations formulées par le juge Stratas dans l'arrêt *Imperial Manufacturing* sur la raison pour laquelle nous devrions appliquer la norme de contrôle *Housen* aux ordonnances discrétionnaires des juges des requêtes. Qui plus est, ces observations viennent manifestement au soutien de l'opinion que la norme *Housen* devrait aussi être appliquée aux ordonnances discrétionnaires des protonotaires. À mon avis, il n'est pas pertinent qu'une requête soit tranchée par un protonotaire ou par un juge des requêtes. La même norme devrait s'appliquer au contrôle de toutes les ordonnances discrétionnaires.

[73] Notwithstanding my view that the Supreme Court did not intend to apply the *Housen* standard to discretionary decisions of motions judges this does not detract from the force of the arguments which my colleague Mr. Justice Stratas makes in *Imperial Manufacturing*. Although my colleague does not, in his remarks in *Imperial Manufacturing*, make reference to *Green*, nor to *Reza* and *Soulos*, his main criticism of the existing standard of review in the case before him was that the *Housen* standard was clearer, simpler and did not differ substantially from the *David Bull* line of authority.

[73] Le fait que, à mon avis, la Cour suprême n'ait pas eu l'intention d'appliquer la norme *Housen* aux décisions discrétionnaires des juges des requêtes ne diminue en rien la force des arguments avancés par mon collègue le juge Stratas dans l'arrêt *Imperial Manufacturing*. S'il est vrai que mon collègue ne se réfère pas à l'arrêt *Green*, ni aux arrêts *Reza* et *Soulos*, la principale critique qu'il a formulée à l'égard de la norme de contrôle existante dans l'affaire dont il était saisi était que la norme *Housen* était plus claire et plus simple et ne différait pas substantiellement de la norme de la jurisprudence découlant de l'arrêt *David Bull*.

[74] I cannot, however, leave this issue without referring to our Court's decision in *Turmel v. Canada*, 2016 FCA 9, 481 N.R. 139 (at paragraph 12), where, again under the pen of Mr. Justice Stratas, our Court appears to have moved beyond the *Housen* standard in determining the standard applicable to discretionary orders of motions judges. At paragraph 12 of his reasons for the Court, Mr. Justice Stratas stated that pursuant to *Imperial Manufacturing*, *David Bull*, *Green* and *Housen*, it was not open to appellate courts, in reviewing discretionary decisions of motions judges, to reweigh the evidence and to substitute their conclusions for those of the first Judge. Then, after setting out the rationale of his opinion in *Imperial Manufacturing* for the adoption of the *Housen* standard, Mr. Justice Stratas formulated a different standard applicable to the review of discretionary orders of judges:

[74] Je ne peux cependant quitter ce sujet sans discuter de l'arrêt *Turmel c. Canada*, 2016 CAF 9 (au paragraphe 12), où notre Cour, dont les motifs ont encore une fois été rédigés par le juge Stratas, semble s'être écartée de la norme *Housen* pour les ordonnances discrétionnaires des juges des requêtes. Au paragraphe 12 des motifs qu'il a rédigés pour la Cour, le juge Stratas a d'abord fait observer que, selon les arrêts *Imperial Manufacturing*, *David Bull*, *Green* et *Housen*, il n'est pas permis aux cours d'appel, lorsqu'elles contrôlent les décisions discrétionnaires des juges des requêtes, d'apprécier à nouveau la preuve et de substituer leurs conclusions à celles des juges. Puis, après avoir exposé la raison pour laquelle il avait adopté le critère de l'arrêt *Housen* dans l'arrêt *Imperial Manufacturing*, le juge Stratas a formulé une norme différente pour le contrôle des ordonnances discrétionnaires des juges :

> Putting aside these subtleties, [by subtleties, Mr. Justice Stratas appears to refer to the various standards enunciated in the cases which he refers to at paragraph 11 of his reasons] what is common to all of these verbal formulations is that in the absence of an error of law or legal principle an appellate court cannot interfere with a discretionary order unless there is an obvious, serious error that undercuts its integrity and viability. This is a high test, one that the case law shows is rarely met. This deferential standard of review has applied in the past to discretionary orders appealed to this Court and it is the test we shall apply to the interlocutory discretionary order made by the Federal Court that is before us in these appeals.

> Abstraction faite de ces subtilités [en utilisant le terme « subtilités », le juge Stratas semble vouloir dire les diverses normes de contrôle énoncées dans la jurisprudence qu'il mentionne au paragraphe 11 de ses motifs], le point commun de toutes ces expressions est le fait qu'en l'absence d'une erreur de droit ou d'une erreur touchant aux principes juridiques, le tribunal d'appel ne peut modifier une ordonnance discrétionnaire que s'il y a une erreur manifeste et grave qui met à mal son intégrité et sa viabilité. Il s'agit d'un critère exigeant, auquel il est rarement satisfait, selon la jurisprudence. Notre Cour a appliqué dans le passé cette norme de contrôle qui commande la retenue aux ordonnances discrétionnaires portées en appel, et c'est cette même norme que nous appliquerons à l'ordonnance interlocutoire discrétionnaire de la Cour fédérale dont nous sommes saisis en l'espèce.

[75] On my count, at least 12 decisions of this Court have followed *Imperial Manufacturing*: *Jamieson Laboratories Ltd. v. Reckitt Benckiser LLC*, 2015 FCA 104, 130 C.P.R. (4th) 414, at paragraph 21; *Mancuso v. Canada (National Health and Welfare)*, 2015 FCA 227, 476 N.R. 219, at paragraph 8; *Canada v. Fio Corporation*, 2015 FCA 236, [2016] 2 C.T.C. 1, at paragraph 10; *AgraCity Ltd. v. Canada*, 2015 FCA 288, [2016] 5 C.T.C. 85, at paragraph 16; *Horseman v. Horse Lake First Nation*, 2015 FCA 122, 5 Admin. L.R. (6th) 188, at paragraph 7; *ABB Technology AG v. Hyundai Heavy Industries Co., Ltd.*, 2015 FCA 181, 475 N.R. 341, at paragraph 84; *Cameco Corporation v. Canada*, 2015 FCA 143, at paragraph 39; *Canada v. Superior Plus Corp.*, 2015 FCA 241, [2016] 2 C.T.C. 65, at paragraph 5; *Kinglon Investments Inc. v. Canada*, 2015 FCA 134, [2015] 5 C.T.C. 104, at paragraph 5; *Fong v. Canada*, 2015 FCA 102, 2015 D.T.C. 5053, at paragraph 5; *Laurentian Pilotage Authority v. Corporation des pilotes du Saint-Laurent central inc.*, 2015 FCA 295, at paragraph 5; *Sin v. Canada*, 2016 FCA 16, 39 Imm. L.R. (4th) 26, at paragraph 6.

[75] D'après mon calcul, au moins 12 arrêts de notre Cour ont appliqué l'arrêt *Imperial Manufacturing* : *Jamieson Laboratories Ltd. c. Reckitt Benckiser LLC*, 2015 CAF 104, au paragraphe 21; *Mancuso c. Canada (Santé nationale et Bien-être social)*, 2015 CAF 227, au paragraphe 8; *Canada c. Fio Corporation*, 2015 CAF 236, au paragraphe 10; *AgraCity Ltd. c. Canada*, 2015 CAF 288, au paragraphe 16; *Horseman c. Horse Lake First Nation*, 2015 CAF 122, au paragraphe 7; *ABB Technology AG c. Hyundai Heavy Industries Co., Ltd.*, 2015 CAF 181, au paragraphe 84; *Cameco Corporation c. Canada*, 2015 CAF 143, au paragraphe 39; *Canada c. Superior Plus Corp.*, 2015 CAF 241, au paragraphe 5; *Kinglon Investments Inc. c. Canada*, 2015 CAF 134, au paragraphe 5; *Fong c. Canada*, 2015 CAF 102, au paragraphe 5; *Administration de pilotage des Laurentides c. Corporation des pilotes du Saint-Laurent central inc.*, 2015 CAF 295, au paragraphe 5; *Sin c. Canada*, 2016 CAF 16, au paragraphe 6.

[76] On the same count, it appears that at least 11 decisions of this Court have followed *Turmel*: *French v. Canada*, 2016 FCA 64, 397 D.L.R. (4th) 746, at paragraph 26; *Galati v. Harper*, 2016 FCA 39, 394 D.L.R. (4th) 555, at paragraph 18; *Canada (Citizenship and Immigration) v. Bermudez*, 2016 FCA 131, [2017] 1 F.C.R. 128, at paragraph 21; *Canada v. John Doe*, 2016 FCA 191, 486 N.R. 223, at paragraph 31; *Teva Canada*

[76] Toujours d'après mon calcul, au moins 11 arrêts de notre Cour ont appliqué l'arrêt *Turmel* : *French c. Canada*, 2016 CAF 64, au paragraphe 26; *Galati c. Harper*, 2016 CAF 39, au paragraphe 18; *Canada (Citoyenneté et Immigration) c. Bermudez*, 2016 CAF 131, [2017] 1 R.C.F. 128, au paragraphe 21; *R. c. Untel*, 2016 CAF 191, au paragraphe 31; *Teva Canada limitée c. Gilead Sciences Inc.*, 2016 CAF 176, au paragraphe

2016 FCA 215 (CanLII)

Limited v. Gilead Sciences Inc., 2016 FCA 176, 140 C.P.R. (4th) 309, at paragraph 23; *Djelebian v. Canada*, 2016 FCA 26, 2016 D.T.C. 5023, at paragraph 9; *Bemco Confectionery and Sales Ltd. v. Canada*, 2016 FCA 21, [2016] G.S.T.C. 16, at paragraph 3; *Kwan Lam v. Chanel S. de R.L.*, 2016 FCA 111, 483 N.R. 15, at paragraph 15; *Zaghbib v. Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 182, [2017] 1 F.C.R. 392, at paragraph 23; *Bayer Inc. v. Fresenius Kabi Canada Ltd.*, 2016 FCA 13 [cited above], at paragraph 7; *Violator No. 10 v. Canada (Attorney General)*, 2016 FCA 42, at paragraph 6.

23; *Djelebian c. Canada*, 2016 CAF 26, au paragraphe 9; *Bemco Confectionery and Sales Ltd. c. Canada*, 2016 CAF 21, au paragraphe 3; *Kwan Lam c. Chanel S. de R.L.*, 2016 CAF 111, au paragraphe 15; *Zaghbib c. Canada (Sécurité publique et Protection civile)*, 2016 CAF 182, [2017] 1 R.C.F. 392, au paragraphe 23; *Bayer Inc. c. Fresenius Kabi Canada Ltd.*, 2016 CAF 13 [précité], au paragraphe 7; *Contrevenant nº 10 c. Canada (Procureur général)*, 2016 CAF 42, au paragraphe 6.

[77] It seems to me, with the greatest of respect, that if we are going to simplify the standard applicable to decisions of prothonotaries and judges, and thus make the process easier to understand for litigants, it is imperative that we get our own house in order. As Mr. Justice Stratas stated, at paragraph 22 of his reasons in *Imperial Manufacturing*:

> …. In those cases, [Mr. Justice Stratas is referring to *Housen*] the Supreme Court provided the definitive word on the standard of review in civil cases. It did not make informal comments of the sort we might be tempted to distinguish. Rather, it analyzed the matter thoroughly—examining precedent, doctrine and legal policy—and it pronounced clearly and broadly on the matter, without any qualifications or reservations.

[77] Soit dit avec le plus grand respect, il me semble que, si nous voulons simplifier la norme applicable aux décisions des protonotaires et des juges, et ainsi rendre la procédure plus claire aux parties, il faut absolument que nous mettions de l'ordre dans nos propres affaires. Je reprends ici à mon compte les observations formulées par le juge Stratas au paragraphe 22 des motifs de l'arrêt *Imperial Manufacturing* :

> […] La Cour suprême a tranché définitivement [dans *Housen*] la question de la norme de contrôle en matière civile. Elle n'a pas formulé d'observations informelles à l'égard desquelles nous pourrions être tentés d'établir des distinctions. Elle a plutôt analysé la question à fond en examinant les précédents, la doctrine et les principes de droit, et elle s'est prononcée de façon claire et nette sur la question sans conditions ni réserves.

[78] I am not to be taken as disagreeing with what Mr. Justice Stratas says at paragraph 12 of his reasons in *Turmel*. However, in my respectful view, introducing new language, language that finds no basis in *Housen*, will have the opposite effect of what our Court intended to achieve in *Imperial Manufacturing*, i.e. "in the interests of simplicity and coherency, only the *Housen* articulation of the standard of review—binding upon us—should be used when we review discretionary, interlocutory orders" (paragraph 29). Introducing new language will detract from simplicity and coherency and will, no doubt, give rise to a fresh line of arguments by counsel which will inevitably detract from the effective review of discretionary orders made by prothonotaries and judges.

[78] Je ne suis pas en désaccord avec ce que dit le juge Stratas au paragraphe 12 des motifs de l'arrêt *Turmel*. Cependant, je le dis en tout respect, l'introduction d'une nouvelle formulation, qui n'a pas de fondement dans l'arrêt *Housen*, ne peut qu'avoir un effet contraire à celui que notre Cour visait dans l'arrêt *Imperial Manufacturing*, exprimé comme suit à son paragraphe 29 : « par souci de cohérence et de simplicité, j'estime que seule la formulation de la norme de contrôle figurant dans l'arrêt *Housen* — qui nous lie — devrait être utilisée lorsque nous sommes saisis d'une demande de contrôle d'une ordonnance interlocutoire discrétionnaire ». L'introduction d'un nouveau libellé ne peut qu'aller à l'encontre de la cohérence et de la simplicité, et, sans doute, inciter les avocats à élaborer une nouvelle argumentation de nature à compromettre inévitablement l'efficacité du contrôle des ordonnances discrétionnaires rendues par les protonotaires et les juges.

2016 FCA 215 (CanLII)

[79] I therefore conclude that we should apply the *Housen* standard to discretionary decisions of prothonotaries. I am also of the view that the *Housen* standard should apply in reviewing discretionary decisions of judges.

[79] Par conséquent, je conclus que nous devrions appliquer la norme *Housen* aux décisions discrétionnaires des protonotaires. J'estime en outre que nous devrions également contrôler suivant la norme *Housen* les décisions discrétionnaires des juges.

B. *Did the Motions Judge Err In Refusing to Interfere with the Prothonotary's Decision?*

B. *Le juge des requêtes a-t-il commis une erreur en refusant d'infirmer la décision de la protonotaire?*

[80] Before turning to the second issue, a few words concerning the standard of review applicable to the motions Judge's decision are necessary. In *Pompey*, at paragraph 18, the Supreme Court held that our Court could only interfere with a decision of a motions judge reviewing the discretionary order of a prothonotary when the judge had no grounds to interfere with the Prothonotary's decision, or where there were such grounds, the judge had decided the matter on a wrong basis or was plainly wrong.

[80] Avant d'aborder la deuxième question, il me paraît nécessaire de dire quelques mots sur la norme de contrôle applicable à la décision du juge des requêtes. La Cour suprême pose en principe au paragraphe 18 de l'arrêt *Pompey* que notre Cour ne peut infirmer ou modifier la décision rendue par un juge des requêtes lors du contrôle de l'ordonnance discrétionnaire d'un protonotaire que si le juge n'avait aucun motif d'infirmer ou de modifier cette ordonnance, ou, advenant l'existence d'un tel motif, si la décision du juge était mal fondée ou manifestement erronée.

[81] In *Bayer*, a case where the appeal to our Court was one from a decision of a motions judge reviewing a discretionary order of a prothonotary pursuant to a rule 51 appeal, our Court held that but for the *Pompey* standard of review, it would have applied the *Housen* standard in reviewing the Judge's decision.

[81] Dans l'affaire *Bayer*, où l'appel porté devant notre Cour avait pour objet la décision d'un juge des requêtes sur un appel formé en vertu de la règle 51 des Règles d'une ordonnance discrétionnaire d'un protonotaire, notre Cour a déclaré que, n'eût été la norme *Pompey*, elle aurait appliqué la norme *Housen* au contrôle de la décision du juge.

[82] As I understand this branch of the *Pompey* standard, this Court cannot interfere with the motions Judge's decision unless he made an error of law or made an error of the type that falls within the palpable and overriding error component of the *Housen* standard. Thus, on my understanding of the *Pompey* standard, there is no difference in substance between it and the *Housen* standard.

[82] Selon mon interprétation de ce volet de la norme *Pompey*, notre Cour ne peut infirmer la décision du juge des requêtes que s'il a commis une erreur de droit, ou une erreur manifeste et dominante au sens de la norme *Housen*. Donc, si je comprends bien la norme *Pompey*, elle ne diffère pas en substance de la norme *Housen*.

[83] Consequently, in my view, not only should we apply the *Housen* standard to the decision of the Prothonotary, we should also apply that standard to the decision of the motions Judge.

[83] À mon avis, par conséquent, nous devrions appliquer la norme *Housen* non seulement à la décision de la protonotaire, mais aussi à celle du juge des requêtes.

[84] Thus the question before us on this appeal is whether the motions Judge erred in law or made a

[84] La question que nous avons à trancher dans le présent appel est ainsi celle de savoir si le juge des

2016 FCA 215 (CanLII)

2016 FCA 215 (CanLII)

palpable and overriding error in refusing to interfere with the Prothonotary's decision.

[85] The facts leading up to the Prothonotary's decision are quite straightforward. On March 19, 2014, counsel for the appellants wrote to counsel for the respondents summarizing their discussions regarding the examinations of the inventors. Counsel for the appellants pointed out that they had requested two days to examine each inventor and that Counsel for the respondents had taken the position that one day was sufficient. More particularly, counsel for the appellants wrote that:

> As I mentioned previously, we anticipate that more than one day will be required for the examination of Dr. Feldmann and also the examination of Dr. Maini. We recommend reserving two days for each of these witnesses particularly in view of our joint request for an early trial date, the witnesses' limited availability and the necessity to travel to London and New York to conduct their examinations. If you maintain your refusal to provide additional dates of availability and one day is found (as is expected) to be insufficient to complete their respective examinations, we shall seek a direction that Kennedy pay for all of the costs of the reattendance.

[86] As I indicated earlier, at the end of the first day of the examination of each inventor, counsel for the respondents did not allow the respondents to pursue their examinations.

[87] In her order of April 17, 2015, at page 4, the Prothonotary dealt with this issue as follows:

> AND UPON the Court taking under reserve its disposition of item #2 in Motion #2 and any issues as to costs thereof, and upon subsequently further considering the submissions of counsel for the Plaintiffs that the examination of each of Dr. Feldmann and Dr. Maini, although conducted for two days, was not completed and that they had requested two days (each) from the outset. The Plaintiffs described generally the topics for discovery yet to be completed with the inventors and requested a further one day with each of the inventors. I am satisfied, however, that a half day with each would be sufficient and that these discoveries should be concluded with some cooperation between the parties so as to permit the litigation to progress. I am also satisfied that, unless the parties

requêtes a commis une erreur de droit ou une erreur manifeste et dominante en refusant d'infirmer ou de modifier la décision de la protonotaire.

[85] Les faits qui ont mené à la décision de la protonotaire sont simples. Le 19 mars 2014, les avocats des appelantes ont écrit aux avocats des intimés une lettre où ils résumaient leurs discussions concernant les interrogatoires des inventeurs. Ils y rappelaient qu'ils avaient demandé deux jours pour interroger chacun des inventeurs, et que les avocats des intimés avaient exprimé l'avis qu'un seul jour suffirait. Plus précisément, les avocats des appelantes ont écrit ce qui suit :

> [TRADUCTION] Comme je le disais plus haut, nous prévoyons qu'il faudra plus d'une journée pour l'interrogatoire de M. Feldmann et plus d'une journée aussi pour celui de M. Maini. Nous recommandons de réserver deux jours pour chacun de ces témoins, étant donné notamment notre demande commune d'une date rapprochée pour le procès, le peu de disponibilité des témoins, ainsi que la nécessité de se rendre à Londres et à New York pour tenir leurs interrogatoires. Si vous maintenez votre refus de nous communiquer des dates additionnelles de disponibilité et que nous constatons (conformément à nos prévisions) qu'une journée ne suffit pas pour achever l'interrogatoire de chacun des témoins, nous demanderons à la Cour d'ordonner à Kennedy de payer la totalité des frais qu'entraînera leur nouvelle comparution.

[86] Comme on l'a vu ci-dessus, les avocats des intimés ont mis un terme à l'interrogatoire de chacun des inventeurs par les appelantes à la fin de sa première journée.

[87] La protonotaire a statué comme suit sur cette question à la page 4 de son ordonnance du 17 avril 2015 :

> [TRADUCTION] ET ATTENDU QUE la Cour a mis en délibéré sa décision sur le deuxième chef de la deuxième requête et sur toute question relative aux dépens y afférents, et vu l'examen subséquent des observations des avocats des demandeurs selon lesquelles les interrogatoires de M. Feldmann et de M. Maini, bien qu'ayant duré en tout deux jours, n'étaient pas achevés, et qu'ils avaient demandé deux jours pour l'interrogatoire de chacun dès le départ. Les demandeurs ont défini en termes généraux les sujets qu'ils souhaitaient examiner durant le reste des interrogatoires préalables des inventeurs et ils ont demandé une journée de plus avec chacun de ceux-ci. J'estime toutefois qu'une demi-journée suffirait pour chaque témoin, et que les parties devraient coopérer dans la tenue

agree otherwise, that the examinations of Dr. Feldmann and Dr. Maini should proceed by way of teleconference. [My emphasis.]

[88] As a result, she made the order which gave rise to the appeal before the motions Judge and now in appeal before us.

[89] The action commenced by Hospira to impeach the patent at issue was bifurcated by consent of the parties. Once liability is determined by the Federal Court, the remedy phase, if necessary, will follow. The action has been case managed by the Prothonotary from its commencement and she has presided over 12 case management conferences and 9 days of discovery motions. There can thus be no doubt that she had full knowledge of the relevant facts and issues now before the Federal Court when she made her decision.

[90] As it appears from her order, the issue before us was only one of many which the Prothonotary had to deal with. In making her order regarding the reattendance of the inventors, the Prothonotary took note of the appellants' argument that their examination of the inventors was incomplete and that a number of topics had yet to be covered. After consideration of the parties' respective arguments, she declared herself satisfied that an additional one half day per inventor would be sufficient to complete the examinations. She also held that the inventors were to be examined by teleconference unless the parties came to a different agreement.

[91] The appeal from her decision was heard by the motions Judge on June 16, 2015 and he dismissed the appeal two days later. In deciding as he did, the motions Judge applied the *Aqua-Gem* standard of review. On the basis of that standard, he held that the Prothonotary's decision was not clearly wrong and that her discretion had not been exercised upon wrong principles or upon a misapprehension of the facts. I pause here to say that in applying the *Aqua-Gem* standard in lieu of the *Housen* standard, the motions Judge did not make a reviewable error in that, as I have already indicated, there is no substantial difference between the two standards other than in respect of the *de novo* hearing when the question

de ces interrogatoires, de manière à permettre à l'instance d'avancer. J'estime également que, sauf entente entre les parties, M. Feldmann et M. Maini devraient être interrogés par visioconférence. [Non souligné dans l'original.]

[88] Elle a en conséquence rendu l'ordonnance portée en appel devant le juge des requêtes, dont la décision est maintenant devant notre Cour.

[89] L'action intentée par Hospira en vue de faire invalider le brevet en cause a été scindée avec le consentement des parties. Une fois que la Cour fédérale aura statué sur la responsabilité, elle statuera, s'il y a lieu, sur la réparation. La protonotaire a dirigé l'action depuis son introduction, elle a présidé à plus de 12 conférences de gestion de l'instance et elle a instruit des requêtes au sujet de la communication préalable durant 9 jours. Il ne fait donc aucun doute qu'elle possédait au moment de sa décision une entière connaissance des questions et des faits pertinents ensuite portés devant la Cour fédérale.

[90] Comme on le voit de l'ordonnance de la protonotaire, la question dont notre Cour est saisie n'était qu'un des nombreux points qu'elle avait à trancher. Pour rendre son ordonnance concernant la nouvelle comparution des inventeurs, la protonotaire a pris acte de l'argument des appelantes comme quoi elles n'avaient pas achevé l'interrogatoire de ceux-ci et certains sujets restaient à couvrir. Après examen des observations des parties, elle a déclaré estimer qu'il suffirait d'une demi-journée de plus par inventeur pour achever les interrogatoires. Elle a aussi décidé que, sauf entente entre les parties, les inventeurs seraient interrogés par visioconférence.

[91] Le juge des requêtes a instruit l'appel formé contre la décision de la protonotaire le 16 juin 2015 et il l'a rejeté deux jours plus tard. Il est arrivé à sa décision en rejet en appliquant la norme de contrôle *Aqua-Gem*. Se fondant sur cette norme, il a conclu que la décision de la protonotaire n'était pas entachée d'erreur flagrante et qu'elle n'avait pas exercé son pouvoir discrétionnaire en se fondant sur de mauvais principes ou une mauvaise appréciation des faits. Je tiens à faire observer que le juge des requêtes, en appliquant la norme *Aqua-Gem* au lieu de la norme *Housen*, n'a pas commis une erreur justifiant notre intervention, au motif que, comme je l'ai déjà dit, les deux normes ne diffèrent pas substantiellement,

2016 FCA 215 (CanLII)

at issue is vital to the final issue of the case, which is not the situation in the present matter.

[92] I will now address the specific grounds of criticism put forward by the appellants in support of their submission that we should allow their appeal.

[93] The appellants' main argument in this appeal is that the Prothonotary erred in shifting the burden in regard to the examination process. They say that if the respondents were of the view that two days were not justified for each inventor, they ought to have brought a motion under rule 243 asking the Court to make a determination that the continuance of the examinations was "oppressive, vexatious or unnecessary". Failing such a motion, the appellants say that their right to examine the inventors was absolute. Consequently, in requiring them to demonstrate why they needed more than one day to examine the inventors, the Prothonotary shifted to them the burden of justifying the length of the examinations.

[94] I am prepared to accept that, in a technical sense only, the appellants are correct. In other words, once it became apparent that the parties could not agree on the duration of the examinations or before they terminated the examinations at the end of the first day, the respondents should have brought a motion under rule 243. However, as we now know, the parties proceeded to London and New York for the examinations and it appears that the appellants hoped for the best, i.e. that once there, the respondents would give in. Unfortunately, that scenario did not occur and, at the end of the first day of each examination, the respondents terminated them.

[95] The appellants say, and they are correct, that it was not the respondents' call to terminate the examinations of the inventors. However, contrary to the appellants' submission, it was not, in my respectful view, entirely their call to determine the duration of their examinations. In the face of a disagreement between

sauf pour ce qui concerne l'instruction *de novo* lorsque la question en cause est déterminante pour l'issue du principal, ce qui n'est pas le cas en l'espèce.

[92] J'examinerai maintenant les moyens précis qu'ont avancés les appelantes au soutien du présent appel.

[93] Le principal argument que les appelantes ont fait valoir devant notre Cour est que la protonotaire a commis une erreur en déplaçant la charge en ce qui concerne l'interrogatoire. Si les intimés considéraient que deux journées d'interrogatoire pour chaque inventeur ne se justifiaient pas, avancent les appelantes, ils auraient dû former, sous le régime de la règle 243 des Règles, une requête limitant les interrogatoires que la Cour estime « abusifs, vexatoires ou inutiles ». En l'absence d'une telle requête, affirment-elles, leur droit d'interroger les inventeurs était absolu. Par conséquent, en exigeant qu'elles démontrent qu'elles avaient besoin de plus d'une journée pour interroger les inventeurs, la protonotaire aurait déplacé sur elles la charge de justifier la durée des interrogatoires.

[94] Je suis prêt à admettre que les appelantes ont raison, encore que seulement dans un sens formel. Autrement dit, lorsqu'il fut devenu évident que les parties ne pourraient s'entendre sur la durée des interrogatoires, ou avant de mettre un terme à ceux-ci à la fin de la première journée, les intimés auraient dû former une requête sous le régime de la règle 243 des Règles. Cependant, comme nous le savons maintenant, les parties se sont rendues à Londres et à New York pour les interrogatoires, les appelantes espérant, semble-t-il, que les choses s'arrangeraient, c'est-à-dire que, les participants une fois sur place, les intimés céderaient. Malheureusement, cet espoir ne s'est pas concrétisé, et les intimés ont mis un terme à chacun des interrogatoires à la fin de sa première journée.

[95] Les appelantes soutiennent — avec raison — qu'il n'appartenait pas aux intimés de mettre fin aux interrogatoires des inventeurs. Cependant, contrairement à la thèse des appelantes, il n'appartenait pas non plus entièrement à celles-ci, à mon avis, de décider la durée de leurs interrogatoires. Étant donné le

2016 FCA 215 (CanLII)

the parties only the Federal Court could make that determination.

[96] It goes without saying, in the circumstances, that it would have been advisable for everyone involved in this litigation to have had the matter decided prior to the commencement of the examinations in London and New York. However, in the end, the matter that should have been determined prior to the commencement of the examinations was brought before the Prothonotary and she made the determination in her order of April 17, 2015.

[97] It follows from the Prothonotary's decision that she agreed with the appellants that their continued examination of the inventors was not vexatious or oppressive and that it was necessary. However, she was satisfied that an additional one half day per inventor was sufficient to allow the appellants to conclude their examinations. She came to this view after listening to the parties arguments which, *inter alia*, were directed at the topics which the appellants said needed to be covered during the examinations.

[98] In answer to the appellants' argument that the Prothonotary erred by shifting the burden to them, I begin by saying that examinations, including those of assignors/inventors, are not without limits. To say, as the appellants do, that there is no limitation to their right of examination is, in my respectful view, incorrect. Circumstances and context matter greatly. They form the parameters within which examinations must be conducted. Prothonotaries and judges must therefore, in addressing and determining issues pertaining to discovery and examinations, keep those factors in mind at all times. They must also remember rule 3 which provides that the rules, including those concerning discovery, are to "be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits." This, it seems to me, is precisely what the Prothonotary did in making the impugned order.

[99] In determining whether the continuance of the examinations of the inventors was justified and whether

désaccord des parties, seule la Cour fédérale pouvait décider cette durée.

[96] Il va sans dire, vu les circonstances, qu'il aurait été souhaitable pour tous les intéressés au présent litige de faire trancher cette question avant que ne commencent les interrogatoires à Londres et à New York. Cependant, la question qui aurait dû être décidée avant le commencement des interrogatoires a été en fin de compte portée devant la protonotaire, qui l'a tranchée par son ordonnance du 17 avril 2015.

[97] Il s'ensuit de la décision de la protonotaire qu'elle pensait comme les appelantes que la poursuite de l'interrogatoire des inventeurs n'était ni abusive ni vexatoire, et qu'elle était nécessaire. Cependant, elle a estimé qu'une demi-journée de plus par inventeur suffisait pour permettre aux appelantes d'achever leurs interrogatoires. Elle est arrivée à cette conclusion après avoir écouté les arguments des parties, qui concernaient notamment les sujets que les appelantes affirmaient avoir besoin d'examiner au cours de ces interrogatoires.

[98] Je répondrai à l'argument des appelantes selon lequel la protonotaire aurait à tort déplacé sur elles la charge en rappelant d'abord que la durée des interrogatoires, y compris ceux des cédants ou inventeurs, n'est pas illimitée. À mon avis, les appelantes se trompent en affirmant que leur droit à l'interrogatoire est sans limites. Les circonstances et le contexte ont une grande importance. Ils forment les limites à l'intérieur desquelles les interrogatoires doivent être tenus. Les protonotaires et les juges appelés à examiner et à trancher les questions relatives à la communication et aux interrogatoires préalables doivent donc toujours garder ces facteurs à l'esprit. Ils doivent aussi se rappeler la règle 3 des Règles, qui dispose que les Règles, y compris les dispositions relatives aux interrogatoires préalables, « sont interprétées et appliquées de façon à permettre d'apporter une solution au litige qui soit juste et la plus expéditive et économique possible ». C'est exactement ce que la protonotaire a fait, à mon sens, en rendant l'ordonnance attaquée.

[99] Il ne fait aucun doute qu'afin d'établir si la poursuite des interrogatoires des inventeurs était justifiée et

2016 FCA 215 (CanLII)

one day or less was required, there can be no doubt that the Prothonotary considered a number of circumstances relevant to her determination, and in particular the topics which the appellants intended to cover in light of the issues before the Court. In considering these circumstances, the Prothonotary must have also had in mind the fact that the inventors were not parties to the action, that they would have to make themselves available for the continued examination, the time frame of the action and its scheduling. All of those factors, in my respectful view, were relevant to the determination that the Prothonotary had to make.

[100] Her consideration of all the above factors led the Prothonotary to hold that a continuance of the examinations of the inventors was justified by teleconference and that an additional one half day per inventor would suffice.

[101] I pause here to say that during the course of their arguments before us on this appeal, the appellants did not make any attempt to apprise us of the topics which they intended to cover during the course of their examinations. This omission, I suspect, stems from their view that it was entirely up to them to determine the duration of the examinations. In other words, the appellants' view seemed to be that it was not for the Prothonotary, the motions Judge and, in effect, for us to tell them how long they should take in examining the inventors. This is why I indicated earlier that the appellants argued that their right to examine the inventors was absolute. In saying this, I should not be taken in any way as criticizing counsel for the appellants. However, in deciding whether the motions Judge ought to have intervened, it seems to me that some details regarding those topics on which the appellants intended to further examine the inventors should have been provided to us. This, no doubt, would have been helpful in better understanding the appellants' need for the continued examinations.

[102] With regard to the appellants' arguments directed at the motions Judge's comments that "elbow room" should be given to case managing prothonotaries, I agree entirely with the respondents when they say, at paragraph 67 of their memorandum of fact and law, that:

s'il faudrait une journée ou moins pour mener chacun d'eux à terme, la protonotaire a examiné de nombreux facteurs pertinents, notamment les sujets que les appelantes avaient l'intention de couvrir, à la lumière des questions en litige devant la Cour. Ce faisant, elle a certainement pris en compte le fait que les inventeurs n'étaient pas parties à l'action et qu'ils allaient devoir se mettre à la disposition des appelantes pour la poursuite des interrogatoires ainsi que l'échéancier de l'action. Tous ces facteurs, à mon avis, étaient pertinents quant à la décision que la protonotaire avait à rendre.

[100] Son examen de tous les facteurs énumérés ci-dessus a amené la protonotaire à décider que la poursuite des interrogatoires des inventeurs était justifiée, mais par visioconférence, et qu'une demi-journée de plus par témoin suffirait.

[101] Je voudrais ici faire observer qu'au cours de la plaidoirie qu'elles ont prononcée devant notre Cour dans le présent appel, les appelantes n'ont fait aucun effort pour nous informer des sujets qu'elles entendaient examiner dans leurs interrogatoires. Je soupçonne que cette omission découle de leur opinion selon laquelle il leur appartenait entièrement de fixer la durée de ceux-ci. En d'autres termes, les appelantes semblaient d'avis que ce n'était pas à la protonotaire, ni au juge des requêtes, ni en fait à nous de leur dire combien de temps ils devraient mettre à interroger les inventeurs. C'est pourquoi je faisais observer plus haut que les appelantes ont affirmé le caractère absolu de leur droit d'interroger les inventeurs. Je ne voudrais pas que ces remarques soient interprétées comme une critique des avocats des appelantes. Il me semble cependant que, pour nous aider à décider si le juge des requêtes aurait dû intervenir, les appelantes auraient bien fait de nous instruire un peu des sujets sur lesquels elles avaient l'intention d'interroger les inventeurs. De tels renseignements nous auraient sans doute aidés à mieux comprendre leur besoin de poursuivre les interrogatoires.

[102] En ce qui concerne les arguments des appelantes suscités par l'observation du juge des requêtes voulant qu'il faille donner une « liberté d'action » aux protonotaires responsables de la gestion d'instances, je suis entièrement d'accord avec les intimés lorsqu'ils font

2016 FCA 215 (CanLII)

> The expression “elbow room” is merely a euphemism for deferring to factually-suffused decisions. “Elbow room” does not equate to “immunity from review” and Justice Boswell did not hold that it did.

[103] In other words, it is always relevant for motions judges, on a rule 51 appeal, to bear in mind that the case managing prothonotary is very familiar with the particular circumstances and issues of a case and that, as a result, intervention should not come lightly. This does not mean, however, that errors, factual or legal, should go undetected. In the end, “elbow room” is simply a term signalling that deference, absent a reviewable error, is owed, or appropriate, to a case-managing prothonotary—no more, no less.

[104] Finally, with regard to the appellants’ arguments that the Prothonotary erred in ordering that the examinations were to be conducted by way of teleconference, I agree with the respondents that since the inventors were both residents of the United Kingdom, they were not compellable absent the issuance of letters rogatory. Consequently, in the circumstances, I can detect no error on the part of the Prothonotary in ordering the continuance of the examinations by way of teleconference.

[105] Therefore, on my understanding of the record and of the parties’ respective submissions, I can see no basis which would allow us to conclude that the motions Judge ought to have interfered with the Prothonotary’s decision. In other words, I have not been persuaded that the motions Judge either erred in law or made an overriding and palpable error which would have allowed us to intervene.

remarquer ce qui suit au paragraphe 67 de leur mémoire des faits et du droit :

> [TRADUCTION] L’expression « liberté d’action » est simplement une manière figurée de dire qu’il convient de faire preuve de retenue à l’égard des décisions qui reposent sur des faits. Cette expression n’est pas équivalente à « immunité contre le contrôle », et le juge Boswell n’a pas dit qu’elle l’était.

[103] Autrement dit, le juge des requêtes saisi d’un appel fondé sur la règle 51 des Règles fera toujours bien de se rappeler que le protonotaire responsable de la gestion de l’instance connaît très bien les questions et les faits particuliers de l’affaire, de sorte que l’intervention ne doit pas être décidée à la légère. Il ne s’ensuit pas cependant qu’il faille laisser passer les erreurs de fait ou de droit. En fin de compte, l’expression « liberté d’action » signifie tout simplement que, sauf erreur donnant ouverture à annulation, la déférence est appropriée ou applicable aux décisions du protonotaire chargé de la gestion de l’instance — rien de plus, rien de moins.

[104] Enfin, pour ce qui concerne les arguments des appelantes selon lesquels la protonotaire aurait commis une erreur en ordonnant la tenue des interrogatoires par visioconférence, je suis d’accord avec les intimés lorsqu’ils rappellent que les inventeurs, habitant tous deux au Royaume-Uni, ne sont pas contraignables, sauf commission rogatoire. Par conséquent, vu les circonstances, je ne discerne aucune erreur dans la décision de la protonotaire d’ordonner la poursuite des interrogatoires par visioconférence.

[105] Donc, selon mon interprétation du dossier et des observations respectives des parties, je ne vois rien qui nous permettrait de conclure que le juge des requêtes aurait dû infirmer la décision de la protonotaire. Autrement dit, on ne m’a pas convaincu que le juge des requêtes ait commis une erreur de droit, ou une erreur manifeste et dominante, qui nous permettrait d’intervenir.

2016 FCA 215 (CanLII)

VII. Conclusion

[106] I would therefore dismiss the appeal with costs.

PELLETIER J.A.: I agree.

RENNIE J.A.: I agree.

DE MONTIGNY J.A.: I agree.

GLEASON J.A.: I agree.

VII. Conclusion

[106] En conséquence, je rejetterais l'appel avec dépens.

LE JUGE PELLETIER, J.C.A. : Je suis d'accord.

LE JUGE RENNIE, J.C.A. : Je suis d'accord.

LE JUGE DE MONTIGNY, J.C.A. : Je suis d'accord.

LA JUGE GLEASON, J.C.A. : Je suis d'accord.

2016 FCA 215 (CanLII)

TAB 2

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May 20, 1999

Chair
Management Board of Cabinet
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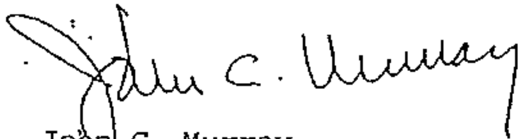
Dear Sir:

Pursuant to the *Courts of Justice Act, 1994*, R.S.O. 1990, c. 43, s. 51.13, and Appendix "A" to the Framework Agreement, the Fourth Provincial Judges Remuneration Commission has the honour of presenting its majority award with respect to the remuneration, benefits, allowances and pension of Provincial Court judges in Ontario. The recommendations relate to a time period commencing May 1, 1998. We also enclose the minority report of Valerie Gibbons.

Respectfully yours,

Stanley M. Beck, Q.C.



John C. Murray

cc: Secretary, Management Board of Cabinet

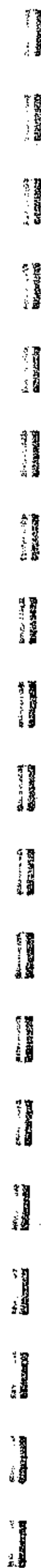
FOURTH TRIENNIAL REPORT

OF THE

PROVINCIAL JUDGES

REMUNERATION COMMISSION

(1998)



IN THE MATTER OF THE *COURTS OF JUSTICE ACT* AND IN THE MATTER OF AN INQUIRY BY THE PROVINCIAL JUDGES REMUNERATION COMMISSION (1998) INTO THE COMPENSATION OF PROVINCIAL COURT JUDGES

B E T W E E N:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO

(the "Government of Ontario")

- and -

THE ONTARIO JUDGES' ASSOCIATION, THE ONTARIO FAMILY LAW JUDGES' ASSOCIATION AND THE ONTARIO PROVINCIAL COURT (CIVIL DIVISION) JUDGES' ASSOCIATION

(the "Judges")

BEFORE: Stanley M. Beck, Chair
Valerie A. Gibbons, Government of Ontario's Nominee
John C. Murray, Judges' Nominee

APPEARANCES:

On Behalf of the Government of Ontario: Roy C. Filion, Counsel
Frances R. Gallop

On Behalf of the Judges: C. Michael Mitchell, Counsel
Steven M. Barrett
Michael Code

HEARINGS: November 26, 27, December 16, 17, 18, 1998
January 19, 28, February 4, 15, 1999

Executive Summary

1. This is the Report of the Fourth Triennial Provincial Judges Remuneration Commission. The Commission was constituted pursuant to the Courts of Justice Act, 1994, and the Framework Agreement, contained in Appendix A to the Act. The Framework Agreement governs the jurisdiction and terms of reference of each of the Triennial Commissions. A Commission's recommendations as to salaries, benefits and allowances, but not as to pensions, are binding on the Government.

2. The actual base salaries of the judges of the Provincial Court have not been increased since 1992. The agreed annual cost of living increase ("the AIW") was not paid from 1992 to 1996 due to provincial fiscal restraint.

3. The current base salary of a Provincial Court judge is $130,810. The base salary of a federally appointed judge of the General Division is $175,800. Over the past seven years, the salary of the Provincial judges has increased just over $6,500 (due entirely to the reinstatement of the AIW in 1996), as opposed to $28,000 for a judge of the General Division.

4. Legislative changes, particularly over the past four years, have seen the General Division's criminal law workload

effectively transferred to the Provincial Court. From 1993 to 1998, there has been a drop of some 78% in the number of criminal cases in the General Division. Those cases are now heard in Provincial Court. The result is, in effect, a single Ontario Court of Justice, with the General Division dealing primarily with matters of property and civil rights, and the Provincial Court dealing with criminal law.

5. The primary criterion which governs the Commission under the Framework is "to provide fair and reasonable compensation ... in light of prevailing economic conditions". The Government's 1998 Budget Statement indicated that in terms of growth, job creation and deficit reduction, the Ontario economy has never been stronger. An expanding economy has allowed for billions of dollars of additional program expenditures, at the same time that the deficit has been reduced.

6. In light of the severe restraint on the judges' salaries since 1991, the <u>de facto</u> transfer of the criminal law jurisdiction to the Provincial Court, and the buoyant state of the economy, it is the appropriate time to correct a significant inequity in the salaries of the Provincial Court.

7. We recommend that "fair and reasonable compensation" would be a salary base of $150,000 in 1998, $160,000 in 1999 and $170,000 in 2000. This recommendation will cost approximately $10,000,000 over the three year period.

8. The pension plan for the Provincial judges should be brought to the 66-2/3% level of the Federal judges. We set out a number of options as to how this might be accomplished. The mandatory implementation of our salary recommendations without a concomitant revision in the pension plan, would not be sound social policy, and would not accomplish the objective of attracting the ablest men and women to the Provincial bench.

INDEX

	Page
Background	1
Remuneration History	4
Henderson (1988)	7
Second Triennial Report (1992)	10
The Framework Agreement	12
The Social Contract Act and the Freeze	14
The Third Triennial Commission (1996)	15
The Current Case	17
Criminal Law	18
The Transferred Workload	22
The Workload	25
Increase in Number of Judges	28
Family Law	30
The Framework Criteria	33
The Provincial Economy	33
Conclusion on Economic Criterion	38
Fair and Reasonable Compensation	39
Decision	42
Benefits and Allowances	50
Benefits	54
Pensions	57
Decision	64
Rule of 80	69
Early Retirement Reductions	70
Addendum - Administrative Salaries	72

This is the Fourth Triennial Report of the Provincial Judges Remuneration Commission ("the Commission"). The Commission was constituted pursuant to the Courts of Justice Act, 1994, R.S.O. 1990, c. 43, s. 51.13, and the Framework Agreement ("the Framework") contained in Appendix A to the Act, which governs the terms of reference and jurisdiction of each of the triennial commissions. Prior to dealing with the Framework, it is important to set out the historical context which led to it, as it is not possible to understand the agreement, and what occurred with respect to the remuneration of the Provincial Court judges subsequent to it, without some understanding of the remuneration setting process, the commission reports, and the response of successive provincial Governments.

BACKGROUND

The current structure of the Provincial Court dates from a basic restructuring in 1989. It is important to note, however, that in the 30 years prior to that, there was a steady evolution of the Magistrates', juvenile and family courts into the modern Provincial Court. The result of that evolution has been the creation of a Court that in every sense, in terms of its selection, qualifications, term of office, jurisdiction, responsibilities, and independence, including the process for determining compensation, is an integral part of the judiciary of Ontario. This evolution is best summarized in the statement of

Attorney General Ian Scott, when he announced Ontario's Court Reform initiative in May, 1989:

> Judges who conduct trials in Ontario whether criminal, civil or family matters will all be members of the same court...All judges in this Province must meet the same high standard prior to being appointed: ten years' experience at the bar. This is the highest standard in Canada for judicial appointment. Judges of this calibre of legal experience drawn from the same pool of lawyers in the Province should be able to enjoy the full range of judicial work in their area of legal expertise without artificial restrictions based on hierarchy.

Effective September 1, 1990, the Ontario Court of Justice was established. The hierarchy that Attorney General Scott referred to was abolished, at least in form, with the creation of the Ontario Court of Justice. All judges in Ontario, whether appointed by the Federal or Provincial Government, are members of that Court. The new Court was divided into two divisions, the General Division and the Provincial Division. The Trial Division of the Supreme Court and the District Court of Ontario merged to become the General Division. The Provincial Court (Criminal Division) and the Provincial Court (Family Division) merged to become the Provincial Division, and all judges of that Court were expected to hear both criminal and family cases. The final change in nomenclature will take place this year with the Ontario Court (Provincial Division) becoming the Ontario Court of Justice, and

the Ontario Court (General Division) becoming the Superior Court of Justice.

The jurisdiction of the Ontario Court (Provincial Division) ("the Provincial Court") will be dealt with below.

Provincial judges are appointed under Section 41(1) of the Courts of Justice Amendment Act, 1989. The Attorney General may only appoint to the Provincial bench from a list of candidates recommended by the Judicial Appointments Advisory Committee, all of whom must have been a member of a provincial bar for at least 10 years. In short, the members of the Provincial Court are drawn from the same pool of practising lawyers as the members of the Ontario Court (General Division). As with judges of the General Division, judges of the Provincial Court enjoy security of tenure and all the other hallmarks of judicial independence both by statute and under the Constitution; see generally Reference re Remuneration of the Judges of the Provincial Court of Prince Edward Island ("the P.E.I. Reference"), [1997] 3 S.C.R. 3.

In the P.E.I. Reference, the Supreme Court of Canada, building on its earlier decisions in The Queen v. Beauregard, [1986] 2 S.C.R. 56, at 74, and Valente v. The Queen, [1985] 2 S.C.R. 673, at 704, firmly established that financial security is one of the necessary essentials for judicial independence, and stressed that the concept includes both the source and level of

compensation. The P.E.I. Reference dealt particularly with the determinative source of judicial compensation and held that:

> What judicial independence requires is an independent body, along the lines of bodies that exist in many provinces and at the federal level to set or recommend the levels of judicial remuneration....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, those recommendations are non-binding, and 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 (at p. 88).

Ontario presaged the decision in the P.E.I. Reference through the 1992 Framework, which provided for independent triennial commissions whose recommendations as to salaries, benefits and allowances, but not pensions, are binding on the Government.

REMUNERATION HISTORY

Prior to the Framework, there had been a number of reports dealing with the remuneration of the judges. The first Provincial Judges Remuneration Commission was appointed and reported in 1988, pursuant to Section 88 of the Courts of Justice Act, 1984. Prior to the Framework, the commissions made non-binding recommendations with respect to "the remuneration, allowances and

benefits of provincial judges". The first triennial commission was chaired by Gordon Henderson, Q.C. ("Henderson", or "Henderson (1988)"), and its report contains an extensive review of the history and jurisdiction of the Provincial Court, as well as the history of previous recommendations with respect to remuneration and the decision of successive governments with respect thereto. While we do not deem it necessary to review the history and jurisdiction of the Court in as thorough a manner as the first commission, a brief review of the remuneration history is important to give context to our recommendations.

Henderson noted that the touchstone for the judges was what the Federal government paid the County and District Court judges. The gap was briefly eliminated in 1973 and widened thereafter until the County and District Court was merged with the General Division in 1990. The repeated goal of the judges was to eliminate the differential. Indeed, as far back as 1968, the then Attorney General, Arthur Wishart, stated in the Legislature that the salary of the judges "is going to be the same" as that of the County and District Court judges.

The first Provincial Courts Committee was created by Order in Council in 1980, and 1983 amendments to the Provincial Courts Act provided a statutory basis for the Committee and its operations. In December, 1980, the first committee recommended that the judges receive an interim increase of $5,000 per year,

and the Government responded by increasing salaries $6,000 per year effective April 1, 1981. In its 1981 report, the Committee considered the recommendations of the Royal Commission Inquiry into Civil Rights (1968) ("the McRuer Report" or "McRuer"), and of the Ontario Law Reform Commission (1973), on an appropriate salary for the judges. The Committee commented on the "ever-widening gap" that had developed since 1974 between the salaries of the judges and those of the County and District Court despite "an opposite trend to expand the jurisdiction and responsibilities of Provincial Court Judges". The Committee concluded that "there is no justifiable basis for paying Provincial Court Judges less than County Court Judges", and recommended that serious consideration be given to eliminating the disparity. Specifically, it recommended an immediate increase for 1981 and further years "so as to achieve equality of remuneration between the Provincial Court Judges and the County Court Judges by April 1, 1985". No action was taken on the Committee's salary recommendations between its report of January, 1981, and late 1985. In October, 1985, the Committee declined to make any recommendation with respect to salaries until it received a response from the Government to its 1981 recommendations.

As a result, the Chair of Management Board of Cabinet, Elinor Caplan, announced in the Legislature that the Government had "decided not to accept the 1981 recommendation of

the...committee to establish parity" between the salaries of the judges and those of the federally-appointed District Court judges. Between the years 1981 and 1985, the judges received small increments, but "their financial position deteriorated dramatically" (Henderson). Indeed, the gap between the judges and the District Court increased by some 50% between 1981 to 1985. In terms of later increases for both groups that were retroactive to April 1, 1985, the gap increased by 133%. With respect to an actual increase in 1985, the Committee recommended that salaries be increased immediately from $71,855 to $80,000. The Government responded by holding the increase to $75,000, because of the "well-recognized need for restraint in the expenditure of the province's financial resources".

As a result of publicly-expressed concerns in 1987 by the Ontario Courts' Advisory Council, chaired by the Chief Justice, and the judges themselves with respect to the salary impasse, the Government agreed to re-activate the Provincial Courts Committee. It was under that agreement that Henderson was appointed.

HENDERSON (1988)

The judges submitted, and Henderson accepted, as have the Supreme Court of Canada decisions in Valente, Beauregard, and the P.E.I. Reference, supra, that financial security is an essential

component of judicial independence. A proper compensation scheme must recognize the financial position in which a judicial appointment places an individual, and guarantee financial security within that context. Again, the judges argued for a salary that would leave little gap between a Provincial Court judge and a judge of the District Court. Appointment to one should be seen as desirable as appointment to the other. In terms of comparisons, the judges argued for considering those at senior levels of private practice, the District Court judges and Provincial Deputy Ministers. Each of those should be used to provide a comparative framework for an appropriate compensation level.

In its decision, Henderson rejected the notion of parity with the judges of the County and District Courts. It noted the comment of Attorney General Wishart as to the salary level being the same, but also noted that subsequent governments had taken the position that it would be inappropriate to link provincial judicial remuneration with federal judicial remuneration. The Provincial Government has a responsibility to the taxpayers of the Province and it ought not, in effect, transfer decision-making in such an important area to the Federal Government. Henderson, while accepting that, on the whole, the work of the judges was of equivalent responsibility, volume and complexity to that assigned to those who sat on the District Court, declined to take the next step of saying that there should be parity in

remuneration. It essentially agreed with the position taken by the Chair of the Management Board in 1985, that it would be inappropriate to set a provincial salary by direct linkage with a federally-determined salary. Secondly, Henderson noted that it had no way of judging whether the judges of the District Court were being paid appropriately - they could be paid too much or too little. Third, Henderson noted that the Report of the Ontario Courts Inquiry (1987) ("Zuber"), had recommended the abolition of the District Court, and it would be imprudent to recommend salary linkage.

The factor that ranked highest with Henderson, and it is one that will be echoed in the recommendations of this Commission, was the continuing need to attract candidates of the highest quality to the Provincial Court, and to retain them on the bench for the duration of their careers. As Henderson put it, "It is absolutely essential that the salary Provincial Court Judges receive be high enough to signify, both to the sitting Judges and to potential candidates, that the Ontario Government respects and trusts the professionalism and dedication of its judiciary. To be attractive, the salary need not - and ought not to be - excessive. It must, however, be sufficiently generous to offset the financial and social restrictions Provincial Court Judges must endure as a cost of ensuring their independence."

Henderson recommended that the judges receive an annual

salary, effective April 1, 1987, of $105,000, as against the $81,510 they were then receiving, a 29% increase. He also recommended that the judges' salaries be adjusted by an inflation factor on an annual basis, and that the national average of the Consumer Price Index be used.

SECOND TRIENNIAL REPORT (1992)

Gordon Henderson also chaired the Second Triennial Commission in 1992 ("Henderson 1992" or "Henderson"). Henderson noted that many of the recommendations made in his first triennial report were not implemented, with resultant "erosion in the salaries and benefits of Provincial Judges". He also noted that, as part of a broad restraint program, the then Government had frozen the salary of the Provincial judges at the 1991 level through to March 31, 1994, which would be the end of the second triennial commission's mandate, all without consulting the Commission. What the Government did accept from Henderson (1988) was the principle of an automatic annual adjustment. The adjustment was to be made on the basis of a wage index published by Statistics Canada (hereinafter referred to as the "AIW", the Annual Industrial Wage). Henderson also noted that the AIW adjustments were also to be frozen to March 31, 1994.

Notwithstanding the freeze in salaries and in annual

increment, Henderson decided to proceed with making recommendations so that they might guide the Government with respect to any future course of action. It should be noted, however, that the Government did increase the judges' salaries to $105,000 effective April 1, 1989, some two years after Henderson recommended that that salary level come into force. At the time the Henderson (1992) recommendations would take effect, April 1, 1991, the recommended salary rate from Henderson (1988), with adjustments, would have been $126,655, as against $116,425, which was the salary paid at that date. Henderson commented that the shortfall for the five-year period from April 1, 1987, to April 1, 1992, over what his Commission considered to be an appropriate salary and what was actually paid, was some $70,000.

Henderson recommended an annual salary as of April 1, 1991, of $127,000, with an annual adjustment based on the AIW. He also recommended that the judges receive back pay based on the AIW from April 1, 1987. As noted, Henderson decided to make salary recommendations notwithstanding the Government freeze. The District Court was amalgamated with the Ontario Court, General Division, in 1990, and the submission of the judges therefore became one of parity with the General Division. Once again, Henderson was not prepared to accept the principle of parity. As the Commission put it, "Each level of judicial responsibility and remuneration should be considered on its own merits." If Henderson (1988) had been implemented, including the annual AIW

increase, the April 1, 1991 salary would have been $126,655, as opposed to the $116,425 being paid. Henderson (1992) recommended a base salary as of April 1, 1991, of $127,000, with an annual AIW adjustment to be continued. Henderson was also clear that the judges should receive back pay from April 1, 1987, that is, the $70,000 that had been foregone.

THE FRAMEWORK AGREEMENT

In the course of the proceedings before Henderson (1992), the judges were advised by the Government that it intended to freeze their salary at the 1991 level from April 1, 1992, through to March 31, 1994, and that the AIW increases would not be provided. It was in that context, which was one of overall Provincial economic constraint, and the judges' continuing concern over their treatment by the Government, that the Framework was negotiated. Apart from the broader agreement, the Framework also set the judges' salary, outside the context of the triennial commissions, at $124,250 as of April 1, 1991. The judges gave up the AIW for 1992-93, but would receive it thereafter.

The Framework firmly recognized the judges of the Provincial Court as a separate and independent branch of government, and not as employees of the Executive. In this, the Framework provided in

1992 what the Supreme Court of Canada held in 1997 was constitutionally required.

It is the essence of the Framework that it deals with the relationship between the Executive branch of the Government and the judges, "including a binding process for the determination of Judges' compensation. It is intended that both the process of decision-making and the decisions made by the Commission shall contribute to securing and maintaining independence of the Provincial Judges." As noted, the triennial commissions make recommendations with respect to salaries, benefits and allowances, and the design and level of pension benefits. A Commission's recommendations with respect to salaries, benefits and allowances, but not pensions, "have the same force and effect as if enacted by the Legislature". The binding process was to take effect as of the 1995 commission. The Framework sets out the criteria which each Commission shall consider. Section 25 of the Framework is as follows:

> The parties agree that the Commission in making its recommendations on provincial judges' compensation shall give every consideration to, but not limited to, the following criteria, recognizing the purposes of this agreement as set out in paragraph 2.
>
> (a) the laws of Ontario,
>
> (b) the need to provide fair and reasonable compensation for judges in light of prevailing economic conditions in the province and the overall state of the provincial

economy,

(c) the growth or decline in real per capita income,

(d) the perimeters set by any joint working committees established by the parties,

(e) that the Governments may not reduce the salaries, pensions or benefits of Judges, individually or collectively without infringing the principle of judicial independence,

(f) any other factor which it considers relevant to the matters in issue.

These criteria will be considered in more detail later in these reasons.

THE SOCIAL CONTRACT ACT AND THE FREEZE

The Framework was finalized in November, 1992. It was followed almost immediately in 1993 with the Government's proposals for a "social contract" to cover wages across the public sector in a time of economic difficulty. A Social Contract Act was passed, but the judges took the position that it did not apply to them. The result of negotiation was a Letter Agreement between the Attorney General, Marion Boyd, and the judges, whereby the judges, in addition to the freeze on their salaries for 1992-93, agreed to forego their AIW increase for the years 1993, 1994 and 1995. They also agreed to collectively make

available up to 3,000 extra sitting days per year. As part of the deal, it was agreed that the Framework would be included in a Bill containing amendments to the Courts of Justice Act, and that the Third Triennial Commission would be postponed from 1995 to 1996. Following the deal, the Government agreed that the Social Contract Act would not apply to the judges. The result of the above was that the judges received a salary increase on April 1, 1991, and no increase thereafter, and no annual increment from then until April 1, 1996.

THE THIRD TRIENNIAL COMMISSION (1996)

The Third Triennial Commission ("Brown" or the "Third Commission") reported in May, 1997, but its recommendations were retroactive to April 1, 1996. When Brown began its deliberations, the Framework had established the annual salary of a judge at $124,250. In addition, as noted, the judges subsequently agreed to waive the AIW to which they would have been entitled for the years 1993, 1994 and 1995. The effect of this was to freeze the judges' salary from 1992 until April, 1996. Apart from other submissions for a salary increase, the judges asked for a restoration of the annual AIW from either 1991 or 1992, which would have resulted in a salary of either $139,300 or $133,550. The Government argued that the Province was still faced with high levels of debt and a continuing deficit of some $8.2 billion in

the current year (1997) and, accordingly, it would be inappropriate to award a salary increase. The AIW adjustment for 1996 (the freeze now being off) would move the salaries from $124,250 to $125,120, and that was fair and reasonable in terms of the Framework.

Brown concluded, notwithstanding the evidence of increased levels of responsibility and increased caseload, that it would be inappropriate, in light of the financial condition of the Province, to award any increase beyond the automatic AIW. In taking this position, Brown commented as follows:

> ...This Commission shares the views expressed by the Scott Commission [the Federal Judges Remuneration Commission] to the effect that if the present quality of justice in Ontario and the independence of the judiciary are to be maintained, the apparent erosion in the overall financial position of the Judges must be reviewed again. We are all of the view, however, that this review should be carried out by the Fourth Triennial Commission to be struck in 1998. Moreover, given the pace of improvement in the provincial economy and, in particular, the improvement in the Government's financial condition, it would seem appropriate that the Fourth Triennial Commission inquires as to why a Judge's remuneration ought not to be restored to the level that would have been achieved had the AIW increases not been voluntarily waived for the years following the Framework Agreement to 1996.

Brown went on to state that the rationale for the AIW increases was to maintain the judges' remuneration at a constant

level, and that had not happened as a result of the 1992 Agreement. Accordingly, when financial circumstances permitted, Brown was of the opinion "that the foregone AIW increases ought to be implemented to maintain the integrity of the 1992 Framework Agreement". With respect to pensions, Brown made the following statement:

> Finally, this Commission is of the view that the present pension arrangements need to be studied again. It may be that a pension that more closely approximates the pension benefits of federally-appointed Judges would be appropriate. Again, in the present circumstances, and without the benefit of a thorough analysis, a change at this time is not appropriate.

THE CURRENT CASE

The essential position of the judges was that the nature of the Provincial Court has been completely transformed over the past ten years in terms of jurisdiction and workload, as well as in quality and selection of candidates for the Court. In the criminal law area particularly, the Provincial Court has become the primary court for criminal cases, whether minor or serious. It also has an enhanced place in family law, its jurisdiction over Charter cases has been affirmed by the Supreme Court, and it is often where ever-expanding regulatory actions are argued. In that context, it was argued, the judges should receive the same

salary and benefits as the judges in the General Division. In short, the argument was, once again, for parity.

The judges also asserted that the Government could no longer raise the spectre of adverse economic conditions to argue against appropriate remuneration for essential actors in the administration of justice. All the indicators point to a thriving provincial economy, and Government's expenditure decisions clearly indicate that money is available for those matters that are deemed to be important, and worthy of financial support. In that context, it was argued, it was no longer appropriate to short change those who preside over the Provincial Court and who are the primary face of justice to those who appear in the courts in Ontario. Each of the primary jurisdictional/workload arguments will be dealt with separately.

CRIMINAL LAW

The argument for the judges was that the steady re-classification of criminal law offences over the past 30 years, and particularly over the last four years, has been to dramatically increase the criminal jurisdiction of the Provincial Court. Statistics were cited to show that there has been a dramatic fall in the hitherto large percentage of indictable offences dealt with by the General Division. The accepted

generalization with respect to the classification of offences under the Criminal Code is that the more serious crimes are indictable offences, and the less serious crimes are summary conviction offences. And, traditionally, the General Division dealt with indictable offences, usually after a preliminary hearing in Provincial Court, and the Provincial Court dealt with summary offences. In the case of what has become known as "hybrid offences", the Crown can choose to proceed by either procedure, although previously the election resided primarily with the accused.

The position now is, through the legislative changes that will be referred to below, that there are only a very small group of indictable offences that fall exclusively within the jurisdiction of the General Division. Realistically, it is only murder and conspiracy to commit murder that fall into that category. A second sub-class of indictable offences is where the accused can elect the mode of trial, that is, summarily before a Provincial Court judge, or through indictment in the General Division with a preliminary hearing in the Provincial Court. A third sub-class are those indictable offences reserved exclusively for the Provincial Court. All summary offences, and all hybrid offences where the Crown elects to proceed summarily, are heard in the Provincial Court.

The constant legislative trend over the past 30 years has

been to move offences from the General Division to the Provincial Division, either by an outright classification of offences, an increase in the accused's election or, most importantly, the creation of hybrid offences. Hybrid offences are those where the election is up to the Crown (rather than the accused) as to whether to proceed by indictment or summarily. It was the submission of counsel for the judges that it was the significant move to hybrid offences in the 1990's that has had the most dramatic impact on the criminal law workload of the judges.

The last five years has seen four major reclassifications: Bill C-42 was passed in 1994; Bill C-17 and Bill C-8, the Controlled Drugs and Substances Act, were both passed in 1996; and further Criminal Code amendments have been tabled currently in the House of Commons. The overall effect of this legislation is to create, in effect, a single Criminal Court for Ontario in the Provincial Court (or its equivalent in the other provinces).

The increase in penalty available to the Provincial judges under the new legislation was, it was argued, as important as the creation of hybrid offences. Some of the serious crimes of violence, including those involving sexual assault, had previously been hybrid offences but carried the maximum summary conviction penalty of six months imprisonment. Accordingly, Crown prosecutors were reluctant to proceed by summary conviction. Bill C-42 tripled the summary conviction penalty to 18 months

imprisonment and this, along with making the most serious crimes of violence, apart from murder, hybrid offences, has had the effect of causing the Crown to proceed by summary conviction in a broad range of crimes. At the same time, Bill C-17 allowed the Crown and defence counsel to agree on a summary election in cases that were over six months old, something that was previously prohibited. This has allowed the increase in what might be termed historical offences, such as sexual assaults and child abuse, to be heard in the Provincial Court.

Bill C-8 accomplishes the same purpose for a wide range of drug offences, either placing them in the absolute jurisdiction of the Provincial Court or making them hybrid offences, with the sentence for possession and trafficking increased to five years less a day. The amendments that are currently before the House of Commons will further increase the number of serious offences that previously were exclusively indictable into hybrid offences, with appropriate sentencing powers in the Provincial Court. The net effect of all of the above, is that for practical purposes only the offences of murder and conspiracy to commit murder remain outside the jurisdiction of the Provincial Court. And in those cases that do proceed by indictment, a preliminary hearing is still conducted in Provincial Court.

Related to criminal jurisdiction is the Provincial Court's jurisdiction under the Young Offenders Act (YOA). This is in

effect a criminal code for offenders under the age of 18. In summary, all crimes committed by those under 18 years come within the exclusive jurisdiction of the Provincial Court. In the recent past, this has become an increasingly significant, and clearly important, part of its work.

THE TRANSFERRED WORKLOAD

The position of the Government was that there "has been very little change, at least since 1988, of the percentage of the criminal case load in Ontario that is disposed of in the Provincial Division". Indeed, counsel for the Government referred to the submission of Paul French, counsel to the judges in 1988, who stated to Henderson that:

> For all practical purposes, the Criminal Division of the Provincial Court has jurisdiction over everything, except murder committed by an adult.
>
> The conclusion to be drawn from the evidence that you have heard and from the statistics that have been made available to you are that anywhere between 95 to 97% of all the criminal matters in the Province are disposed of in the Criminal Division.

In short, counsel argued that the arguments made before this Fourth Triennial Commission were almost exactly the same arguments made to the First Triennial Commission, using the same

transfer of jurisdiction, and virtually the same criminal statistics. Looking at the percentage of criminal matters that the Provincial Court now disposes of, as against the numbers in 1988, it was submitted that the increase could hardly be characterized as a "dramatic increase" in jurisdiction and workload.

Apart from the statistical evidence, counsel for the Government also made the point that the Provincial Court has always had jurisdiction to deal with the types of offences that over the past number of years have been transferred exclusively to the Provincial Court, or made hybrid offences. In short, the jurisdiction has not been expanded; what has been expanded are the areas of either exclusive jurisdiction, or where the election as to how to proceed has been placed in the hands of the Crown rather than the accused.

The Judges' brief also referred to the Charter of Rights and Freedoms as expanding the jurisdiction of the Provincial Division. Once again, the Government argued that although that might be so, it was hardly a new matter. Again, the same submission was made in 1988 to Henderson. The judges' 1988 brief stated that:

> The impact of the Charter of Rights has been greatly felt in the Provincial Court (Criminal Division). It is now the rare case

> where a Charter argument is not made at trial....its judges have the task of defining the Charter of Rights, and making it relevant to the citizens of Ontario.

In summary, the Government submitted that on comparing the situation in 1988 as against the situation in 1998, it is difficult "to conclude that there has been a dramatic increase" in the Court's jurisdiction and workload.

Apart altogether from the argument over increased criminal jurisdiction and workload, the Government made the point that the judges did not address the significant increase in their numbers to deal with criminal law matters. On May 31, 1988, there were 159 judges in the Provincial Court (Criminal Division). By contrast, in 1998 there were 198 judges who were assigned exclusively or predominantly to criminal law matters. Indeed, some 27 of the new judges were appointed specifically to deal with the criminal caseload as a result of the decision of the Supreme Court in R. v. Askov (1990) 59 C.C.C. (3d) 449, where the case was dismissed because of undue delay and the Court was critical of the time it took to bring criminal cases to trial. The result, with an attendant public outcry, was a stay of proceedings in some 50,000 cases. It was this that led to the appointment of the 27 new judges in Ontario. In short, the Government submitted that it was "meaningless" to consider any increase in workload or jurisdiction without also examining the

increase in the number of judges available to handle the workload.

THE WORKLOAD

It is always difficult to deal with statistical arguments, particularly when it was submitted by the judges in 1988 that between 95% to 97% of all criminal matters in Ontario were handled in the Provincial Court (after analysis of Ministry of the Solicitor General "disposition" statistics, Henderson stated that the figure was 93%). What does it mean to say that there has been a 2% to 3% increase in the number of criminal offences disposed of in the Provincial Division? When the comparative statistics of the indictable offences heard in the General Division and the increase in the caseload of the Provincial Division are examined, it is clear that there has been a significant increase in the number of serious matters now heard almost exclusively in the Provincial Division. This is clearly a result of the jurisdictional and sentencing changes outlined above.

The judges submitted that the Ministry's 1997 data showed that the General Division received approximately 2% of the criminal case load, with the approximately 98% remainder being disposed of in the Provincial Court. Indeed, the Ministry's

figures for 1992 as against 1997 for the Provincial Court show 92% disposition in 1992 as against 97% disposition by 1998. Most importantly, the figures show that the greatest decline in General Division dispositions occurred over the last three years, that is between 1995 and 1998. The "Indictments Disposed" chart indicates a 50% drop, from 10,823 to 5,500 indictments, over the last three years. How significant, if at all, is that change? Is it insignificant, as the Government would have it, or does it indicate a change of important magnitude as the judges submit? There is no question that a 50-60% reduction in General Division indictments between 1993 and 1997 is large. Does it, however, indicate a significant increase in the Provincial Court's workload when approximately 500,000 charges are laid each year?

On a consideration of the statistics, and considering counsel's arguments as to what they actually indicate, we are of the opinion that fully three-quarters of what was previously a "significant and difficult caseload" in the General Division has been transferred to the Provincial Court. This, by itself, must have a significant impact on its workload. It is not just a matter of the number of cases, but also of the type of case, as one is talking about the most serious criminal offences that were traditionally within the exclusive preserve of the General Division, or were chosen to be proceeded with in the General Division by Crown counsel. In short, there has been a qualitative change in the kind of case and proceeding that is now conducted

in the Provincial Court rather than the General Division, "that results in lengthy or more complex proceedings that involve greater responsibility for the Provincial Division than in an earlier era".

Counsel for the Government argued that the admittedly large reduction in the General Division's criminal caseload of some 60% between 1993 and 1997 represents only a small - 5% - increase in the Provincial Division's total caseload. Counsel for the judges argued strongly that this was an inherently implausible argument. The figures for 1998 now show a 78% decline in the General Division's caseload and, it was argued, on the Government's theory, if the General Division's entire criminal workload were moved to the Provincial Court, it would still be insignificant. It was argued that given the type of case concerned, that is, the most serious indictable offences, such a large shift was bound to have a significant impact on the Provincial Court.

Moreover, once it was appreciated that of the some 500,000 charges laid each year, only 8-9% actually proceed to trial or a preliminary hearing, the impact of shifting an additional 5% of serious indictable matters from the General Division to the Provincial Division, can be appreciated. That 5% represents, according to the judges' argument, 25,000 charges that were not resolved earlier and required at least a preliminary hearing. And it is reasonable to assume that some "significant proportion" of

them would be included in the 8% of cases that actually proceed to trial. This, it was stressed, constitutes an enormous quantitative, as well as qualitative, increase in the workload of the Provincial Court.

INCREASE IN NUMBER OF JUDGES

As indicated above, counsel for the Government submitted that the increased workload for the Provincial Court must be seen in the context of the increased number of judges appointed to handle that workload. In 1988, there were some 159 judges sitting in the Provincial Court (Criminal Division). In 1998, there were 198 judges assigned exclusively or predominantly to criminal matters, and another 26 that are available for criminal law work. If there are 198 judges whose work is predominantly criminal, that is an increase of 39 judges, or 25% more than were available to hear criminal matters in 1988. In submission of the Government, it would be "meaningless" to examine the increase in workload or jurisdiction without also considering the significant increase in the number of judges available to handle that workload. The Government also submitted that a relevant statistic would be the number of days that the judges spent in Court from fiscal year 1994/95 (the first year relevant statistics were kept) to fiscal year 1997/98. The Government's figures indicate that the average annual days in Court have remained almost

constant at 177 days for the four-year period.

The judges' reply to the increase in their number, stressed again not simply the quantity of the workload, but the "increased responsibility, difficulty, complexity and importance" of the workload. The argument was that the Provincial Court's criminal work was now so similar to the previous workload of the General Division that, for that reason alone, parity in remuneration was justified. The judges also argued that the increase in judicial complement must also be measured against the growth of the caseload, and that when those figures were considered, the increase in complement was slightly less than the maximum increase in charges received. In addition, counsel made the point that during the period 1990 to 1998, the number of Crown Attorneys in Ontario has increased from 387 to 548, a 41.6% increase in complement. This gives some idea of the increased workload in the Provincial Court (Criminal Division), and is to be compared with the increase in judicial complement. Finally, when one compares the judges in the Provincial Court with those in the General Division, one sees significantly increased salaries and dramatically-reduced criminal caseloads for the General Division, as opposed to the opposite scenario for the Provincial Court (Criminal Division).

FAMILY LAW

As with criminal law, the judges submitted that the Provincial Court deals with a broad range of family law matters in Ontario. These include matters arising under the Children's Law Reform Act (Custody and Access), the Family Law Act, the Child and Family Services Act and other related statutes. Indeed, the only matters that fall exclusively to the General Division are divorce (which was agreed has today become a relatively minor matter), and custody, access and support ancillary to divorce. The support ancillary to divorce is only exclusive to the General Division if it concerns a matrimonial property issue. A further significant consideration with respect to family law is the creation of the Unified Family Court in 1977 under the Unified Family Court Act. Originally, it consisted of provincially appointed judges of the Family Court who, through agreement with the Federal Government, were also given jurisdiction over those matters reserved to federally appointed judges. In 1990, the Provincial Family Court became a branch of the General Division and was renamed the Family Court.

The Family Court currently operates as a branch of the General Division in the Counties of Hamilton-Wentworth, Frontenac, Leonard and Addington, Middlesex and Simcoe. This expansion was partially accomplished through the re-appointment or appointment of some judges of the Provincial Division to the

General Division. It is the expressed intention that when agreement is reached with the Federal government, the Family Court will be expanded to cover all of Ontario. It is also understood when the next expansion takes place in 1999, at least three-quarters of the appointees to the Family Court will come from the Provincial Division. In short, a significant percentage of judges in the Provincial Division with expertise in Family Law will become federally appointed judges with remuneration on the Federal judicial scale "while performing work which is not significantly different than the work they now perform in the Provincial Division" (Judges' Brief, p. 36).

The Government submitted, once again, that the Provincial Division's jurisdiction with respect to family law was basically the same in 1988 as it is today and, accordingly, was taken into account by the first three triennial commissions. Essentially, the only matters reserved exclusively to the General Division are divorce (and custody, access and support ancillary to divorce) and the distribution of matrimonial property. Indeed, with the creation of the Family Court, the workload of the Provincial Division in the family law area is actually decreasing. In 1995, the Family Court branch of the General Division was expanded to four new locations: London, Barrie, Kingston and Napanee. Five of the eight federal appointments came from the Provincial Division. The Family Court will be expanding to 12 new locations this year: Ottawa, Brockville, Perth, L'Original, Cornwall, Oshawa,

Peterborough, Lindsay, Cobourg, Newmarket, Bracebridge and St. Catharines. While there is no firm commitment that three-quarters of the new appointments will come from the Provincial Court, it is expected that a substantial number will come from the Provincial bench based on their experience in family law.

Those who are appointed to the Family Court will have the opportunity to be rotated out to do other General Division work. Similarly, other General Division judges will be able to be rotated into the Family Court. The importance of that, in the Government's submission, was that the jurisdiction in family law is still somewhat different in the General Division than in the Provincial Division, and those who are appointed to the Family Court are appointed as judges of the General Division and as such may be called upon to hear any matters within the General Division's jurisdiction. Moreover, in terms of workload, the creation and ongoing expansion of the Family Court will see the percentage of family law matters handled in the Provincial Court fall from 75% in 1988, to approximately 39% once the 1999 expansion of the Family Court is completed. A further recommended change that is likely to be enacted is that Young Offender matters which have been dealt with in some of the Family Courts on a trial basis, will be dealt with exclusively in the Provincial Court.

THE FRAMEWORK CRITERIA

It remains to consider the criteria which must govern this Commission in its decision-making. The criteria have been set out above. The two overriding and relevant criteria are those contained in Section 25(b) and (f). Section 25(b) reads as follows:

> (b) The need to provide fair and reasonable compensation for Judges in light of prevailing economic conditions in the province and the overall state of the provincial economy.

Before considering the fundamental issue of "fair and reasonable compensation", it is necessary to assess economic conditions and the state of the provincial economy.

THE PROVINCIAL ECONOMY

It is perhaps not too strong a statement to say that the Ontario economy, in terms of growth, job creation and deficit reduction, has never been stronger. To quote the Minister of Finance, The Honourable Ernie Eves, Q.C.:

> In the first quarter of 1998, Ontario experienced a rate of job growth unprecedented in the past 15 years....Between February, 1997, and February, 1998, more jobs

> were created in Ontario than have ever been created in a one-year period in the entire history of our Province.
>
> The Province's economy expanded by 4.8% in 1997. The average private-sector forecast for growth in 1998 is 4.0%.
>
> The private-sector forecasters expect Ontario's economy to grow faster than that of any of the G-7 over the next three years.

As would be expected in a robust economy, the deficit has been steadily reduced. The Minister announced that the 1997-1998 provincial deficit would be 5.2 billion dollars, a reduction of almost 1.4 billion dollars from the 6.6 billion dollar target set out in the 1997 budget. Moreover, the Minister was confident that the deficit would be eliminated by the year 2000-01. The 1998-99 forecast deficit of 4.2 billion dollars is to be contrasted with the actual deficit of 11.3 billion dollars in 1995-96. In short, over a four-year period, there has been a deficit reduction of some seven billion dollars.

The expanding economy has translated into rapid job creation, with some 265,000 net new private sector jobs being created in the 1997-98 period, the largest number of jobs created in a 12-month period in the Province's history. Strong economic growth has, of course, meant greatly increased provincial revenues which has allowed for a 30% reduction in the provincial personal income tax since 1995 (and this at the same time that the deficit has been reduced some 11 billion dollars). Indeed,

the economic performance has allowed the Government, as indicated by the Minister, to complete a 30% provincial income tax cut by July 1, 1998 - half-a-year ahead of schedule.

The Minister's 1998 Budget Statement also outlined the program initiatives that an expanding economy allowed. It is not necessary to detail here these initiatives. Suffice it to say that they run the gamut from education, health care, including salary increases for health care professionals, research and development funds, cultural initiatives, transportation upgrades, jobs in tourism and the arts, a youth training program, a major new student assistance program (jointly with the Federal Government), an opportunities program for those with learning disabilities, and an access to opportunities program focused on computer scientists and engineers. These are only a partial list of the programs, that over a number of years run into billions of dollars of expenditures. They are all reflective of a strong North American economy of which Ontario is Canada's major beneficiary. This has allowed strong program expansion and for individual sector needs to be addressed, at the same time that the provincial deficit and personal income taxes have been sharply reduced.

The Government, in its argument, recognized that the provincial economy has been strong and is continuing to improve. It chose to emphasize, however, the "astronomical debt load" of

approximately 110 billion dollars. It argued that the Province's fiscal condition ought to be seen in light of that debt and its nine billion dollar annual interest cost. Although a snapshot of the particular year indicates a strong economy, the overall fiscal condition is not one that dictates large wage increases, and the arguments of the judges ought to be seen in that context. The Government's brief also noted that the unemployment rate is currently at 7%, which is high compared to the 5% annual average rate in 1988. While the Ontario economy is strong and continuing to recover, it "still has some way to go to reach full health".

With respect to the debt, the judges responded that that is a matter of Government choice in times of an expanding economy. That is, the Government has chosen tax reductions and increased expenditures to utilize its greatly increased revenues. A different choice might have seen a greater emphasis on debt reduction. Every Government makes those sorts of economic tradeoffs given the interest cost of carrying the debt, as against the expansionary nature of tax reductions. Expansion will see the debt fall as a percentage of the provincial domestic product, which many economists see as the more relevant measure in terms of coping with Government debt. Indeed, many governments choose not to devote actual dollars to debt reduction at all, but rather rely on expansionary fiscal and monetary policies to lower debt as a percentage of an expanding GDP. It is that figure that is the most relevant in terms of an economy's capacity to carry

the interest charges.

Counsel for the Government also argued that there was no guarantee that strong economic conditions would continue indefinitely and, accordingly, the Government must be prudent in managing its finances. While it is certainly true that there is no guarantee of economic strength for the indefinite future, it is also true that the Government itself, in the Minister's 1998 Ontario Economic Outlook and Fiscal Review, forecast continued economic growth and low inflation. Indeed, the Minister quoted from the economic forecasting firm DRI/McGraw-Hill, in October, 1998, to the effect that "Ontario is expanding quickly...Lower tax rates and a large share of high technology industry will help to keep Ontario at the top of the provincial growth rankings over the next decade."

The Minister emphasized that Ontario is particularly well positioned globally. In terms of the economic downturn in Asia, he noted that Ontario's exports are oriented primarily to the U.S. market and consist mainly of finished consumer goods and capital goods. As a result, Ontario is less exposed to instability in Asia and the difficulties in the world's commodity markets. Indeed, with primary industries accounting for under 2% of the Province's GDP, Ontario has the least resource-based economy of all the provinces. In short, in terms of the near future, the economic outlook for Ontario remains very strong.

CONCLUSION ON ECONOMIC CRITERION

On all of the evidence, it is unquestionably clear that the Ontario economy is in excellent shape and is continuing to grow and create jobs at record rates. As noted, the Government has been able to reduce personal income taxes while at the same time funding a variety of programs deemed important to Ontario's economic, social and cultural well-being. And all of this at the same time that the provincial deficit has been greatly reduced. Whatever the merits of an increase in remuneration for the judges may be, we are of the opinion that there is no case for restraint based on the condition of the provincial economy, or expenditure restraint by the Government itself.

The conclusion with respect to the criterion set out in Section 25(b) of the Framework, insofar as it refers to "...prevailing economic conditions in the Province and the overall state of the provincial economy", is that economic conditions in Ontario are very strong, as is the overall state of the provincial economy. The Government's economic figures, quoted above, clearly indicate that, as do the Government's expenditure decisions, both of a major and minor nature, and of a one-time and multi-year commitment. The decision as to what would be "fair and reasonable compensation for the judges" in light of these economic conditions, will be dealt with below.

The criterion in Section 25(f) refers to "any other factor which it [the Commission] considers relevant to the matters in issue." We do not regard that criterion as in any way being limited by the criterion in Section 25(b). That is, it is an independent criterion which allows the Commission to take into consideration factors which it deems to be relevant. Again, this will be dealt with in our decision as to "fair and reasonable compensation".

FAIR AND REASONABLE COMPENSATION

The argument for the judges was, once again, parity with judges in the General Division. That would mean a salary of $175,800 as against the current $130,810. The argument was that the Provincial Court, as a result of the changes outlined above, has become the Criminal Court for Ontario. The General Division is the court for civil matters and family law. In reality, that is the only distinction between the Courts, apart from the inherent jurisdiction that lies with a superior court of record such as the General Division. That difference, however, was not enough, it was argued, to justify a large discrepancy in remuneration paid. There is now, in effect, one Ontario Court divided into the General Division for civil and family matters, and the Provincial Division for criminal law matters. To consign the Provincial Court to a second-class status in terms of salary

and pensions is, it was argued, to downgrade the importance of the Criminal Court. It is to send a message both to the profession and to the citizens of the Province that the criminal jurisdiction is of lesser importance than the jurisdiction that deals with property and contractual rights.

Counsel for the judges went through the history of their remuneration, and noted the continuing failure of governments to implement the recommendations of successive Committees and Commissions, usually on the basis of fiscal restraint. He argued that in light of current economic conditions, the time had now come to recognize the reality of the court system in Ontario, and to put all judges on the same economic basis. The issue was not one of "automatic linkage" which had been rejected by Henderson in 1988 and 1992, but of simple equity between those who perform the judicial function in Ontario. We ought not to perpetuate the perception of a second-class court, especially when it is that court that administers the criminal law and is the face of justice to the overwhelming majority of citizens who come into contact with the courts.

The position of the Government was that the case for parity with the General Division (and previously the District Court) has been a constant theme of the judges before each of the successive Committees and Commissions. Each one, it was argued, has rejected the concept of automatic linkage, notwithstanding some

expressions by various Attorneys-General that there should be no disparity. It was particularly emphasized that the argument for parity was strongly urged on Henderson (1988) and Henderson (1992), and was rejected both times. Henderson was firmly of the view that the matter of the appropriate salary for the Provincial Court is one for Ontario to determine in light of economic and social factors pertaining in the Province. Insofar as support for parity was expressed, it was with reference to the District and County Court, and not with respect to the General Division.

The Government also argued, as noted above, that most of the changes that have taken place in the Provincial Court's jurisdiction had already occurred by 1998 and were, accordingly, taken into account by the first three triennial commissions, as well as by the judges and the Government in the Framework. Insofar as there has been an increase in workload, it has been offset by the appointment of more judges, and the on-going transfer of family law jurisdiction to the Family Court. In summary, the Government submitted that the judges' salaries, pensions and benefits were "at a fair and appropriate level, and their salaries ought not to be increased beyond the automatic adjustment each year based on the AIW". Moreover, it was argued that the criteria outlined in the Framework do not justify any increase in compensation beyond the automatic AIW increase.

DECISION

While we do not consider that there ought to be automatic linkage with the federally-determined salary for judges of the General Division, we do think that the time has come for a substantial increase in the salary of the judges of the Provincial Court, such that the disparity with the General Division is considerably narrowed. As outlined above, successive governments have turned a deaf ear to the recommendations of the Committees and Commissions over the years with respect to appropriate remuneration. Moreover, as a result of general economic restraint and the salary freeze, including the give-up of the automatic AIW increases from 1992 through 1995, the judges have seen their salaries severely restrained in this decade and have fallen further behind their federal counterparts.

There are a number of factors that we consider relevant in setting an appropriate remuneration base. One very clearly is the salary paid to the judges of the General Division. The General Division is the Civil Court of Justice for Ontario; the Provincial Court is the Criminal Court of Justice for Ontario, and we can see no reason that justifies a significant disparity in the remuneration paid to the Provincial judges. While we reject the concept of automatic linkage, the salary of $175,800 currently paid to judges of the General Division is one very important factor which we would take into account.

In considering the salaries of the federal judges as extremely relevant, we are mindful of the writings of Professor Peter Russell, the leading scholar of the Canadian courts. Russell has noted that the differential treatment of federal and provincial judges promotes the perception of a two-level system of justice. To paraphrase Russell, this may have been tolerable when the provincial courts dealt with minor matters. It is not tolerable, however, when those courts are vested with jurisdiction over the most vital matters between the citizen and the state - the criminal law.

Russell has been particularly acute in stressing what is essentially a class-based distinction in treating the courts as a hierarchy, with the provincial courts at the lower end:

> The traditional practice of paying judges of the so-called lower courts much less than the 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 translating this hierarchy of courts into a 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.

While we do not recommend parity, we think the time is long past-

due to end out-dated notions of hierarchy and second class status.

Another relevant factor is the salary paid to the most senior level of the civil service in Ontario. It is the salary determined in Ontario for the leaders and managers of the civil service. The judges of the Provincial Court are the senior provincial judicial officials, and while the two functions are vastly different, the salaries paid to senior civil servants are clearly a relevant factor to be taken into account.

The Crawford Commission (Federal, 1992) made the point as follows:

> We believe 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. As the two immediately previous Triennial Commissions have also indicated, the DM-3 range and mid-point reflect what the marketplace expects to pay individuals of outstanding character and ability, which are attributes shared by deputy ministers and judges.

In 1998, the average salary for a DM-3 in Ontario was in the $170,000 plus range and topped at $195,000. We would particularly note the increases that were given in 1997. They were clearly to address what was seen as the deteriorating position of the most senior officials, coming through the years of financial

stringency - a position not unlike that of the judges. The increases averaged $41,600, which was an average salary increment of fully one-third. The increases continued in 1998, averaging 6.6%. While we do not recommend similar increases for the judges, we do consider how the government treated its most senior officials when the economy improved in 1997, to be particularly relevant.

A third relevant factor is the remuneration of practising members of the Ontario Bar. And here there was a good deal of controversy as to what the figures show and what is the relevant section of the Bar. Is it the average practitioner in the criminal courts? Should it be the most senior and highly-paid criminal lawyers in the hopes that they might be attracted to an appointment in the Provincial Court? Or should it be senior Crown counsel who appear daily in the Provincial Court? Depending how one answers those questions, the relevant figures would vary widely. On the whole, we are of the opinion that a figure in the area of what is paid to judges in the General Division, that is, $175,000, is a reasonable level of remuneration for those who we hope would seek appointment to the Provincial bench. That figure is higher than what is currently being paid to senior Crown counsel, and is more than is earned by some criminal lawyers. At the same time, however, it is far less than is earned by more senior criminal lawyers, and those who do a combination of civil and criminal litigation. The salary surveys were not at all

helpful in determining this question, and the best we, or any Commission, can do is to look at a cross-section of actors in the criminal law arena and ask what is a reasonable level of salary to consider.

Another factor that we think is important is the attraction of the Provincial bench to a cross section of the best of the men and women practising at the criminal bar, or with some experience at the criminal bar. For many, appointment to the Provincial Division would see little, if any, increase in salary. For others, such an appointment would constitute a fall, in some cases a very sharp fall, in remuneration. What is absolutely essential is that the level of remuneration (including pension, which will be dealt with below), be set at such a level that it will be attractive, or at least not a disincentive, to the ablest men and women at the bar. We are of the opinion that the current level of $130,810 is a disincentive, and a substantial increase is justified.

The inequity in a significant discrepancy between the salaries of federal and provincial judges, is brought into sharp relief by the creation of the Family Court. As noted, approximately three-quarters of the appointments to that Court have and will come from the Provincial Division. And when appointed, the salary becomes that of a judge of the General Division - for doing essentially the same work that was being

done while in the Provincial Division. While it is true that a judge of the Family Court can be rotated into General Division work, it does not change the fact of sharply increased pay for basically exercising the same jurisdiction. The matter is one of pure happenstance - the creation of the Family Court and the appointment of a significant number of Provincial Court judges to it. The question then becomes: should those who exercise the criminal law jurisdiction be paid significantly less than those who exercise the family law jurisdiction? We think not.

Support for a decision to award a substantial increase in remuneration "in light of prevailing economic conditions in the province" is outlined above. There is no need to repeat what we have said. The current levels of Government expenditure in the context of greater than budgeted for revenues, clearly indicate that money is available for a wide range of social, economic and cultural matters that are deemed worthy of support. Beyond all question, a substantial increase in the remuneration of the judges of the Provincial Court is one such matter. Our decision is as follows:

1. Commencing April 1, 1998, the base salary shall be $150,000;

2. Commencing April 1, 1999, the base salary shall be $160,000;

3. Commencing April 1, 2000, the base salary shall be $170,000.

The total base salary cost for the Ontario Court (Provincial Division) is $33,104.323. The increase in salary to $150,000 in 1998 will cost approximately $4,788,000, based on 250 puisne judges. The increase to $160,000 in 1999 and $170,000 in 2000, will cost an additional $2,500,000 in each of those years. The total cost of the increases over three years will be somewhat over $10,000,000, including those judges who hold senior administrative positions. Whether looked at in individual years, or in the aggregate, the cost is small both in absolute terms, and relative to the social benefit gained.

We are of the opinion that the recommended staged salary increase, with a final base of $170,000, provides a "fair and reasonable compensation for Judges in light of prevailing economic conditions in the Province...". While each successive Commission will, of course, make its own determination, we are of the opinion that the ratio of $170,000 to $175,800 is an appropriate range for the judges in the Provincial Court as against the judges in the General Division. In so stating, we have in mind the stated purpose of Attorney-General Ian Scott when he announced the creation of the Ontario Court of Justice:

> "[There] would be a single high standard of appointment to the bar, and essentially a single court, where judges drawn from the same pool of lawyers in the Province would be able to enjoy the full range of judicial work in their area of legal expertise without artificial restrictions based on hierarchy."

If the increases are thought to be generous, they are only so in light of the extremely restrictive salary position since 1991, which has seen an increase of just over $6,500 in the past seven years, as against $28,000 for the General Division in the same period. We would put particular stress on this point. For five of the seven years since 1991, the judges' salaries were frozen. In those years they did not receive the annual AIW increase (albeit through agreement), which was put in place to keep their salaries constant. Had the AIW increases been applied to the 1991 base, the 1998 salary would be $145,706. And we were mindful of the Third Triennial Commission's admonition, that when financial circumstances permitted, "the foregone AIW increases ought to be implemented <u>to maintain the integrity of the 1992 Framework Agreement</u>" (emphasis added). To bring the 1998 rate to $150,000, is a very modest increase to the salary base over seven years.

As to generosity, we would adopt the words of Professor Martin Friedland in his study for the Canadian Judicial Council, <u>A Place Apart: Judicial Independence and Accountability in Canada</u>, at p. 56:

> [T]he 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.

In accordance with Section 45 of the Framework, the annual base salaries shall be adjusted by the AIW on the first day of April in each year according to the formula set out therein.

BENEFITS AND ALLOWANCES

Allowances

1. Representation Costs

Section 13(c) of the Framework requires each Triennial Commission to recommend benefits and allowances as well as salaries. The main argument with respect to benefits and allowances was over representational costs. The position of the judges was that there is a constitutional requirement for this Commission to award reimbursement of representation costs incurred as a result of their participation in the hearings before the Commission. In particular, counsel relied on the decision of Roberts, J. in Re Judges of the Provincial Court of Newfoundland et al. and the Queen in Right of Newfoundland, 1998, 160 D.L.R. (4th) 337. In analyzing the decision of the

Supreme Court in the P.E.I. Reference, supra, Roberts J. emphasized that the independent tribunal envisaged by the Supreme Court, and mandated under the Framework in Ontario, required a determination through a hearing process "that is one step removed from the judges themselves". In ordering funding for the judges, Roberts J. held as follows:

> "For this dialectic [the hearing process] to function, the judges have to be represented before the independent commission and/or the courts, if necessary, in the same way that 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 whose 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."

The judges rely on the decision of Roberts, J. to ask for funding for the costs of the hearing before this Commission as a benefit or allowance.

Counsel for the Government sought to distinguish the Newfoundland decision in two ways: first, there was no Framework Agreement in Newfoundland "which comprehensively set out the terms and conditions of the relationship between the two branches in the context of

a compensation committee". Second, the Newfoundland Supreme Court noted that there were only 23 members of the Provincial Court in that Province, and it would be inequitable to impose the costs of a Commission on so few judges. By contrast, there are over 200 judges in Ontario over which to spread the costs of participation.

It is somewhat difficult to appreciate how the fact of the Framework, with its detailed provisions for a triennial commission, effectively decides the issue of the payment of the judges' representation costs. The fact that the Framework is silent on the issue is in no way determinative. The costs of a lengthy hearing, with voluminous exhibits, such as took place before this Commission, are very high. Whether the cost is spread over a small or a large number of judges, does not answer the question of what is equitably, and perhaps constitutionally, required. We are in agreement with Roberts, J. 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. This is particularly so in a context where a hearing is statutorily required every third year, and a hearing process is constitutionally mandated as determined by the Supreme Court in the

P.E.I. Reference. In that context, we are of the opinion that the representation costs of the judges should be paid as an allowance by the Government for each triennial hearing.

There is nothing in the decision of the Supreme Court of Canada in the Alberta Provincial Judges' Association case (December 24, 1998) that holds to the contrary. We do not agree, as the Government argued, that the holding by the Supreme Court in that case was that representation costs were not a constitutional necessity. The Court simply held that the issue did not arise before it as a result of its prior decision in the P.E.I. Reference. What the Court said was:

> The court is of the opinion that the motion for direction [on costs] should be dismissed with costs and that it does not arise from the implementation of the judgment of the Court.

The Supreme Court was clearly of the opinion that it was within the jurisdiction of the compensation commissions to determine the issue of reimbursement in the context of the particular form and procedure established for the determination of compensation. As those procedures may vary, "so will the approach to the payment of representational costs of the judges".

In following the dictates of the Supreme Court, and the Newfoundland decision, supra, we hold that it would be fair, equitable and reasonable, in the context of this hearing under the Framework, that an allowance for costs be determined. We direct that counsel for the parties attempt to agree on an appropriate cost figure. If counsel cannot agree, or if it is felt that negotiation with respect to costs violates the dictates of the P.E.I. Reference, supra, we will remain seized of the matter and will hear submissions as to costs.

2. Expense Allowance and Robes

The judges currently receive an allowance for expenses of $2,000 per annum, including robes, and ask for an increase to $2,500, to match the Federal judges, and to replacement robes every seven years. We see no reason to increase the expense allowance of $2,000 per annum, but would grant an entitlement to new robes every seven years.

Benefits

1. Dental Plan

The judges request 100% reimbursement for basic services (now 85%) and 75% reimbursement of dentures,

major retractions and orthodontics (now 50%). The Government argues for the maintenance of the co-insurance principle, and says that the judges are simply cherry picking when they note that some provinces have 100% coverage for basic services and up to 80% coverage for major restorative work. We agree that there should be some principle of co-insurance, and would leave the reimbursement of basic services at 85%, but increase the coverage for major restorative work, dentures and orthodontic costs, to 75%, as it is those costs that may bear most heavily on the judges.

2. <u>Implants</u>

Implants are not currently covered by the Plan, and the judges ask that they be included with a reimbursement, as for other major restorative work, of 75%, with a cap of $2,000. We would grant this request, as implants are becoming a more common form of restoration.

3. <u>Drug Plan</u>

The judges ask an increase from coverage of 90% of drug costs to 100%. We are of the opinion that 90% is reasonable, as the Government pays 100% of the premium for this benefit.

4. Vision Care

The current supplemental vision plan provides a benefit of $200 payable every two years, with the judges paying 40% of the annual premium. The judges request the benefits be increased to $400 per annum, and that the current premium costs be frozen. The payment of $200 every two years for eyewear seems somewhat low in the current marketplace, and we would increase it to $400 every two years and require the judges to pay 30% of the cost of the annual premium.

5. Hearing Aids

The existing benefit is $200 lifetime, and the judges argue that that is seriously inadequate. They argue that the current cost of hearing aids can run from $1,000 to more than $3,000. Such a benefit would not be expensive in any benefit plan because of the low incidence of use. We are of the opinion that the request of $1,500 every five years is reasonable, and we so award.

6. Physiotherapy Coverage

The current plan provides $12 per visit to various paramedical practitioners (physiotherapists, podiatrists, naturopaths, etc.), up to a maximum of $1,000 per year per type of practitioner. We would set the reimbursement at $25 per visit once the annual coverage under OHIP expires.

7. PA Tests

The judges ask for coverage for this test, whose annual cost is in the $40 to $50 range. We do not think that specific coverage is required.

8. Life Insurance

The judges were concerned with insurance coverage for those judges who continue to work but who are no longer eligible for the basic life insurance coverage. We think that the request for life insurance of at least one times salary coverage for judges who continue to work is a reasonable one, and we so award. We would also award the requested $10,000 death benefit, arranged as a self-insured benefit.

9. Annual Vacation

We agree that the annual vacation should be increased from six weeks to eight weeks, and we so award.

PENSIONS

A judge of the Provincial Court currently receives a pension of 45% of salary at age 65, with 15 years of service. A judge who has more than 15 years of service accrued before the age of 65, receives an additional 1% per year for every year of service

beyond 15 years. He/she also receives an additional 1% of pension for every year worked past age 65 through to 75. The judges contribute 7% of salary, and the cost to the Government is 27% of payroll. Counsel for the judges emphasized that pensions are a critical component of judicial compensation. If they are inadequate, it will act as a significant deterrent to accepting an appointment to the Provincial bench.

Once again, the comparator raised by the judges was the pension paid to the judges of the General Division. Federally appointed judges have a pension of 66-2/3% of salary at age 65 after a minimum of 15 years of service, and also contribute 7% of salary. They may also elect supernumerary status, in which they have a reduced workload with full compensation up to age 75. In addition, a Rule of 80 factor is being introduced for Federal judges for early retirement before age 65 without penalty (that is, years of service and age must equal 80). Not only is there not a Rule of 80 for Provincial judges, there is an early retirement reduction factor of 5% per year between the ages of 60 to 64, and 2% per year between the ages 55 to 59. In the submission of the judges, the pension differences are so substantial that even if the salaries were the same, appointment to the Provincial bench would be far less attractive than a federal appointment. The argument of the judges was, once again, for parity with their federal counterparts.

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.

Previous Committees and Commissions that have dealt with pensions have focused on a replacement ratio of 75% of salary at retirement "when taxes, OAS and CPP are taken into account", as that was the goal set by the 1984 Report of the Provincial Courts' Committee. And it was that pension plan that the then-Government essentially implemented. Henderson (1988) recommended a 10% increase across-the-board, which would have lifted the pension to 55% at age 65 after 15 years of service. That recommendation was not implemented. Henderson (1992) commissioned an actuarial study. The study provided seven options to the Commission which ranged from no change to adopting the Federal pension plan. Henderson recommended no change in the entitlement, but said that for years of service beyond 15 accrued before the age of 65, the pension should increase by an additional 1% of

salary per year. This recommendation was implemented, but the Government continued to take no action on the Henderson (1998) recommendation of a 10% increase.

Counsel for the judges submitted that even in terms of the adoption of the 1984 Committee recommendation of a 75% replacement ratio at retirement, the current Ontario plan falls short of that goal. A chart was submitted comparing provincial and federal appointees at age 43 who elect to retire at ages 63, 65 and 70, with salaries assumed to be at their present levels. The chart shows that for a Provincial judge to reach a replacement level of 75%, he/she would have to rely on personal savings of 27% at age 63, 12% at age 65, and 7% at age 70. A federal appointee, on the other hand, would have to rely on only 4% of personal savings at age 63, and 0% personal savings at both ages 65 and 70 to achieve a replacement rate of 75%. It was submitted that such a heavy reliance in Ontario on pre-retirement savings makes the 75% goal unattainable. This was particularly so, it was argued, given that the average age of appointment in Ontario is now 43 years. The argument was that in the early years of one's professional practice and of raising a family, it is difficult to accumulate a significant amount of savings in the pre-appointment period.

The Government submitted that unlike salaries which will erode over time unless they are inflation-protected (such as

through the automatic AIW), pensions will not erode as they are automatically protected by the fact that the benefit formula is based on final salary at retirement and indexed thereafter. Accordingly, a change was not required. The change in 1991 was because of a change in demographics, that is, the increasingly younger age at appointment. Accordingly, there was an addition of 1% annual accrual for service in excess of 15 years before age 65. There is currently no such demographic shift and, it was submitted, no other changes which would justify a departure from the plan which was recommended and accepted in 1991. The Government also strongly contended that when one takes into account pre-appointment savings, the target of a replacement ratio of 75% of final salary at age 65 was either met or exceeded.

The dispute between the submission of the judges on the one hand and that of the Government on the other as to obtaining the goal of 75% replacement cost turned on the assumed level of pre-appointment retirement savings. The Government relied on the 1991 Joint Actuarial Report and Henderson (1992) in arguing that it was reasonable to assume a significant level of pre-appointment savings. The actuarial assumption used was zero RRSP contributions for the first five years of an appointee's career, and 85% of the maximum thereafter. The submission of the judges, it was argued, does not acknowledge any pre-appointment accrual. Given its estimated pre-appointment savings, the Government

charts indicated replacement rates equalling or exceeding the 75% target for all appointment ages. Assuming an appointment age of 45, which is close to the norm, the Government considered that a pre-appointment RRSP would provide 18% of the indicated replacement rate of 77%, and would rise to 23% for appointment at age 50 for the same replacement rate. For the Government's indicated replacement rate of over 80% at age 70 for those appointed at 45 years, 50 years, and 55 years, the assumed pre-appointment RRSP percentage contribution would be, respectively, 20%, 25% and 30%.

The Government also emphasized that on its calculation of the retirement rate achieved, and taking into account the 75% replacement target recommended in 1984 and adopted by Henderson (1992), the judges' current plan exceeds its own target and is very generous when applied against public and private pension plans in general.

There was sharp disagreement on the part of the judges with respect to the Government's assumptions as to pre-appointment RRSP savings - an assumption, as noted, that is critical to the calculation of its retirement rate. The judges, in a reply submission, said that the Government's assumed commencement of practice at age 25 is too low by some three years. And its assumed average starting income of $65,000 was far too high as lawyers in private practice, either as associates, in sole

practices or in small partnerships, tend to have relatively low incomes in their early years. The Government's actuarial assumptions assumed no RRSP contributions in the first five years of practice, and contributions of 85% of the maximum thereafter. The judges took issue with that assumption based both on what it considered an over-estimation of earnings in the early years of practice, and the demands on lawyers' income through their 30's and early 40's as families grow.

The Government's submission with respect to appointees at age 40, 45 and 50 assumed a pre-appointment RRSP contribution of 12%, 18% and 23% to achieve a replacement ratio of 76/77%. The judges submitted that it would be relevant to consider the amount of capital that that would represent in today's dollars. It calculated that the amount of capital that would have to be available in 1999 to the 40, 45 and 50-year-old appointee today was, respectively, $227,000, $457,000, and $817,000. It submitted that "lawyers at those ages do not have that amount of capital, or anywhere close to it, available in RRSPs today." Taking the Government's model and substituting what it considered more realistic figures, and correcting what it suggested were errors in the Government's model, the judges took the same ages of appointment, 40, 45 and 50 years, and a 65-year retirement age, and arrived at replacement ratios of 59% and 66% depending on whether the assumed RRSP contribution level was 50% or 85%. The replacement ratios for an appointee at 45 years, which is near

the current average age (43) at appointment, were 62% and 64%.

Most importantly, the judges submitted that pre-appointment savings were irrelevant when considering a comparison to the Federal pension plan, which it urged us to do. It emphasized that the guaranteed replacement ratio of the Federal plan, irrespective of OAS, CPP, and any pre-appointment RRSP savings, is 66-2/3%. It suggested that if one used the Government's assumptions for pre-appointment RRSP savings, and added them to the replacement ratio in the Federal plan, the Ontario plan would still be significantly behind at every level. That is, the gap between the Federal plan and the Ontario plan is very large, given that the Federal plan is so much higher in the first instance, notwithstanding any argument concerning pre-appointment RRSP savings.

DECISION

The statistical battle between the submissions of the Government and those of the judges is not possible of resolution for the very reason that it is based on assumptions. Moreover, and most importantly, we think that it begs the essential question. That question, in our view, is: What pension replacement ratio is necessary to attract a cross-section of the ablest men and women at the bar to the Provincial bench? The

pension ratio is as important, and arguably more important, than the base salary. This is so because of a younger appointment age, and longer life after retirement. If, as we indicated in our base salary decision, it is essential to have a remuneration package that is attractive in terms of comparison with federal judicial appointees, then the current Ontario pension plan needs revision.

As with the salary level, the matter of pensions must be seen in the context of what is, in effect, a single Ontario Court of Justice. It is, in our view, absolutely essential that the Ontario pension plan be seen to be as attractive as the Federal plan. Absent that, the hard reality is that the Provincial bench will not be as attractive as the Federal bench. And that is simply not acceptable in the arena of the criminal law. It is widely acknowledged that one of the main reasons senior, highly remunerated practitioners are willing to accept a federal judicial appointment at a greatly reduced salary, is because of the generous pension plan. The goal of doing away with a hierarchy of courts in Ontario, and attracting the same high quality of practitioner to the bench, regardless of the court, will not be attainable without a substantial revision to the pension plan. The mandatory implementation of our salary recommendations, without implementation of our pension recommendations, would not be sensible social policy.

Mindful that our recommendations as to pensions are not

binding, we would urge one of the following three options on the Government for improvement in the judges' pension plan, to be effective April 1, 1999. We would repeat that we regard the matter of pensions as being extremely important. The increase in salary that we have put in place will, by itself, be inadequate to provide a level of remuneration that will attract the desired quality of practitioner to the Provincial bench. It is critical that there be a concomitant improvement in the pension plan.

1. The first option would be to move the Provincial plan to the level of the Federal plan, that is, a replacement ratio of 66-2/3% at age 65 after 15 years of service, with a 7% contribution rate. There is a good deal to be said for moving to the Federal plan, as the current provincial goal of a 75% replacement rate at retirement depends on very generous assumptions as to pre-appointment RRSP contributions. We tend to agree with the submission of the judges that given that the average age of appointment in Ontario is now 43 years, it is difficult to assume that there will be, in most cases, significant pre-retirement savings. It is doubtful that that is the case in the first 12 to 15 years of one's career when building practices and families through that time period. The current annual cost of the Ontario pension plan is $9,449,000. The additional annual cost of introducing the Federal plan is estimated at approximately $4,816,000. The increase from $9.5 million to

$14.3 million seems to us to be both a reasonable and manageable annual increment - indeed, it is relatively minor, to achieve such an important social goal.

2. The second option is to move to a 20-year accrual rate of 3.3%. This is what was recommended by Professor Friedland in his 1995 study for the Canadian Judicial Council, A Place Apart: Judicial Independence and Accountability in Canada, p. 66. In Professor Friedland's opinion, a 20-year accrual period was reasonable for the Provincial judges to reach a 66-2/3% pension. That would mean an effective accrual rate of approximately 3.3%, which would be an increase above the current Ontario accrual rate of 2.5% over a 20-year judicial career between ages 45 and 65. If the Government does not wish to move immediately to a 66-2/3% replacement ratio, then we recommend that it move the current Ontario plan from an accrual rate of 2.5% for a 45-year-old appointee retiring at 65 years, to a 3.3% accrual rate. Any current members of the Provincial bench who might have a higher entitlement under the current Provincial plan would need to be grandfathered. Of course, if a Provincial judge retires before 15 years of service, he/she would have a smaller pension. There will be some who achieve 20 years of service prior to age 65 and might not get a full pension even with a 3.3% accrual rate. Without considering here the Rule of 80, some thought will have to be given to what, if any,

actuarial reduction should be put in place for those who leave before age 65 with 20 years of service or less. To repeat, the main point of Professor Friedland's conclusion was that a Provincial judge should be able to retire at age 65 after 20 years of service with a 66-2/3% pension, representing a 3.3% annual accrual rate. The additional cost of this recommendation is slightly less than the straight move to 66-2/3%, being estimated at $4.5 million. That would mean an annual cost of $13.9 million, as against the current $9.449 million.

3. A third option, and one that we would stress is not nearly as desirable as options 1 or 2, is an across-the-board increase on the lines recommended by Henderson (1988). He recommended that the entire range of percentages be increased by 10% so that a judge retiring at age 65, appointed at age 50, would receive 55% of salary, as opposed to the current 45%. Although this would be an improvement, it would still be significantly under the Federal plan of 66-2/3%. The estimated annual increased cost is $2,932,000.

Whichever of the three options are chosen, and we would hope that the Government would choose one of them, and preferably option 1 or 2, the increased annual costs are not great. The benefits to the Provincial judicial appointment process would, however, be enormous. Whichever option is chosen, consultation

with the judges will be required to work out appropriate implementation. The important thing is an agreement in principle, with an effective date of April 1, 1999.

RULE OF 80

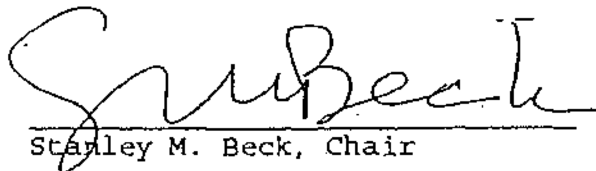
The Rule of 80 under the Federal plan provides for retirement before age 65 without penalty if the years of service and the judge's age equal 80. With an earlier age of appointment becoming common, we think this is a beneficial rule to encourage retirement and regeneration of the bench. Under the Federal plan, a judge is required to serve at least 15 years in order to be eligible for the early retirement option, and we would recommend the same for Ontario if the Rule of 80 is brought into play, as we recommend. To quote the Scott Commission, "...In a changing world, there is a constant need for rejuvenation of the Bench by younger persons expressive of current views. Renewal must be systemic so as to ensure that the profile of the Bench is expressive of contemporary societal values. The result is, as has been recognized by successive Governments, that the appointment process can no longer be seen as a mere matter of finding suitable candidates for office who are at the end of their careers." We agree with those sentiments, and urge that the Rule of 80 be enacted.

EARLY RETIREMENT REDUCTIONS

The Rule of 80 which we recommend must be seen in the context of the current penalties for early retirement under the Ontario plan. Under the current plan there is a penalty of a 5% reduction in pension for every year between ages 60 to 64 that a judge takes early retirement, and an additional 2% per year for early retirement between ages 55 and 59. If there is to be a reduction, it should certainly be lesser for retirements closer to age 65 and greater for those further away from 65. That is the opposite of the current plan, and makes early retirement very unattractive. We recommend that a Rule of 80 be enacted, and that the early retirement reductions be eliminated. If they are not eliminated, they should be restructured at reduced levels, with the lower percentages coming the closer one gets to 65 years. One option that the judges suggested is that the current reduction factors be reversed, such that there would be a 5% reduction between ages 55 and 59 and only 2% between ages 60 and 64. If

there is to be a reduction factor, we agree with the suggestion for reversal of the current plan.

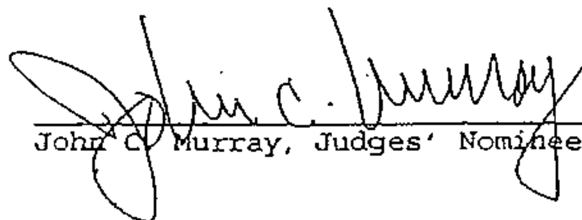
DATED at TORONTO this 20th day of May, 1999.



Stanley M. Beck, Chair

See attached Minority Report

Valerie A. Gibbons, Government of Ontario's Nominee

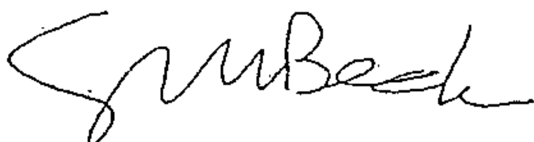


John C. Murray, Judges' Nominee

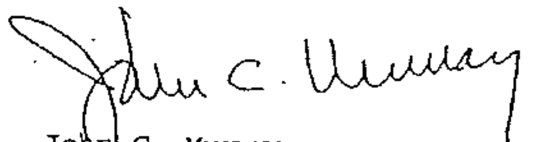
ADDENDUM

Administrative Salaries

Currently there are seven Regional Senior Judges, two Associate Chief Judges and one Chief Judge for the Ontario Court of Justice (Provincial Division). These judges all receive a salary greater than Puisne Judges. The current differential -- between the salaries of these judges and the salary of a Puisne Judge shall be preserved to the extent possible except that in no case shall the salary of a Regional Senior Judge, Associate Chief Judge or Chief Judge exceed the salary of a Puisne Judge of the Ontario Court (General Division).



Stanley M. Beck, Q.C.



John C. Murray

IN THE MATTER OF THE *COURTS OF JUSTICE ACT* AND IN THE MATTER OF AN INQUIRY BY THE PROVINCIAL JUDGES REMUNERATION COMMISSION (1998) INTO THE COMPENSATION OF PROVINCIAL COURT JUDGES

B E T W E E N:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO

(the "Government of Ontario")

- and -

THE ONTARIO JUDGES' ASSOCIATION, THE ONTARIO FAMILY LAW JUDGES' ASSOCIATION AND THE ONTARIO PROVINCIAL COURT (CIVIL DIVISION) JUDGES' ASSOCIATION

(the "Judges")

BEFORE: Stanley M. Beck, Chair
Valerie A. Gibbons, Government of Ontario's Nominee
John C. Murray, Judges' Nominee

APPEARANCES:

On Behalf of the Government of Ontario: Roy C. Filion, Counsel
Frances R. Gallop

On Behalf of the Judges: C. Michael Mitchell, Counsel
Steven M. Barrett
Michael Code

HEARINGS: November 26, 27, December 16, 17, 18, 1998
January 19, 28, February 4, 15, 1999

FOURTH TRIENNIAL REPORT OF THE PROVINCIAL JUDGES REMUNERATION COMMISSION (1998)

ADDITIONAL REASONS

FOURTH TRIENNIAL REPORT - ADDITIONAL REASONS

These additional reasons to the Fourth Triennial Report of the Provincial Judges Remuneration Commission (1998) ("the Report") are issued pursuant to a request of the Ontario Judges' Association ("the Association") pursuant to Section 28 of the Framework Agreement for amendment and clarification of the Report. The amendments or clarifications sought are in respect of the following two matters:

1. ADMINISTRATIVE SALARIES

In our Report we stated that the administrative salary differentials for the Chief Judge, Associate Chief Judge and Regional Senior Judges should be maintained, with the exception that they should be capped at the salary base of the puisne Judges of the Ontario Superior Court. The effect of that is that they would be capped at $178,100. The current salary for the Chief Judge is $149,497, for the Associate Chief Judge $146,383, and for the Regional Senior Judges $143,720. As the current base salary for a Judge of the Provincial Court is $130,810, it will be appreciated that the administrative differentials are in the range of $13,000, $16,000 and $19,000. In the year 2000, which is the third and final year in which the recommendations of the Report are implemented, the base salary becomes $170,000, plus

the AIW increment. With a cap of $178,100, it will be appreciated that there will be a very little differential for administrative positions.

We are asked to reconsider our decision with respect to administrative salaries on the basis of it being appropriate to maintain a differential, as is the case in the Superior Court. The submission of counsel for the Association was that in the absence of some amendment to the Report, "the Chief and Associate Chief Judges' salaries will be equal to that of the Senior Regional Judges, which is not appropriate given the differential and responsibilities, and that this would create an insufficient differential with the puisne Judges."

Counsel for the Government, in his reply to the Association's submission, submitted that further increases in administrative salaries, beyond the increases given in the Report, would not be appropriate. In particular, it was argued that there should not be parity with the Chief Justice and Associate Chief Justice of the Superior Court of Justice, when the Report itself did not award parity with judicial salaries for the Superior Court. As to the argument for maintaining the existing differential between the puisne Judge and the Chief Judge and Associate Chief Judges, the Government argued that what was awarded in the Report adequately recognized the responsibilities associated with those positions.

DECISION

For 1998, the existing differentials can be maintained so that the issue does not arise for that year. For 1999 and 2000, the Regional Senior Judges shall maintain their differential until such time as they are capped at the $178,100 level. At such time as the $178,100 cap would come into play for an Associate Chief Judge or the Chief Judge, the Associate Chief Judges shall be paid an administrative differential of $5,000 above that cap, and the Chief Judge shall be paid an administrative differential of $10,000 above that cap.

2. REPRESENTATIONAL COSTS

The second issue raised by counsel for the Association was that of representational costs. In the Report, we held that representational costs should be paid to the Judges in an amount to be determined. We directed that counsel for the parties attempt to agree on an appropriate cost figure and that if they could not so agree, we would remain seized of the matter and would hear submissions. Counsel for the Association asked for clarification with respect to the payment of representational costs. As the Report held that such costs were an appropriate allowance to the Judges, it might be thought to follow that the

allowance would be paid on a pro rata basis to the individual Judges and then by them to the Association. Counsel for the Association stated that it was the Association's preference that such an allowance be paid in the aggregate to the Executive of the Association, and through it to counsel rather than from each individual Judge to counsel.

Counsel for the Government argued, once again, that representational costs are not within the ambit of the term "allowance" as that term is used in Section 13(c) of the Framework Agreement. It was also argued that since Section 17 of the Framework states that the Commission may retain professional and support services, including counsel services, and is silent as to representational costs for the Judges, the award of representational costs is therefore not contemplated by the Framework and is beyond the jurisdiction of a Triennial Commission. Moreover, counsel also noted that the Framework was negotiated after 1988 when the Henderson Commission had declined to award representational costs.

We do not think that either of the points raised by counsel for the Government are determinative of the issue. The fact that Section 17 gives a Triennial Commission the power to retain professional and support services says nothing about whether representational costs may be awarded to the Judges as an allowance. Nor is it particularly relevant that the Framework was

negotiated after an earlier Commission had declined to award such costs. The Framework deals with "benefits and allowances" and as we said in the Report, and we would clarify now, we consider such representational costs to be an appropriate allowance for the Judges for all the reasons set out at pages 50-54 of the Report. A sum paid to the Judges once every third year to allow them to participate on an equal footing with the Government in a statutorily, and since the P.E.I. Reference, supra, constitutionally mandated hearing, is within the concept of an allowance - "an amount allowed esp. regularly for a stated purpose" (Oxford Dictionary of Current English, 2nd ed. 1993), as that term is used in Section 13(c) of the Framework.

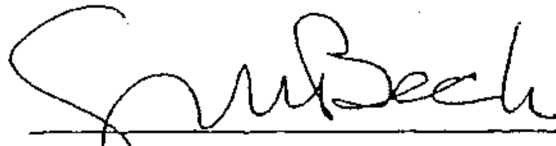
We see no reason why the order as to costs should not direct that that allowance be paid directly to the Executive of the Association rather than being paid in individual lump sums to over 200 Provincial Court Judges to then be passed on to counsel. There is no reason to handle the matter of an allowance for representational costs in such an inefficient manner.

In conclusion, we reaffirm our award of representational costs as being an appropriate allowance under Section 13(c) of the Framework and would direct that it be paid directly to the Executive of the Association once the amount has been determined.

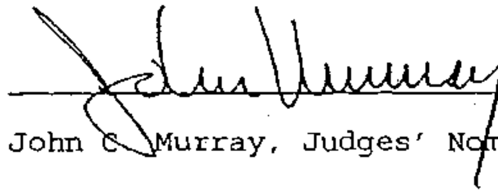
As Commissioner Gibbons dissented in the Report with respect

to both the matter of salary levels and the awarding of representational costs, she does not join in this clarifying majority award.

DATED at TORONTO this 30th day of June, 1999.



Stanley M. Beck, Chair



John C. Murray, Judges' Nominee

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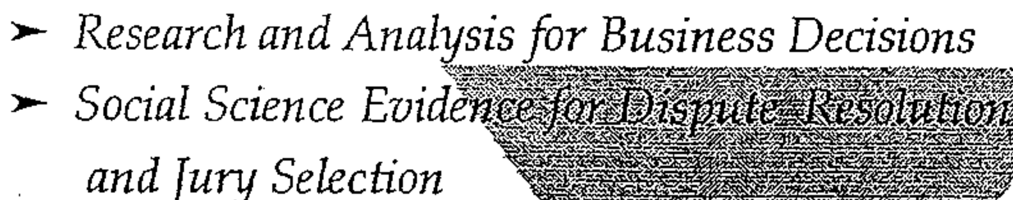

Assessment of the PricewaterhouseCoopers Ontario Lawyer Compensation Survey

Report of Ruth M. Corbin, Ph.D.

to the Fourth Triennial Provincial Judges' Remuneration Commission

February 4, 1999

1235 Bay Street, Suite 802, M5R 3K4

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REPORT OF RUTH M. CORBIN, Ph.D.
To the Fourth Triennial Provincial Judges' Remuneration Commission
February 4, 1999

Introduction and summary opinion

1. I was retained by the Ontario Judges Associations through Mr. Michael Mitchell of Sack Goldblatt Mitchell to assess a survey of lawyers' incomes, conducted by PricewaterhouseCoopers (hereafter, "PWC") with respect to the reliability and validity of its results. The survey was submitted to the 1998 Provincial Judges' Remuneration Commission.

2. A summary of the assessment is as follows: The PWC survey is unreliable. No conclusions can be drawn which apply to the population of Ontario lawyers, or to any significant group within that population, such as family or criminal lawyers in Ontario who practice in the Provincial Division. The lawyers surveyed for the study did not constitute a representative or valid sample. In addition, the credibility of the survey is undermined by several inconsistencies, inaccuracies, and missing information.

Professional Qualifications

3. I am the President and C.E.O. of Decision Resources Inc., a marketing science company conducting business analysis and survey research for Canadian and international corporations. The company also has an established practice in research support for litigation and regulatory matters.

4. In addition to my full-time position with Decision Resources Inc., I have been an Adjunct Professor in the Faculty of Management at the University of Toronto since 1982. In 1998, I received a cross-appointment to teach in the Faculty of Medicine at the same University. I have also held an appointment as Adjunct Associate Professor of Marketing at Carleton University. In the latter positions, I have taught statistics, marketing strategy, consumer behaviour, and survey research in undergraduate, Masters of Science, M.B.A. and Executive M.B.A. programs.

5. My professional activities include Editorships of the Canadian Journal of Marketing Research and the Journal of Forecasting, and Directorships of three international public companies with headquarters in Canada—Trimark Financial Corporation, Unihost Corporation, and Alphanet Telecom Inc. I am on the Audit Committee of all of those corporations, and on the Compensation Committees of two of them.

6. I was previously Chief Operating Officer and a Director of the Angus Reid Group, one of the country's largest survey research firms. During my tenure with that company, I designed, conducted or supervised at least 500 surveys across a wide range of industry sectors.

7. My educational background includes a Bachelor of Science degree in Mathematics, and M.Sc. and Ph.D degrees in Psychology. My graduate research was funded by a National Science Scholarship, awarded to the country's top 38 science graduates chosen from across all fields. Results of my research were published in two different international journals, and in a textbook chapter on Decision-Making.

8. I have given several invited speeches on business strategy and market trends, and given guest lectures on expert evidence at Osgoode Hall, the University of Toronto Faculty of Law, and the Advanced Course in Trade-marks sponsored by the Patent and Trade-mark Institute of Canada.

9. I have given evidence as an expert witness before the Federal Court of Canada, the courts of the Ontario General Division, British Columbia Supreme Court, Alberta Court of Queen's Bench and Quebec Superior Court, and various regulatory bodies and tribunals including the Canadian International Trade Tribunal, the Copyright Board of Canada, the Trade-Marks Opposition Board, the Ontario Municipal Board, and Advertising Standards Canada.

10. I have published on a wide range of marketing and statistical matters, as well as on advances in survey evidence for litigation. A recent chapter on Survey Research Expert Evidence was published by Canada Law Book, in a book entitled The Litigator's Guide to Expert Witnesses, edited by Freiman and Berenblut. Carswell has contracted with me and two intellectual property lawyers to produce a book on survey evidence and the law, to be published within the next 12 months.

11. A detailed *curriculum vitae* appears as Exhibit A.

Standards for reliable and valid survey research

12. Survey research has grown significantly in the past 10 years as a source of expert evidence in litigation and regulatory proceedings. One of the reasons for its growth is the demonstration that survey research can incorporate rigorous statistical principles and scientific integrity. There are several recognized textbooks on the procedures and standards for sound survey research. There are also industry standards published by the Canadian Association of Market Research Organizations, and the Professional Market Research Society.

13. Several members of the Bar have published appropriate standards for surveys to meet, in order that survey results be acceptable and credible as expert evidence. Some of these published articles are listed, with full citations, in my own review article published in a law journal, entitled "Survey Research as Expert Evidence." It is appended to this report as Exhibit B.[1]

14. In the remainder of this section, I will list and briefly explain certain of the recognized standards, against which I have evaluated PWC survey.

15. ***Reliability is a pre-eminent requirement.*** Reliability means the extent to which a survey *sample* can predict the true characteristic (in this case, professional income) of the overall population of interest. Reliability depends on correct sampling[2] and unambiguous instructions.[3] As will be explained in subsequent paragraphs, the PWC survey fails to adhere to key criteria for reliability.

16. ***The sample must be drawn from the pertinent population.*** To be reliable, a survey must be based on a properly defined sample, that is a sample of respondents who are indeed drawn from the population relevant to the issues at hand. In the present case, I am advised that members of the relevant population must meet the legal requirement of being at least 10 years from the Bar. As will be shown in the next section, the PWC survey did not meet this requirement.

17. ***Qualification to participate must be unambiguous.*** Even if the population is well-defined in the minds of those who have commissioned the survey, the criteria conveyed to the respondents qualifying for the survey need to be unambiguous. Otherwise the survey data will be a jumble of input from some unqualified people who responded along with the qualified people, and certain qualified people will be omitted from the survey altogether. As will be shown in the next section, the criteria for participating in the PWC survey were ambiguous to respondents.

18. ***Sampling must be random.*** Statistical reliability also requires that the sampling from the population be random. That means that everyone in the population should have an equal chance of being selected—or at least a known probability of being selected. As will be shown in the next section, PWC's sampling process appears not to have been random, but rather to have contained a bias toward lawyers in small firms.

19. ***The process by which a sample is selected should reflect the objectives of the study.*** If the purpose of the study is to obtain an estimate of the average incomes within law firms, then firms should be sampled—from a given list of *firms*. On the other hand, if the purpose of the study is to obtain an estimate of the average incomes of

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[1] Corbin, R. "Survey Research as Expert Evidence: its past successes, its future trials." Canadian Patent Reporter, November 1995, pp. 215-247.

[2] See, e.g. Chakrapani, C. and Deal, K. Marketing Research Methods and Canadian Practice. Scarborough: Prentice-Hall, 1992, p. 331.

[3] Ambiguous understanding by the respondent makes it impossible to interpret his/her data. Ambiguity is described in one text as being "a cardinal sin in question-writing." See Warwick, P. and Lininger C., The Sample Survey: Theory and Practice. New York: McGraw-Hill, 1975, p. 141.

individual lawyers, then individual lawyers should sampled—from a given list of *individuals*. The PWC report claims that firms were sampled, yet conclusions were drawn about individual lawyers. This is a fundamental error in reporting.

20. *The sample needs to capture distinct groups in approximately the right proportions.* The sampling must be representative. That is, the sample should take into account all types of groups in the population whose characteristics may be distinct from other groups in a relevant and material way. According to January 13 correspondence from Filion Wakely and Thorup to Mr. Mitchell, PWC lacked basic information about the population at large to ensure a statistically correct cross-section of the population of lawyers in Ontario[4], and the characteristics of the sample they actually achieved suggest that the sample is unrepresentative.

21. *Small sample sizes are particularly vulnerable to sampling errors.* The sample should be sufficiently large that one can draw statistically sound inferences from it. Statistics textbooks advise a minimum sample of 30 (so that the so-called Central Limit theorem applies), but survey researchers would typically insist on a sample of 100 or more. When unqualified respondents are removed, and when one notes the geographic distortions in the sample, the PWC sample size is unacceptably low.

22. *All reasonable steps should be taken to achieve a high response rate.* There is no absolute criterion for what constitutes a good response rate. The industry average has dipped as low as 18% in recent years, although response rates of over 70% are being achieved in certain surveys with diligent attention to motivation and follow-up. As will be explained below, the PWC survey had a response rate so low as to be trivial, and the firm apparently took no standard industry measures to improve it.

23. *Survey questions should be unambiguous.* Where factual information is required, every respondent should understand the requirement in the same way. As will be explained in the next section, there were a number of ways that certain questions in the PWC survey could have been interpreted.

24. *Irrelevant sources of variation, such as differences among interviewing style, should be controlled and minimized.* Interviewers must all follow an identical script, without subjective elaboration or ad hoc assistance to respondents. This is to ensure that all respondents have an identical understanding of the requirements, and that interviewers do not influence respondents to take on different motives for submitting information. As will be explained in the next section, the interviewers in the PWC survey were almost certainly required to deviate from their script, and to improvise information about which they may have had limited knowledge.

25. *The integrity of the entire process should be ensured.* Insufficient documentation, inconsistencies, erroneous calculations, and unexplained missing data all serve to

[4] From the letter from Filion, Wakely & Thorup, p. 2 "You had requested the number within each subgroup in each geographic area...This information was not available for use in the survey."

weaken the scientific credibility of the study. The PWC survey appears to have been vulnerable to all these weaknesses.

Technical details to support the conclusions reached in the previous section

26. This section adds technical detail and published support to all of the conclusions summarized in the previous section, paragraphs 16 to 25, concerning the reliability and validity of the PWC survey.

27. Paragraph 16 above cited the requirement that a survey sample must be drawn from the population pertinent to the objectives of the study. This requirement is essential to statistical reliability of the findings. Otherwise, it is impossible to draw any conclusions from a survey about the population at large. Articles I have written for law journals have included reviews of cases involving survey evidence, where surveys have been discounted or accorded very little weight by a judge or other trier of fact, if they have not addressed the pertinent population.[5] As I understand the purpose of the PWC survey, a sample should have been drawn from lawyers who meet the legal requirement to be candidates for the bench, which I am advised is a minimum of 10 years practice since being called to the Bar. PWC's stated objective is consistent with this understanding; in the first paragraph, page 1 of their report, the following sentence appears: "The research is focussed on obtaining salary and benefits data for lawyers in Ontario who...have 10 or more years of work experience." Yet 9 lawyers, more than one-fifth of the sample surveyed by PWC, had been called to the Bar fewer than ten years ago.[6]

27. An additional 14 respondents (34 % of the sample) were not identified as partners of their firms.[7] I am advised by Mr. Mitchell that lawyers in private practice who are plausible candidates for the Bench would be of a calibre that would normally have elevated them to partnership status before ten years had passed since their call to the Bar.

28. Ambiguity in the data on the previous point should be noted. PWC data records identify 20 respondents as being non-partners, 14 of which have been called to the Bar more than ten years ago. However, inspection of the original questionnaires shows that several of the 14 may be sole practitioners who simply declined to refer to themselves as partners. In only three cases out of the 14 was there other data in the questionnaires that allowed me to confirm that these respondents were not sole proprietor lawyers.

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[5] See resume attached, and publications cited therein.

[6] Inferred from the report, p. 3, and verified through direct reference to the original questionnaires.

[7] Obtained from the original questionnaires, rather than the summary report, to avoid duplicating counts of non-partners and lawyers with fewer than ten years since the Bar.

29. Thus, in either case, some respondents (a number between 3 and 14) are included who are associates and not partners. This observation leads to three conclusions about the survey. First, the survey includes some lawyers who are not self-employed after 10 or 15 years of practice, who, I am advised by Mr. Mitchell, are not normally among those who would be chosen to advance to the Bench. Second, it demonstrates ambiguity in the question and inconsistency in the data, whereby the L/P coding (for lawyer or partner) was inconsistently applied. Third, to the extent that the L/P coding *was* inconsistently applied, the statistical summary in the PWC report (in particular the chart on page 3) is invalid, as is any other analysis that relies on the lawyer versus partner distinction.

30. Before leaving the topic of the pertinent population for the survey, I note that certain of the lawyers submitting questionnaires listed hours of work that constituted less than full-time hours. The PWC survey was supposed to be administered only to lawyers who work full-time. The instructions to respondents make specific reference to this requirement, suggesting that some respondents did not read the instructions, and may have provided other information incorrectly. Four lawyers reported working hours (not billable hours) of fewer than 30 per week, which I conservatively assume to be the lower limit for full-time work. One of the four is a lawyer of fewer than 10 years experience following admission to the Bar. Thus, at least 3 more respondents, additional to those identified in paragraphs 26 and 29, appear to have been inappropriately included in the estimate of lawyers' compensation levels, given the purpose of the evidence.

31. Respondent #36 had been called to the Bar in 1957 and worked in his firm for 42 years. I infer his age to be 67 or higher. I am advised that this lawyer would also likely lie outside the age range for being appointed to the bench. Because he also works less than full-time (25 hours per week), his unsuitability as a respondent on other grounds has been discussed in paragraph 30.

32. Paragraph 17 in the previous section cited the requirement that the criteria for participating in the survey need to be unambiguous. Otherwise, unqualified respondents could end up participating, and qualified respondents may be left out. The PWC survey contained ambiguous criteria. It specified that qualified respondents were those whose "area of primary practice [is] family or criminal law in the Provincial Division (i.e. at least 40 percent of your time)."[8] This definition leaves ambiguous whether time spent in family or criminal law each has to add up to 40% or whether they may be combined to add to 40%; the definition requires that lawyers be able to associate their cases with the Provincial Division, even if such cases do not get to Court; alternatively it may suggest to a respondent that he or she needs to be spending 40% of their time in Provincial Division courtroom. People could interpret the definition in a variety of ways. Evidence that respondents interpreted it in different ways is shown in the questionnaire responses. In response to whether their primary area of practice was criminal or family ("C or F") some lawyers took the initiative to write in both. Others (who did not answer) may not

[8] See the MBS survey screener submitted by PWC, which provided initial instructions to respondents

have realized that this option was available to them. Respondent #7 apparently believed she might qualify and wrote in "C+F=50%. Respondent #16 wrote in an ambiguous "C+Civ.Lit." It is not clear what the respondent meant; it is possible that his "C" (criminal) practice alone was less than the required 40%

33. Further ambiguity or inconsistency about what respondents understood is demonstrated in how they answered Question 2, which asked for firm size broken down by lawyers and partners. Respondents were inconsistent in sometimes referring to themselves as lawyers in Question 2, and partners later on in the questionnaire (or vice versa.) Respondents were inconsistent in whether they counted themselves in Question 2, or omitted counting themselves. Respondents gave other apparently illogical answers. And to exacerbate the problem, PWC was inconsistent in how they recorded apparently identical situations. To support this analysis, I list below the groupings of problems with Question 2 that I found in the questionnaires.

- *General misunderstanding of Question #2*
  Respondent #7 identified "2 associates" on the line reserved for partners, which suggested she did not understand the question

- *Respondents who apparently forgot to record themselves in Question 2*
  Respondent #7 refers to 2 associates in Question 2, and no-one else, but then records herself as a partner on the next page. Respondent #16 says in Question 2 that there are 0 partners and 0 lawyers in the firm, so evidently omitted himself.

- *Respondents who are inconsistent in identifying themselves as lawyers or partners*
  Respondent #8 claims in Question 2 on page 1 of the questionnaire that the firm consists of one partner only, then on page 2 of the questionnaire identifies himself as a lawyer.[9] Respondent #15 answers question 2 by saying there are no partners in her firm, then identifies herself as a partner on page 2 of the questionnaire. Respondent #22 and #25 say that their firms consist of one partner only, yet identify themselves as lawyers (L) not partners (P) on the second page of the questionnaire.

- *Law firms with no partners or proprietor practitioners?*
  Respondents #11, 17, 20, 27, 29, 34, 35 and 36 say in question 2 that their firms have no law partners nor proprietor practitioners—which would be quite an irregular situation. If the situation is explainable by the fact that respondents were not reached at a law firm (but rather at a company or institution), respondents would have erred in answering question 1 which referred to their "law firm." Possibly they misunderstood the question, which would constitute an inherent weakness in the questionnaire. (Possibly one or more of these cases were branch offices with no local partners, although there is no such indication given.)

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[9] The respondent actually wrote in that the firm had 1 lawyer and 1 partner, but someone from PWC has hand-written in a correction on my copy, crossing out the 1 lawyer.

- *Arbitrary creation of data by PWC*
  Respondent #16 answers question 2 by saying there are "0" lawyers and "0" partners in the firm. Yet PWC shows his firm as having 1 to 3 lawyers. Respondent #21 did not answer the question about firm size, yet PWC recorded a firm size of "greater than 20" in their data spreadsheet. In other words, in the face of incomplete data, PWC recorded it on their own. No explanation is given of where they obtained the information. If they made a follow-up call, it should have been recorded. Similarly, PWC filled in "lawyer status" for Respondent #39 on the data spreadsheet, without information volunteered by the respondent. It is an important industry standard that research personnel not fill in missing data at their own initiative, without consistent documented procedures. This is particularly important when the researchers represent the data as having originated directly from respondents.

- *Faced with confused respondents, PWC records data inconsistently.*
  Respondent #18 identifies only 2 legal secretaries in question 2, and on the next page identifies herself neither as a partner (P) nor a lawyer (L) but as "X" (sole). PWC has interpreted the X to be an "L" according to their data spreadsheet. Respondents #19 and 41 *appear* to be sole practitioners (they say their firms consists of one partner and identify themselves as partners "P"), and PWC accepts and records their status as a "P." This appears to be an inconsistency with how they treat other sole practitioners. Respondent #24 lists himself as a sole practitioner lawyer (L) rather than partner (he actually writes in the words "sole practitioner"), and PWC accepts the L as correct. Yet respondent #40 writes in that she is a sole practitioner, and PWC accepts and records her status as "P." Respondent #39 apparently relayed over the phone that he was a sole practitioner (it is hand-written in a hand that is different from the respondent's writing) and PWC *made their own decision* to record his sole practitioner status as an "L."

33. In summary, question 2 was interpreted inconsistently and the data were recorded inconsistently. Inconsistent data cannot be meaningfully combined to produce single summary statistics. PWC errs in doing so.

34. Paragraph 18 above cited the requirement that sampling must be random. Paragraph 19 went further to explain that the sampling "unit" had to be the right one for the study. Since PWC was charged with estimating the average compensation of certain lawyers in Ontario, the firm should have sampled randomly from a list of lawyers. Instead, they drew their sample from a list of firms, and then spoke to (usually) one lawyer within that firm. (See, for example, in the last paragraph of page 1 of the PWC report: "A representative sample of lawyers was obtained *by randomly selecting law firms* in Ontario from the Canadian Law List publication." Further confirmation that they sampled first from firms rather than individual lawyers is contained in the next sentence "A screening call was made to ensure that each selected *firm* was eligible to participate." The page of discussion about response rates on page 2 also refers to screening of, communication with, and responses from *firms*.) Still further confirmation to me that they did not use a list of individual lawyers as their baseline for sampling (or "sample frame" as it is technically known) is shown in

the chart on page 2. In Toronto, 378 firms were screened for possible eligibility. In Northern Ontario, 250 firms were screened. In other words, the Toronto screenings outweighed Northern Ontario screenings by a factor of about 1.5 to 1. But independent data provided by LPIC, the Lawyers' Professional Indemnity Company, from their operating records, show that Toronto lawyers outnumber Northern Ontario lawyers by a factor of 15 to 1. Thus, assuming reasonable accuracy of LPIC business records, one can only infer that PWC's sample frame was *not* individual lawyers, but rather law firms.

35. The PWC author errs in writing, in the last paragraph of page 1 of the report, that using law firms as the sampling unit produces "a representative sample of lawyers." On the contrary, that method gives undue weight to smaller firms, since the number of sole practitioner and very small firms in the Canada Law List are much more numerous than large firms. Accordingly, lawyers in small firms have a disproportionate chance of being selected, and their incomes would be disproportionately represented in the estimate of the population mean.

36. PWC's error in sampling procedure has been documented (and warned against) in recognized texbooks on surveys. As observed in Warwick and Lininger, *supra*, p. 104, a sample drawn in a way similar to the PWC process "would give a distorted picture of the population. The oversampled...elements would carry more weight than they deserve, while the rest would be underrepresented." The authors then point out the necessity of "weighting" the data, so that every respondents' answers are counted in proportion to their group size in the population. PWC has not done this essential procedure, to compensate for their unbalanced sampling.

37. In direct conversation with PWC professionals and Filion Wakely & Thorup, Mr. Mitchell and I were advised that the sampling was actually done not by using law firms as the sampling unit, but by using a list of individual lawyers. I could not reconcile this verbal information with the printed report. The information in the report and the information given verbally are contradictory. As explained three paragraphs earlier, the printed report makes continued reference to the fact that the sampling unit was law firms.

38. PWC further reported verbally that, in sampling from a list of lawyers, rather than law firms, more than one lawyer in the same firm might have been contacted for a separate response. Again, this seems inconsistent with the instructions that each respondent was asked to report for his or her entire law firm. The fact that few of them did so suggests that some did not follow the instruction and some did. This latter observation adds another inconsistency to the administration of the survey.

39. PWC's verbal report that individual lawyers were the sampling unit is also inconsistent with the fact that the Canada Law List includes lawyers in the public service, lawyers in corporations, and non-practising lawyers. No mention was made in the report of how these individuals were identified and eliminated from the sampling process. No indication is given that the PWC staff had the expertise to recognize

whether the organizations associated with the lawyers' names on the Canada Law List were or were not law firms. It is an established standard in the survey industry, according to the Canadian Association of Market Research Organizations, that survey documentation must include "a full description of the sample, sample design, and its execution."

40. In summary to the previous paragraphs, the written report suggests to me that it was indeed law firms who were the *initial* sampling unit and not individual lawyers. The data received suggests that what actually happened as the process unfolded for contacting law firms and lawyers was some uncontrolled hybrid of the two possible sampling methods. This makes it impossible to judge the statistical reliability of the data.

41. According to paragraph 20 in the previous section, the sampling must be representative, in order that the resulting statistics are trustworthy. That is, the sample should take into account all types of groups in the population whose characteristics may be distinct from other groups in a relevant and material way. In particular, if Toronto firms have different incomes from northern Ontario firms, each group should be represented in the sample in approximately the same proportion as they appear in the population. Otherwise, the sample mean will be biassed in the direction of the group that is over-represented. Similarly, if lawyers in small firms have different incomes from lawyers in large firms, then small and large firms should be represented in the sample in approximately the same proportion as they appear in the population. As shown in the chart below, Toronto lawyers are significantly underrepresented in the sample. Northern Ontario lawyers are overrepresented in the sample by a factor of 1000% (one thousand percent). The distortion increases in magnitude, as one eliminates from consideration lawyers who are less than ten years from Bar admission, lawyers who are not yet partners in their firms, and lawyers who do not work full-time. A statistical test ("a chi-square test") proves that the sample distribution in the overall sample is significantly different from the distribution in the population.

Based on 16,952 lawyers in Ontario	% of lawyers in Toronto	% of lawyers in Southern Ontario	% of lawyers in Northern Ontario
In the population (according to LPIC)	60% (10192 people)	36% (6038)	4% (722)
In the sample	24% (10)	29% (12)	46% (19)
In sample for the 32 qualified respondents	22% (7)	31% (10)	47% (15)
In sample for the 26 respondents who were qualified, partners, full-time	19% (5)	35% (9)	46% (12)

42. The geographical distortion of the sample has direct impact on the results of the survey. According to the survey's own data, incomes in Toronto are higher than in Northern Ontario by a statistically significant amount. Thus, the mean income of the overall sample is distorted toward the low end and is statistically unreliable.

43. Paragraph 21 discussed the need for a credible-sized sample, in order to reduce vulnerability to other problems. The PWC sample size was (in my opinion) unacceptably low. Only 41 people responded from 36 firms. Of these 41, 9 failed to qualify because they were not ten years from admission to the Bar (see para.26 above). An additional 3 identified themselves as lawyers rather than partners, in firms that did have partners (see paragraph 29 above). An additional 3 reported working hours that were less than full-time (see paragraph 30 above). Thus the size of sample relevant to the purpose of the survey could have been as low as 26, based on conservative assumptions. As stated in the earlier summary, a sample size of 26 is below even the 30 minimum that most statistical textbooks identify as being suitable for drawing inferences about a population.[10]

44. The response rate is 6% for the survey. That means that only 6% of eligible firms contacted agreed to participate. In my opinion, 6% response rate is unacceptably low. My firm (and presumably others) have obtained response rates of more than 50% from well-defined lawyer populations. The industry average across all surveys is currently estimated to be about 18% for one time studies.[11] Even PWC's 6% figure overestimates the true response rate, because "eligible firms" were only those who

[10] The Central Limit Theorem, which is the foundation of statistical inference from a sample to a population, is applicable when a sample size becomes "sufficiently large; statisticians have generally accepted the number 30 as being sufficiently large. But some authors, such as Mendenhall and Reinmuth, Statistics for Management and Economics. Boston: Duxbury Press, p.223 caution that even a sample size of 30 may be too small for certain types of populations.

[11] PMRS Response Rate Committee, "Measuring Refusal Rates", Canadian Journal of Marketing Research, 1997, pp. 31 to 42.

had not originally refused to respond due to disinterest.[12] The usual method for reporting response rates is to take into account refusals due to disinterest.

45. Response rate for Northern Ontario was approximately four times that of Toronto and Southern Ontario.[13] This observation reinforces the earlier finding that Northern Ontario lawyers were disproportionately represented in the results.

46. Paragraph 22 pointed out the importance of improving the response rate through all reasonable means, in order to improve the size and representativeness of the sample. The industry standard is that a minimum of 3 call-backs be made to non-responding people for whom a contact attempt has been made. PWC appears to have undertaken no steps to improve on a very low response rate.

47. Paragraph 24 summarized the need for consistent and controlled interviewer behaviour, so that interviewing styles do not induce biasses or any irrelevant source of variation. Interviewers are part of the measurement process, and it is a standard scientific requirement that measurement processes be consistent and controlled. There were no interviewer instructions presented in the report. There was no direction to interviewers about how to handle unexpected questions. I infer from the the survey screener that unexpected questions must have arisen, such as those described in the following points:

- The second sentence of the screener refers to the Management Board Secretariat sponsor—a name which would have been unfamiliar to people answering the phone at law firms. What did interviewers say if they were asked more about the sponsor?

- There is no instruction to interviewers of what to do if the targeted person is not available.

- When the interviewer reaches the correct respondent, the questionnaire shows that the interviewer immediately asks about the respondent's primary area of practice. It is implausible that an interviewer would ask such a question immediately upon being connected to the respondent—some up-front explanation would need to be repeated before questions were asked.

- After respondents answered a qualifying question, they were told that "survey data is being gathered for a submission to the Judges Triennial Commission." Interviewers were given no instructions about how to handle questions about the nature of this Commission. Such questions would almost certainly have arisen.

- Since confidential information was being requested, it is likely that some respondents would have inquired about the use to which the information would be put.

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[12] See page 2, paragraph 1 of the PWC report: During the first round, 312 firms were contacted, which produced 82 eligible firms *who were interested in participating* in the survey.
[13] This calculation taken from the table at the bottom of page 2 of the report.

- The survey plan calls for individual respondents to answer on behalf of their firm. Thus respondents would need to be qualified to know confidential information of other lawyers in their firms. The survey screener does not have any questions which permit the interviewer to verify that the respondent could represent his/her firm in answering the survey. Either interviewers delivered this request impromptu, or else an omission was made which was germane to the validity of the survey.

In summary, the screener script was implausible as the sole basis for motivating respondents to participate. Very likely, interviewers were required at more than one point in their script to improvise information, information which required a certain level of knowledge on their part. It is inappropriate to permit interviewers to use their own discretion in giving instructions and explanations to respondents.

48. The problem extended beyond initial solicitation of survey responses. Certain follow-up calls were made to respondents who had not provided income information in their partially-completed questionnaires. Interviewers would have had to explain to respondents why they needed the income information in particular. It is very important for a reviewer of the survey to know what motives respondents were given to supply information, that they had initially been reluctant to give. According to survey literature, respondents' perceptions of why they are giving information is known to influence the nature of answers that they give.

Inaccuracies, irregularities and deficiencies

49. Paragraph 25 summarized the final criterion used in assessing the PWC survey, namely the requirement of scientific integrity. All of the following quality control standards should be met: data should be recorded accurately, objectively, completely, and consistently; all materials and processes should be documented; the researcher avoid making subjective or inconsistent judgments about what respondents intended. Without these standards, one can obviously have little confidence in a survey as a legitimate measurement instrument. The whole process becomes suspect. Unfortunately, the PWC survey report illustrates all of the deficiencies just identified.

50. PWC reports on the geographical location of each respondent—yet there is no place on the survey form for respondents to report their town or city. How PWC came to know it is unexplained. Thus, the accuracy of the information is not open to validation.

51. The report is incomplete. It omits important detail about how interviewers were trained, how they handled questions about the sponsorship and use of the survey, how they came to know and record certain information when it was not part of the survey response data, and what procedures were followed when interviewers had to call back to obtain missing information. Answers to all these questions should have been

documented, so that a third party could assure himself or herself that the process was carried out with an acceptable level of quality control and objectivity.

52. Certain statistical analysis appears to be incorrect. The average reported income on page 5 of the report is $94,643, with a reported 95% confidence interval of $16,514 at the lower end and $15,955 at the higher end.[14] With standard statistical assumptions, the confidence interval should be symmetric at the lower end and the higher end. The fact that it is not suggests either that PWC has made an error, or that PWC has used some unusual statistical assumption or test—which is not described or justified.

53. A further apparent inaccuracy in calculations appears in Paragraph 1 on page 2. The report says that questionnaires were sent to a total of 288 firms (82 in Phase 1 and 206 in Phase 2). Yet the last paragraph on page 2 indicates that 586 firms were mailed the survey.

54. The sample averages reported by PWC may be misleading. The average compensation estimate for partners (as opposed to lawyers) is outside the 95% confidence interval for the overall sample. In other words, the conclusions have no statistical relevance for partners. The result for partners is essentially outside the maximum "margin of error."

55. The same is true for the income estimate of Toronto lawyers. It is outside the 95% confidence interval. This observation highlights the bias created by the underrepresentation of Toronto lawyers in the sample.

56. Finally, ***more than half the questionnaires have irregularities or recording errors***.

- Record #1: Someone other than the respondent has corrected a number in Column I of the questionnaire, without explanation. The researcher appears to have used his/her judgment in deciding that the recorded work week of 2250 hours was unrealistic. Possibly he/she assumed the respondent was referring to annual hours worked. The number has been adjusted to 50, which is unexplained, and is not an accurate result of a division of 2250 by 52 (weeks per year).

- Record #4: PWC has entered a figure for column L into its data tables, even though the respondent appears to have crossed out her answer for column L.

- Record #5: An adjustment has been made without explanation, similar to that made for Record #1. Again, the basis for the calculation is indiscernible. There is a further unexplained irregularity: the questionnaire is a different version and format than that which we were provided with as part of the PWC report. Finally, PWC appears to have used their own judgment to record the figure given in column H as what the respondent "meant" to write for column F. Their reasoning may have been sound, but the proper procedure is to call back the respondent to verify the solution—not for researchers to substitute their own inference.

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[14] These confidence intervals were calculated by subtracting the end-points of the range from the mean

- Record #8: The respondent refers to himself as a lawyer rather than a partner, and then fills in a response to "year of partnership admission." PWC does not indicate how they have dealt with this inconsistency.

- Records #9 and #10: The respondent says in question 2 that there are 4 lawyers in the firm in total; PWC's data record shows it as "one to three" lawyers.

- Record #11: The questionnaire contains a handwritten note, showing that an interviewer took the information by phone. No procedures are documented about how this came to occur, how the questions were phrased, and the qualifications of the individual carrying out the interview.

- Record #15: PWC interprets a figure of 100 in column L as meaning 100%. They apparently then apply judgment to change the figure to a dollar figure, when recording the data in the data table. The dollar figure they use is the lawyers gross taxable income. This judgmental process (as I have inferred it) was applied inconsistently, whereby another questionnaires with "100" in Column I was recorded as "no answer." Another inconsistency in this questionnaire is the respondent's report of "no partners" in Question 2, followed by identification of herself as a partner later in the questionnaire.

- Record #16: Question 2 response is inconsistent with information on page 2, and respondent's qualification on "practice specialty" is ambiguous.

- Record #18: Question 2 response inconsistent with information on page 2

- Record #21: The respondent omits reporting anything about the size of his firm, yet PWC records a number ("greater than 20"). Record #21 is also based on an irregular version of the questionnaire, as was Record #5, with no explanation.

- Record #22: Question 2 response inconsistent with information on page 2

- Record #25: Question 2 response inconsistent with information on page 2. PWC has recorded the response from column I inaccurately in their data record.

- Record #27: This is one of the questionnaires which had a figure of 100 in Column L, and PWC used a recording procedure for their data record which was inconsistent with how they treated Record #15.

- In Record #28, the respondent originally chose not to report her gross taxable income. A PWC interviewer called her back to obtain the figure. The validity of the figure should be treated as more doubtful than the validity of other respondents' income answers, given that this respondent had originally been reluctant to reveal it.

- In Record #29, the respondent appears to have left her firm in 1996. (PWC's data record confirms that they interpreted the respondent's situation as being no longer with the firm.) [15] Yet PWC records that person's income as of 1996. In fact, they may have recorded not the 1996 income, but the respondent's average income between the years 1993 and 1996. This is a clearly invalid record.

- In Record #30, the gross taxable income on the questionnaire is hard to read. PWC has recorded it as $25,000. The respondent was a sole practitioner of 19 years experience in a large city in Northern Ontario, who billed 1200 hours in the past year. He further claims to have taken 100% of the firm's net income into his own account. It is hard to imagine a combination of billing rate and overhead expenses that would leave him with only $25,000 income.

- In Record #31, a data entry error appears to have been made by PWC with respect to the size of the respondent's firm.

- In Record #32, a data entry error appears to have been made with regard to size of firm. This record is another case in which income information was originally omitted, and PWC called to obtain it. Following up was a good step for PWC to have taken; the validity of the figure is likely more suspect than might be the case for respondents who freely volunteered it originally.

- In Record #33, PWC ignored information given by the respondent in Column L, and recorded it as "no answer."

- In Records #34 and #35, one lawyer filled in personal information for both himself and another lawyer in the firm. No indication was given about his qualifications to know the personal information of his colleague. The information is suspect because it is identical in every respect for both lawyers, including identical work weeks and identical T4 incomes. The irregular version of the questionnaire was used in producing both of these records.

- Record #39 is missing the top page. There is no indication of where PWC sourced the information, usually recorded on the top page, to include in their data record. A question mark appears on the page, suggesting something is missing or misunderstood. The respondent did not write in his status as "L" or "P" yet PWC appears to have "guessed" it to be an L. The respondent had originally declined to give his gross taxable income, writing in only "not enough." A follow up call was made, yet only income was asked for—this despite the fact that several other pieces of information were missing. PWC should have taken the opportunity to fill in all missing information, especially because internal consistency checks on all information supplied are the only source of validation that we have.

[15] The respondent joined his firm in 1993. When asked the number of years he had worked for the firm, he recorded 1996. PWC translated this to mean that he had been with the firm 3 years. PWC then ignored the data in the column of "billable hours in the past year." I infer that they believed that the billable hours recorded by the respondent applied to 1996, and not to 1998.

57. In summary to this final section, I found the underlying data records for this survey to be incomplete, factually inconsistent in many cases, and inaccurately recorded by PWC in many cases. My analysis has been limited only to those data records where the validity could be checked, and of course there is much else that could not be checked. The poor condition of the information undermines the legitimacy and credibility of the entire survey process and its conclusions.

58. Combined with conclusions reached in earlier sections, I believe the results of the survey to be unreliable, and of no value in drawing inferences about compensation levels of any defined group of lawyers in Ontario.

All of which is respectfully submitted

R. M. Corbin

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CURRENTLY: C.E.O., DECISION RESOURCES INC., a marketing science company, conducting market research and business analysis, and research support for civil and criminal litigation.

Also holds "Adjunct Professor" appointment in the FACULTY OF MANAGEMENT, and the FACULTY OF MEDICINE, UNIVERSITY OF TORONTO. Activities have included teaching business strategy, marketing and marketing research in the MBA and Executive MBA programs, and guest lectures in the Faculty of Law, and at Osgoode Hall.

PREVIOUSLY: Chief Operating Officer, Angus Reid Group (1992-1994); Executive Vice-President, Angus Reid Group (1990-1992); Vice-President and Managing Partner, Royal Trust (1987-1990); Director of Marketing, Royal Trust (1985-1987); Director of Policy, CNCP Telecommunications (1982-1985); Business Professor, Carleton University (1975-1982), Assistant Director, Market Intelligence, Telecom Canada (1979-1982); Policy Advisor, Federal Government (1976-1979); Supervisor, Marketing Department, Bell Canada (1975-76).

SEE APPENDIX A, P. 3, FOR DETAILS OF ALL PREVIOUS CAREER APPOINTMENTS. LIST OF BUSINESS AWARDS IN APPENDIX B, P. 5

EDUCATION: Bachelor of Science degree in mathematics (Toronto, 1972), followed by Masters and Ph.D. degrees in psychology (McGill, 1973, 1976)

Full scholarship financing throughout university career and top academic honours
DETAILS OF EDUCATION, AND ALL SCHOLARSHIPS AND ACADEMIC HONOURS IN APPENDIX C, P. 6

CURRENT/RECENT BOARD APPOINTMENTS

Board of Directors, Trimark Financial Corp. (1995 -); Audit and Nominating Committees

Board of Directors, Journey's End Corporation (1997 -); Audit and Corporate Governance Committees

Board of Directors, Alphanet Telecom Inc. (1997-); Audit & Human Resources Cttees

Board of Directors, MDS Inc. (1995 -1998); Corporate governance, Nominating and Environment Committees

Dean's Advisory Council, Faculty of Management, University of Toronto (1993 -)

Board of Editors, Canadian Journal of Marketing Research (1992 -)
Board of Editors, Journal of Forecasting (1984 -)

PREVIOUS BOARD APPOINTMENTS ON P.7, APPENDIX D

PUBLICATIONS/INVITED ADDRESSES/MEDIA

Approximately two dozen published articles in business publications and professional journals, plus a book in press on scientific evidence in intellectual property litigation

Several invited radio and television appearances on the subject of public policy for regulated industries, competition and innovation in telecommunications, customer service problems in Canadian business, and C.E.O. management issues

Frequent invited addresses to business groups and industry conferences, including the Keynote Address to the Financial Post Retail Financial Services Conference, the Keynote Address to the Annual Marketing Conference of the Conference Board of Canada, and Keynote luncheon address to the Canadian Club. Recently chaired the Plenary Session of the Conference Board Symposium on Human Resource and Compensation issues in Canadian corporations and governments.

Pending public dissemination of Canadian Corporate Governance update, co-authored with the Chairman of the Institute of Corporate Directors, and sponsored by the Toronto Stock Exchange

SEE APPENDIX "E" and APPENDIX "F" , P.8-10, FOR DETAILED LIST OF AUTHORED BOOKS, PUBLICATIONS AND INVITED ADDRESSES

EXPERT WITNESS APPEARANCES

Affidavits and appearances before the Federal Court, four Provincial Courts, Trade-Marks Opposition Board, the Ontario Municipal Board, the Copyright Board, the Canadian Competition Tribunal, and the Triennial Judges' Commission as an expert witness in the fields of international marketing, trade-mark infringements, advertising impacts, brand equity, survey research, and misleading advertising.

Retained by the Canadian Advertising Foundation (self-regulatory body for misleading advertising in Canada) both to adjudicate, and to advise the regulatory panel on evidentiary disputes

Qualified by the Ontario Court as an expert witness in psychology, behavioural science, and survey research, with respect to evidence on jury selection for criminal proceedings

OUTSIDE INTERESTS

Tennis, cycling, water-skiing and fitness, Membership in the Fitness Institute, and the Rosedale-Moore Park Tennis Association; Associate member of Stratford Festival

Bridge, Inuit art, contemporary British novelists

Piano (former scholarship student of the Royal Conservatory of Music, and a member of the Conservatory's Suzuki Piano Association)

Community service work for the United Way, Canadian Mothercraft Society, and Medical Research

APPENDIX A: PREVIOUS CAREER APPOINTMENTS

1990-1994 ANGUS REID GROUP

Chief Operating Officer (1992 - 1994) and member of the **Board of Directors**. Together with senior colleagues, reengineered support services, revamped financial reporting system, and launched a major technology strategy for the company, computerizing its national interview operations. Opened first U.S. office.

Executive Vice-President (1990 - 1992). With the support of a newly recruited team, achieved record profitability for the firm's largest office.

1985-1990 ROYAL TRUST

Vice-President and Managing Partner (1989 - 1990) for a strategic business unit of Royal Trust, responsible for credit card marketing and business development, strategic alliances (including joint ventures with Canadian Airlines, Woodwards Department Stores, Shell and Loblaws), customer service, telemarketing and direct marketing. Position reported to the Chief Operating Officer.

Vice-President, Marketing & Distribution (1988 - 1989). Directed the launch of Canada's first "Frequent Flyer" credit card; oversaw all corporate marketing and positioning programs, which attracted several industry awards.

LIST OF BUSINESS AWARDS ON P.6, APPENDIX B

Vice-President, Sales and Distribution (1987 - 1988)

Director, Executive Projects (1985-1986), responsible for Canadian Operations Strategic Planning, and Trilon policy/project coordination.

Director, Electronic Banking (1985 - 1986). Facilitated and wrote Royal Trust's first business plan for electronic debit and credit services; launched the corporate marketing strategy for same; managed, in partnership with the Bank of Montreal, Canada's first shared banking network for financial services known as "Cirrus".

1982-Present UNIVERSITY OF TORONTO, Adjunct professor, Faculty of Management; cross-appointed to Faculty of Medicine in 1997

Appointments held simultaneous to full-time industry positions. Lectured in marketing and marketing research to MBA and Executive MBA classes; supervised student consulting assignments to industry clients; participated on committees for executive programs and MBA curriculum. Cited for merit by the Dean of the Faculty of Management in 1984, 1985 and 1986 for teaching excellence. In midst of designing private sector business strategy course for Faculty of Medicine.

APPENDIX A, cont'd: PREVIOUS CAREER APPOINTMENTS

1982-1985 CNCP TELECOMMUNICATIONS: Director, Policy Development (and Corporate Secretary for the Executive Policy Committee).

Responsible for policy and planning in all areas of competitive positioning, public advocacy, pricing, new service development, and new market entry. Designed business strategy for satellite services, equipment leasing, fibre optic networks, and T-1 Carrier systems; presented major policy submissions to government

Performance reviews resulted in maximum salary progressions citing excellence in executive presentations, staff motivation, and quality of writing

1979-1982 TELECOM CANADA: Assistant Director, Marketing Intelligence and Information

Established company's first "Marketing Intelligence" program - including market research, statistical forecasting, and database development. In addition to managing the department, conducted large-scale national research projects, including planning, execution, analysis, report-writing and presentation of results to national management committees

1975-1982 CARLETON UNIVERSITY: Lecturer, then Associate Professor.

Appointment held simultaneous to full-time industry positions. Taught in both management and psychology. Teaching ratings rose steadily, moving to top 5% of department.

1975-1978 GOVERNMENT OF CANADA: Policy Advisor and Research Manager

Held appointments with successive promotions in three government departments:

Privy Council Office/Federal Provincial Relations Office: seconded to department at personal request of Clerk of the Privy Council; developed and managed program for research support to National Unity Policy; prepared Cabinet documents and briefings for the Minister

Canadian Unity Information Office: launched the research function for this newly established office; planned and evaluated strategies for dissemination of information to the public; analyzed policy proposals for Constitutional Reform

Statistics Canada: advised on standards and consulted on research design/supplier selection for survey research across all government departments; developed tests to assess the effectiveness of driver education programs for Transport Canada; designed the curriculum and co-authored the text for a Survey Design course for professionals in government and industry.

1975 BELL CANADA: Supervisor, Marketing Department

Launched the SL-1 Business telecommunications system.

APPENDIX "B": BUSINESS AWARDS AND HONOURS

1979-1980 TELECOM CANADA

"National Merit Awards" won by RMC's research staff for outstanding performance

1986 OGILVY AND MATHER ADVERTISING MANAGEMENT SEMINAR

Award for the best television commercial, designed, produced, sound-mixed and edited.

1988 ART DIRECTOR'S CLUB OF TORONTO

- Gold Award to Royal Trust team under RMC's direction for "Complete Design Program"
- Merit Award to Royal Trust team under RMC's direction for "Advertising Illustration"

1989 INTERNATIONAL TELEVISION ASSOCIATION OF CANADA

- Eva Award for "Excellence in Video", to Royal Trust team under RMC's direction
- Golden Maple Award for "Information", to Royal Trust team under RMC's direction

1989 CANADIAN DIRECT MARKETING ASSOCIATION

Silver Award for Best Multi-Media Campaign for "Canadian Plus Credit Card", for program designed under RMC's direction

1989 ROYAL TRUST INTERNATIONAL "COMMITMENT TO QUALITY" AWARD

Awarded to RMC's sales team

CANADIAN DIRECT MARKETING ASSOCIATION

Silver Award for Best Product Launch for Royal Trust/Shell Canada "Vision" Card, for program designed under RMC's direction

1993 TORONTO LIFE MAGAZINE

Finalist, Annual National "Women Who Make a Difference" Award

1998 ROYAL CONSERVATORY OF MUSIC

Silver Medal Award for Piano Performance

1999 CANADIAN BUSINESS MEDIA

Canadian Business Who's Who designation and Chatelaine Who's Who of Canadian Women

APPENDIX "C": DETAIL ON EDUCATION HISTORY

EDUCATION

1968	Secondary School honour graduation diploma	Wm.Lyon Mackenzie Collegiate, Toronto
1972	B.Sc. (Mathematics--Honours)	University of Toronto
1973	M.Sc. (Psychology)	McGill University
1976	Ph.D. (thesis area: Decision-making)	McGill University
1989	Canadian Securities Diploma (First Class Honours)	Canadian Securities Institute

SCHOLARSHIPS AND AWARDS

1968	Ontario Scholarship, for First Class Honours standing in grade 13. Graduating Class Valedictorian
1968-1972	Jacob Cohen Memorial Scholarship. Full tuition plus annual cash award, tenable for studies at the 1972 University of Toronto. Renewed 1969, 1970, 1971 for maintenance of"A"standing.
1968	Royal Conservatory of Music scholarship. Tenable for part-time piano and theory studies at the Royal Conservatory.
1969	Reuben Wells Leonard Scholarship, University College, University of Toronto. Awarded for high academic standing in first year.
1971	C.L. Burton Scholarship, for high standing in third year.
1972	University College Honour Award, for "outstanding contribution to college life".
1972	University College Alumnae Scholarship, for high standing in graduating year.
1972	McGill University McConnell Fellowship (cash award declined, in favour of National Science award, listed next).
1972-1975	National Science Scholarship, National Research Council of Canada. Awarded to Canada's top 37 science graduates across all fields.
1976	Dean's Honour list commendation for doctoral thesis. McGill University nominee for the James McKeen Cattell Award of the National Academy of Science.

APPENDIX "D"
BOARDS AND PROFESSIONAL MEMBERSHIPS

Board of Directors, Trimark Financial Corporation (1995 -); Member of the Audit Committee

Board of Directors, Journey's End Corporation (1997 -); Member of the Audit Committee and Corporate Governance Committee

Board of Directors, Alphanet Telecom Inc. (1997 -); Member of the Audit Committee, Nominating Committee, and Human Resources Committee

Board of Directors, MDS Health Group (1995 -1998); Member of the Corporate Governance Committee, Nominating Committee and Environment Committee

Member, Institute of Corporate Directors (1995 -)

Dean's Advisory Board, Faculty of Medicine, University of Toronto and Chair of the Public Relations Committee (1994 -1997)

Dean's Advisory Council, Faculty of Management, University of Toronto (1993 -)

Board of Editors, Canadian Journal of Marketing Research (1992 -)

Board of Editors, Journal of Forecasting (1984 -)

United Way Cabinet (1994)

Board of Directors, Canadian Mothercraft Corporation (1990 - 1994); member of the Finance Committee, Program Committee, and Chair of the Robertson House Advisory Committee

Canadian Chamber of Commerce: Industrial Competitiveness Committee (1983 - 1993)

Board of Directors, Angus Reid Group (1990 - 1993)

Board of Directors, Centre for Director and Board Development (1992 - 1993)

Vice-Chairman, Council of Marketing Executives, Conference Board of Canada (1988 - 1992)

Executive Programs Committee, Faculty of Management, the University of Toronto (1988 - 1991)

Chairman, Board of Management, Royal Trust/Shell Joint Venture (1990)

Vice-President, Radio Advisory Board of Canada (1984 - 1985)

APPENDIX "E": PUBLICATIONS

.972 - 1989:

"Random utility models with equality: an apparent, but not actual, generalization of random utility models." Journal of Mathematical Psychology, 1972, 11, 274-293. (with A.A.J. Marley)
"Context effects in optional stopping decisions." Organizational Behaviour and Human Performance, 1975, 14, 207-216. (with C. Olson and M. Abbondaza)
"Essai de définition de fardeau de réponse." Nouvelles enquêtes, 1977, 3, 8-13.
"Decisions that might not get made." In T.S. Wallsten (Ed.), Cognitive processes in Choice and Decision Behaviour. Hillsdale, N.J.: Erlbaum, 1989.
"Canadian corporations in the '80's: Marketing research will become part of global information support programs." Marketing News, April 18, 1980, p.6.
"Questions d'enquête - L'état actuel de la boîte à outils." Nouvelles enquêtes, 1979, 4, 8-20
"The Secretary problem as a model of choice." Journal of Mathematical Psychology, 1980, 21, pp. 1-29.
"Alligators in swamp thwart managers' forecast judgment." Journal of Business Forecasting, 1983, 2(1), 3-6.
"Telecommunications in Canada: the Regulatory Crisis." Telecommunications Policy, September 1983, 215-227. (with J.S. Schmidt)
"Rare event probabilities unfold." Canadian Jour. of Psychology, 1984. (with L. Cousins and W. Petrusic)
"Financial Consumers are changing". Toronto Business Magazine, December 1988.

1990 - current year

"Perceived consumer effectiveness and faith in others as moderators of environmentally responsible behaviours." Journal of Public Policy and Marketing, 1992. (with Ida E. Berger, University of Toronto)

"Public attitudes and behaviour concerning the environment". Canadian Journal of Marketing Research, 1992, 11, pp. 74 - 86. (with Scott MacKay)

"Survey Research in Litigation: its past successes, its future trials." Canadian Patent Reporter, November 1995, pp. 215-247.

"Social Science Evidence in Misleading Advertising." Canadian Journal of Marketing Research, 1995, 14, pp. 57-65 (with Charles Mayer and Douglas Forer).

"Taking Legal Action to Stop Competitors in their Tracks." Canadian Journal of Marketing Research, 1996, 15, pp. 66-73.

"Market Research Comes of Age." Invited editorial, Strategy, Toronto: Brunico Communications, April 1997, p. 39.

"Market Research and Surveys as Expert Evidence." Invited chapter in Freiman, M. and Berenblut, M. (eds.), The Litigator's Guide to Expert Witnesses. Toronto: Canada Law Books, 1997, pp. 55-77.

"Evidence of Irreparable Harm in Interlocutory Injunction Applications." Canadian Patent Reporter, 1997, 74, pp. 289-306

TRIAL BY SURVEY, working title of forthcoming book authored jointly with Scott Jolliffe and Kelly Gill. Toronto: Carswell, in preparation (publication contracted for June, 1998).

Invited Book reviews
"Judgement and choice: A review for forecasters and futurists." Journal of Forecasting, Spring 1982;
"The MBO Process and Strategic Planning". By invitation, Journal of Business Forecasting, 1985
"Raving Fans." By invitation, Canadian Journal of Marketing Research, 1993, 12, 99-100.
"Grow to be Great." By invitation, Canadian Journal of Market Research, 1995, 14, pp. 105-106.
"Corporate Abuse: How 'Lean and Mean' Robs People and Profits." By invitation, Canadian Journal of Market Research, 1996, 15, pp. 100-101
"Reading people." By invitation, Canadian Journal of Market Research, 1998, 17, pp.87-88

APPENDIX "F": INVITED ADDRESSES

1980 - 1989

"Evaluating the payback from research expenditures". Invited address to the Annual Marketing Conference of the **Conference Board** of Canada, March, 1980.
"Forecasting into a future of dynamic change". Invited address to the **International Symposium of Forecasting**, Quebec City, May 1981.
"The problem of ill-defined choice sets". Invited address to an international workshop on Economic Choice Behaviour, hosted by the **University of California at Berkeley**. Berkeley, June, 1976.
"The Future of cable technology in the Canadian telecom environment". Invited address to a Canada/UK workshop hosted by the **Science Council of Canada**, March, 1984.
"Samuel Morse meets the silicon chip: 'What hath technology wrought?'" Keynote address to the annual meeting of the **Electrical and Electronic Manufacturing Association of Canada**, Jasper, Alberta, June 20, 1984.
"No time for econophobia". Invited address to the **Canadian Information Processing Society**, Toronto, October 15, 1984.
"Keeping the lid on local rates". Invited address to the **Consumers' Association of Canada**, Winnipeg, October, 1984.
"The sky is falling! The sky is falling! and other telecom fairy tales". Invited address to the **Canadian Information Processing Society**, Regina, November , 1984.
"The role of market segmentation in strategic planning". Invited address to the **Canadian Public Relations Society**, Toronto, June, 1986.
"Competition in the service industries: the war of plastics". Invited address to the **American Marketing Association**, April, 1987, with television and radio interviews.
"Competitive warfare through sales and distribution:. Invited address to the National Marketing Conference of the **Conference Board in Canada**, March, 1988. (Rated "Best in conference" by participants).
"The financial service consumer of tomorrow". Invited address to the **Ontario Ministry of Financial Institutions**, Toronto, September, 1988.

1990 - current year

"The war for consumers in financial services: love conquers all". Keynote address to the **Financial Post Retail Services Conference**, Toronto, February 8, 1990.
"Investor Hot Buttons". Invited address to the Western Regional Conference of **RBC Dominion Securities Pemberton**. Vancouver, March, 1991.
. Appealing to tomorrow's consumers: Innovation doesn't need to be risky". Invited address to the Annual Marketing Conference of the **Conference Board of Canada**. Toronto, March, 1991.

"The Marketing of Financial Planning Services." Invited address to the Canadian Association of Financial Planners. Toronto, June, 1991.

"Women and the Art of Negotiation." Keynote address to the Annual Meeting of the Businesswomen's Zonta Organization of Kitchener/Waterloo. Kitchener, March, 1992.

"Leadership by Business People on Public Issues: The Case of the Missing Horse", Keynote address to the Canadian Club. Hamilton, December, 1992.

"Predictions Guaranteed or Your Money Refunded", Opening address to a Conference for the Planning Forum on "Working the Predictable and the Unpredictable into Today's Plans." April, 1993.

"Networking Financial Services: What Customers Want." Luncheon speaker at an **Insight Conference** for the Financial Service Industry, June 1993.

"Real Estate Forecasts based on People Factors." Invited address to a **Canada Forum Conference** for the Real Estate Investment Industry, Toronto, October, 1993.

"The Customer is the Business." Invited address to the National Executive Conference of the CIBC, Toronto, November, 1993.

"Tomorrow's Customers." Invited address to the **Canadian Association of Financial Planners**, Toronto, December, 1993.

Real Estate Forecasts based on People Factors." Invited address to a Real Estate staff conference of the CIBC, and subsequently to a private luncheon of Real Estate industry executives. Toronto, January and May, 1994.

"The Politics of Customer Service." Invited address to a conference of the **Society for Consumer Affairs Professionals**, Toronto, May 1994.

"Permanent shifts in Real Estate Markets in Canada". Invited address to the **Property Forum**, Toronto, November 1994.

"Launching an entrepreneurial business in Canada". Invited address to the Executive Program on Human Resource Development, **University of Toronto**, Toronto, March, 1995

"Survey Research for Litigation and Expert Testimony". Chairperson's address to a professional conference for the legal and research communities, sponsored by **Insight Information and the Globe and Mail**, Toronto, April , 1995

"Confessions of a Social Scientist: the Honeymoon's Over". Invited luncheon address to a conference on Misleading Advertising, sponsored by the **Canadian Institute**, Toronto, October, 1995.

"Advertising messages that break through." Invited luncheon address to a professional conference on Legal, Practical and Tactical Advertising, sponsored by the **Canadian Institute**, Toronto, June 1997.

The Special Status of Famous Brands." Invited luncheon address to a professional conference on Challenges and Opportunities of Advertising Today, sponsored by **Insight Information Inc.**, Toronto, April, 1998.

SURVEY RESEARCH AS EXPERT EVIDENCE: ITS PAST SUCCESSES, ITS FUTURE TRIALS*

by Ruth M. Corbin, Ph.D.†

AUTHOR'S NOTE

This article reviews emerging developments in survey research support for litigation, and documents some of the early experience in Canada in making such research persuasive to judges in deciding cases. While courts have become more sophisticated in identifying what constitutes "good" survey research, they appear not to have taken into account the measurement distinction between "reliability" and "validity". Appreciating this distinction may help in the important issue of assigning weight to survey evidence. Solving problems of validity is also an important challenge for survey researchers, if they are to keep up with the increasingly creative demands of legal applications.

TABLE OF CONTENTS

1. Introduction 216
2. Applications of survey research to litigation 217
   2.1 Confusion in trade mark proceedings 217
   2.2 Reputation and passing-off 220
   2.3 Lack of distinctiveness/genericism 221
   2.4 Misleading advertising 222
   2.5 Change of venue, or challenge for cause 225
   2.6 Decisions of trial by judge alone 228
   2.7 "Marketing" a verdict 229
   2.8 Evidence of community standards in disseminated material 230
3. Getting past the rules of evidence 230
   3.1 The hearsay rule 231

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3.2 The opinion evidence rule 232
3.3 Emerging reliance on experts 233
3.4 The de rigueur status of surveys today 234
4. What constitutes "good" survey evidence, in the view of the courts 235
5. Emerging issues: Reliability v. Validity 236
Reliability 237
Validity 238
6. Validity issues coming to the fore 241
7. Summary and conclusions 243
Bibliography 244

1. *Introduction: A fast-growing field*

Survey research is a fast-growing evidentiary field for support to litigation. It has an opportunity to come into play whenever it is important to know what certain groups of the public experience or believe. Survey evidence is anticipated, though not explicitly called for, in at least four Acts or Codes: the *Trade-marks Act*, R.S.C. 1985, c. T-13, the *Competition Act*, R.S.C. 1985, c. C-34, the *Canadian Charter of Rights and Freedoms*, and the *Criminal Code*, R.S.C. 1970, c. C-34 — now R.S.C. 1985, c. C-46. The bulk of applications of survey evidence have occurred in the context of the first two, with respect to the protection of intellectual property.

There is now wide agreement that on issues of confusion, reputation, and misleading advertising, surveys of the relevant public are essential to both lawyers in arguing their cases, and judges in deciding them. "To attempt to make such a determination [of confusion] without regard to evidence of what others may think or have said", wrote MacFarland J. in *Sun Life Assurance Co. of Canada v. Sunlife Juice Ltd.* (1988), 22 C.P.R. (3d) 244 (Ont. H.C.J.) at p. 249, "would to my mind be nothing more than an exercise in pure judicial fantasy and of not much assistance at all." Yet the multi-disciplinary science of survey research is not yet fully understood or fully utilized by the Canadian judicial system. This is in marked contrast to the American situation, where use of surveys is so well-entrenched, it appears at times overzealous, and where judges have routinely made more lengthy and detailed assessments, than their Canadian counterparts, of the weight they are prepared to give survey evidence before them. (For an appreciation of the breadth of survey usage in American courts see, *e.g.*, Ford, 1992.)

This article reviews the emerging opportunities for survey research in supporting litigation, and documents some of the early experience in Canada in making such research persuasive to judges in deciding cases. While courts have become more sophisticated in identifying what constitutes "good" survey research, they appear not to have taken into account the measurement distinction between "reliability" and "validity". Appreciating this distinction may help in the important issue of assigning weight to survey evidence. Solving problems of validity is also an important challenge for survey researchers, if they are to keep up with the increasingly creative demands of legal applications.

2. *Applications of survey research to litigation*

A review of published cases in Canada leads us to conclude that there have been at least nine application areas of survey research to courtroom issues:

- establishing confusion in trade mark infringement and passing-off proceedings;
- establishing reputation and secondary meaning
- supporting trade mark oppositions, for lack of "distinctiveness";
- supporting trade mark oppositions, because of "genericism";
- assessing whether given advertising is properly characterized as "misleading";
- potential jury bias in criminal proceedings: supporting requests for change of venue or challenge for cause;
- supporting trial by judge alone in criminal proceedings;
- assessing likely impact of defence arguments on juries — "marketing a verdict";
- establishing community standards for obscenity.

This section reviews each of the above applications, with examples that give colour to the theoretical issues. The examples also demonstrate the nature of questions and tests used by survey researchers to give everyday meaning to legal terminology.

2.1 *Confusion in trade mark proceedings and passing-off actions*

Trade mark litigation frequently involves a dispute over confusion caused by two competing trade marks. Under s. 6(2) and (3) of the *Trade-marks Act*, the use of a trade mark causes confusion

with another trade mark, or with a trade name, if the use of both in the same area would be likely to lead to the inference that the wares or services associated with those trade marks, or with the trade mark and the trade name, are manufactured, sold, leased, hired or performed by the same person, whether or not the wares and services are of the same general class: see *e.g.*, *Joseph E. Seagram & Sons Ltd. v. Seagram Real Estate Ltd.* (1990), 33 C.P.R. (3d) 454 (F.C.T.D.) at p. 464.

A related area for establishing confusion is passing-off actions. Passing-off is a common law cause of action which entails a misrepresentation to consumers, which injures the goodwill of another company's product or service in a material way. Survey evidence may be called upon to demonstrate that consumers are so influenced. Wherever accusations of confusion and passing-off are intertwined in the same case, survey evidence is typically used to address them simultaneously. The remainder of this subsection will be organized by different ways that have been used to establish confusion, and related passing-off actions.

There are at least three groupings of likelihood of confusion surveys based on different factual situations: source confusion, product appearance confusion, and sponsorship, approval or affiliation confusion.

(1) A classic example of source confusion is provided in *McDonald's Corp. v. Peter MacGregor Ltd.* (1987), 15 C.P.R. (3d) 433 (T.M. Opp. Bd.). In 1979, Peter MacGregor Limited filed an application to register the trade mark MACSTEAK based on proposed use in Canada in association with a meat product. McDonald's Corporation opposed the application on the grounds that the mark was confusing with several registered trade marks of McDonald's Corporation, including BIG MAC, MACSUNDAE and MCDONALD'S itself. A survey was carried out in Toronto, with the pivotal question being the following: "If you were to see or hear of a product called MacSteak, who do you think would make or market this product?" Of two hundred completed interviews, 63% of the respondents gave the reply, "McDonald's", that percentage being nine times greater than the next most common response.

Backed by this evidence, McDonald's was successful in opposing the registration of MACSTEAK, on the grounds of likelihood of confusion.

The company was similarly successful in *McDonald's Corp. v. Silverwood Industries Ltd.* (1984), 4 C.P.R. (3d) 68 (T.M. Opp. Bd.), in opposing registration of the name "MacFreeze" for soft ice-

cream, using almost the same survey question as for the MacSteak case.

A further example shows that risk of source confusion can cross language barriers. In *Scott Paper Co. v. Kaysersberg* (1992), 44 C.P.R. (3d) 544 (T.M. Opp. Bd.), the latter being a French company, a registration was requested for the trade mark MOLTONEL for hygienic paper products. The application was opposed by Scott Paper on the strength of its trade mark COTTONELLE for bathroom tissue. (Moltonel is roughly a French translation of Cottonelle.) Among the influential evidence was a survey indicating that the Cottonelle product is associated with the Moltonel product by 25% of typical buyers in Quebec of such products, when shown the Moltonel product. Moreover, the survey evidence showed that 97% of the typical buyers of such products, who are shown the Moltonel product, are reminded of the Cottonelle product, and that the Moltonel product is perceived to be manufactured by the same company which manufactures the Cottonelle product by 54.5% of typical buyers of such products. On the strength of the survey and other evidence, the trade mark application was denied.

The examples just described incorporated surveys that measured source confusion. Surveys may also be used to measure product appearance confusion—*i.e.*, the respondents' belief that the defendant's product *is* the plaintiff's product. This type of confusion usually occurs where the defendant's name or trade dress is identical or highly similar to the plaintiff's name or trade dress.

Finally, within the category of confusion, surveys may be used to measure "confusion of sponsorship or affiliation". An example is provided in the American case *National Football League Properties, Inc. v. Wichita Falls Sportswear, Inc.*, 532 F.Supp. 651 (1982). The method used in that case has come to be known as the "NFL Test", and has been accepted in at least three American courts (Amend and Johnson, 1992). The respondent is shown the defendant's product and asked whether he or she believes that the company that made the product had "to get authorization or sponsorship, that is permission, to make it?" If the respondent answers affirmatively, then he or she is asked from whom such permission must be obtained.

An example of confusion of affiliation is provided by a recent and well-publicized passing-off action concerning the Fantasyland Hotel and Amusement Park at the West Edmonton Mall: see *Walt Disney Productions v. Triple Five Corp.* (1992), 43 C.P.R. (3d) 321

(Alta. Q.B.); affirmed 53 C.P.R. (3d) 129 (Alta. C.A.). In two separate actions (one for the hotel and one for the amusement park) Walt Disney Productions commenced passing-off proceedings against Triple Five Corp., claiming that the name "Fantasyland" was likely to mislead consumers into thinking that the Edmonton properties were associated with Disney World.

A survey was conducted in the amusement park case in eight cities in Canada, plus Seattle, with the key question being as follows: "Is there a business connection between the Fantasyland area in West Edmonton Mall and the Fantasyland area of Disneyland and Walt Disney World?" Across the whole sample, approximately 5% of people said "yes". Perhaps surprisingly, this was considered by both the trial judge and the Court of Appeal to be sufficient evidence of confusion and passing-off. It is certainly one of the lowest percentages of confusion known to have supported a passing-off action.

The case has attracted considerable interest, because a similar action against the hotel was decided in the opposite direction, that is, in favour of Triple Five — despite the overlap in the survey evidence and expert witness presented by Disney.

2.2 *Reputation and secondary meaning*

Establishment of reputation and secondary meaning in a name or mark determines the owner's latitude in protecting it, and is typically required to support a passing-off action. Affidavits were recently filed in *Sunkist Growers, Inc. v. Sunkist Fruit Market Toronto Limited* (unreported 1995, F.C.T.D., Court File No. T-1/89), each side arguing the extent of their established reputation in consumer markets. Reputation was "operationalized" in a survey instrument for Sunkist Growers as association of the word "sunkist" with products of Sunkist Growers Inc., and strength of awareness of Sunkist oranges. Individual questions included the following: "When you hear the word SUNKIST, what one thing first comes to mind? What else, if anything, do you think of when you hear the word SUNKIST? For about how many years have you connected the word SUNKIST with [oranges or fruit market, depending on mentions to previous questions]? [If oranges or fruit market not mentioned] Have you ever seen or heard of SUNKIST oranges or not? Are you aware of any store in the province of Ontario named SUNKIST FOOD MARKETS or not?" Survey evidence established a remarkably high awareness of Sunkist oranges, and geographically limited, relatively small awareness of Sunkist Food Markets. Resolution of the case is pending at the time of writing.

2.3 *Lack of distinctiveness/genericism*

a Trade marks must be "distinctive" in order to be registrable. Proof of distinctiveness of a name, or even a nickname, would arise from evidence that consumers associate the name in question with a particular source. A good example is provided by consideration of the word "Canadian". In 1982, Molson sought to register the trade mark CANADIAN for use with beer. Molson had been using b CANADIAN in association with its products since 1959. Carling Breweries opposed the registration on the ground that the word "Canadian" is a word in common use by manufacturers of beers, serves to distinguish the place of origin of the product, and is not distinctive of wares of any particular entity. However, Molson filed c survey evidence to establish that the word "Canadian" had indeed become distinctive of its product by reason of its extensive use and advertising. The survey evidence entailed having interviewers pose as restaurant and bar customers, who asked the servers for "a Canadian"; in the majority of cases, they were served a d Molson's beer of that brand.

The opposition was decided in Molson's favour (*Carling Breweries Ltd. v. Molson Companies Ltd.* (1982), 70 C.P.R. (2d) 154 (T.M. Opp. Bd.)) — allowing the application to register Canadian — but it was later overturned on appeal (1 C.P.R. (3d) 191 (F.C.T.D.)). e The judge on appeal raised doubts about the value of the research, and put more stock in criticisms of the research raised by the opponent's expert. One of the criticisms was that restaurant servers are used to deciphering limited cues about what people want when they order, and so are an inappropriate population for f assessing distinctiveness. Another criticism was that the request for a "Canadian" was made in the context of requests (by other people at the table) for other brands of beer — this was thought to give too significant a clue to the servers about the nature of the product being ordered.

(*) problems with surveys
sophisticated buyers

g Surveys may also be used in a related attempt to establish "genericism": mainly that the term in question is the common name of a product or service, and *not* distinctive of a particular source. A classic example of a test for genericism has come to be known as the "Teflon Test": see, *e.g.*, *E.I. Dupont De Nemours &* h *Co. v. Yoshida Intern., Inc.*, 393 F.Supp. 502 (1975). In a "Teflon test", survey respondents are told that there are two ways to name products — the common name, which refers to all products of a given class, and the brand name, which refers to a specific product within that class. The respondents are then given a list of

terms, including the term in question, and asked whether each term on the list is a common name or a brand name. Another test for genericism has come to be known as the "Thermos Test": see *American Thermos Products Co. v. Aladdin Industries, Inc.*, 207 F.Supp. 9 (1962). The product in question is described in a general way to respondents, who are then asked how they would identify the product if they wanted to ask for it.

2.4 *Misleading advertising*

The reference point for the application of survey evidence to misleading advertising is the *Competition Act*, R.S.C. 1985, c. C-34 (as amended), which reads, in part, as follows:

> *Misleading advertising*
>
> 52(1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or ... any business interest, by any means whatever,
>
> (*a*) make a representation to the public that is false or misleading in a material respect ...

Industry Canada's Director of Investigation and Research summarizes the Act's meaning of "materially misleading" as indicating a situation where "the representation could influence a consumer to buy the product or service advertised" (Industry Canada, *Misleading Advertising and Deceptive Marketing Practices*; informational brochure, undated).

The Act does not explicitly anticipate the introduction of survey evidence. But in *R. v. Kenitex Canada Ltd.* (1980), 51 C.P.R. (2d) 103 (Ont. Co. Ct.) at pp. 107-8, while the court deemed that it was the responsibility of "the trier of fact to determine what impression any such representation would create", the court went on to indicate that the trier of fact should determine such impression "not by applying his own reason, intelligence and common sense, but rather by defining the impression that the fictional ordinary citizen would gain from hearing or reading the representation".

In practice, survey evidence has been tendered more and more frequently to help define the impression of that "fictional ordinary citizen". A recent case, dubbed the "Milk Wars", entailed an attack by milk giant Beatrice Foods Inc. on their chief competitor, Ault Foods Limited: *Beatrice Foods Inc. v. Ault Foods Ltd.* (1995), 59 C.P.R. (3d) 374 (Ont. Ct. (Gen. Div.)). Beatrice attempted to restrain Ault from launching an advertising campaign for its new PurFiltre Milk, a product from which most of the small amount of bacteria typically found in milk had been removed. Beatrice complained that Ault's advertised references to the removal of bacteria, as well as to the fresher taste and purer product, unfairly

tainted public perception of the safety of ordinary pasteurized milk.

a The survey evidence incorporated an experimental design, whereby one group was shown the PurFiltre Milk ad, another was not, and both groups were asked to rate the milk they currently drink at home. The misleading advertising analysis was addressed by statistically comparing the average ratings between the control b and test groups on 11 image questions concerning the milk that respondents drank at home.

While the research contained sound experimental design, it was criticized severely by the opposition and the judge on three grounds:

c (1) the researchers had extrapolated far too loosely from the results, attributing unsubstantiated generalizations to the population;

(2) the open-ended (qualitative) data had been ignored in interpreting the results; and

d (3) the research test had not directly addressed the relevant sections of the *Competition Act* (including requirements to demonstrate that buying decisions would be affected).

Generally speaking, in the field of misleading advertising, it has been necessary to rely more on case-by-case professional judg- e ment for survey design, and less on proven "formulae" to test the law. Misleading advertising studies are also typically more costly to carry out, than many types of trade mark infringement studies, because of the necessity to interview respondents in person in order to show them the advertisements to be evaluated. For both f of these reasons, research into misleading advertising is a far less developed field of science than that available for other types of litigation support.

However, there is a recent trend in cause for litigation which may produce well-honed research precedents in misleading adver- g tising. The trend concerns interpretations of the tort of injurious falsehood, where the offended competitor is not named.

An example is contained in *Unitel Communications Inc. v. Bell Canada* (1994), 56 C.P.R. (3d) 232 (Ont. Ct. (Gen. Div.)). Winkler J. stated at p. 250: "It is critical to the success of this action that h Unitel be identifiable directly or by implication in the advertisement." As Unitel was not named directly in the advertisement, it submitted some limited (focus group) research in support of its claim that the public would believe it to be the target of Bell's price competition ads. The claim was rejected, in that the research conclusions were considered too ambiguous to carry weight.

Another example is contained in *Church & Dwight Ltd. v. Sifto Canada Inc.* (1994), 58 C.P.R. (3d) 316 (Ont. Ct. (Gen. Div.)), wherein Jarvis J. had before him a motion for an interlocutory injunction in an action based upon ss. 36 and 52 of the *Competition Act* and the tort of injurious falsehood. Jarvis J. stated at p. 321 that, in order for the tort to apply, the party complaining of injury must have been identified by name or by implication:

> ... virtual domination of the market-place has been established by the plaintiff's product. Where a party virtually controls the market-place, it cannot be said that the absence of the name of the target competitor is determinative of the question. Viscount Simon L.C. in *Knupffer v. London Express Newspaper Ltd.*, [1944] A.C. 116 (H.L.) said at p. 119:
>
> > "Where the plaintiff is not named, the test which decides whether the words used refer to him is the question whether the words are such as would reasonably lead persons acquainted with the plaintiff to believe that he was the person referred to."
>
> . . . . .
>
> The facts of the case before me satisfy me that the plaintiff's product is identifiable by implication in that its product dominates the market, and for that reason the disparaging comments would fall upon them with virtually full force.

A similar finding was made by Jarvis J. in *Maple Leaf Foods Inc. v. Robin Hood Multifoods Inc.* (1994), 58 C.P.R. (3d) 54 (Ont. Ct. (Gen. Div.)). In that situation, Maple Leaf Foods products represented 75% of the market, and so could be "identifiable by implication".

The early stages of this type of litigation, based on "implied reference", appear to the author to bear some similarity to early stages of trade mark litigation with respect to evidence regarding what the public thinks or believes. That is, originally lawyers and judges relied on common sense statements about what the public mood was likely to be, but survey research began more and more to be introduced as evidence to substitute for common sense opinion. We anticipate the same developments occurring with respect to claims of injurious falsehood "by implication". The passage cited earlier from *R. v. Kenitex Canada Ltd.* applies equally well here: decisions are unlikely to be sustainable based only on the "reason, intelligence and common sense" of the trier of fact, but will be expected to incorporate evidence of what the "ordinary citizen would gain from hearing or reading the representation".

Of possible interest is a related example contained in *Purolator Courier Ltd. v. United Parcel Service Canada Ltd.* (1995), 60 C.P.R. (3d) 473 (Ont. Ct. (Gen. Div.)). Purolator brought an action against an offending advertisement by U.P.S. — which compared

prices of U.P.S. services to "what other couriers charge" — even though the ad made no reference to either Purolator or its products. Citing such examples as those given earlier with respect to the implied reference to a dominant competitor, U.P.S. argued that the precedents did not apply in this case because Purolator did not dominate the market; they had only about a quarter of the market share, and a share roughly equal to at least two other competitors. Therefore, argued U.P.S., Purolator is no more likely to be singled out as the target of the representation than U.P.S.'s other major competitors.

However, the judge relied on the following alternate passage from *Knupffer v. London Express Newspaper Ltd.*, [1944] A.C. 116 (H.L.) at p. 119:

> There are cases in which the language used in a reference to a limited class may be reasonably understood to refer to every member of the class, in which case every member may have a cause of action.

The judge pointed out that because of the few number of major couriers operating in the Canadian business market, the reference to Purolator in the advertisement could be "reasonably understood" (*Purolator Courier Ltd. v. United Parcel Service Canada Ltd.*, at p. 479).

While the legal nuances in the *Purolator Courier Ltd. v. United Parcel Service Canada Ltd.* case are different from those in *Unitel Communications Inc. v. Bell Canada*, and *Church & Dwight Ltd. v. Sifto Canada Inc.*, all of them invite the same type of market evidence: mainly the extent to which the public perceives significant competitors to be described in an advertisement absent those competitors being named.

2.5 *Change of venue, or challenge for cause*

The previous examples were in the arena of intellectual property. There are also important applications of survey research to criminal law. One such application is found in jury trials — particularly homicide cases — where change of venue may be sought. Canadian law recognizes that jury members must be unbiased, "indifferent between the Queen and the accused" (*Criminal Code*, R.S.C. 1970, c. C-34, s. 567(1)(*b*) — now R.S.C. 1985, c. C-46, s. 638(1)(*b*)). The most common situation which is thought to lead to bias is that pretrial publicity may have set community sentiments against the accused, or put inadmissible evidence in the hands of potential jurors. Two of the remedies for such situations are change of venue (Canadian *Criminal Code*, s. 527(1)(*a*) (now s. 599(1)(*a*)), which allows that "a court ... or a judge ... may at any time before or after an indictment is

found ... order the trial to be held in a territorial division in the same province other than that in which the offence would otherwise be tried if ... it appears expedient to the ends of justice ..."), and challenge for cause (*Code*, s. 567(1) (now s. 638(1)).

Change of venue entails seeking a jurisdiction where a body of unbiased jurors is more likely to be found. Survey evidence can be tendered to help with decisions on whether pretrial publicity has hurt the chances for assembling a fair jury. The first successful use of survey evidence for change of venue applications in Canada occurred in *R. v. Brunner* (see Vidmar and Judson, 1981). In July, 1977, Brunner was arrested in Middlesex County, Ontario and charged with fraud contrary to s. 338(1) of the *Criminal Code*. He was alleged to have misrepresented his business ties with a building products company and with selling overpriced materials and services by fraudulent means. As the question of pretrial publicity is germane to this story, it is important to point out that Brunner had previously entered a guilty plea in a related fraud trial known through newspaper accounts as the "Bevlen Conspiracy". That so-called conspiracy was the subject of a highly publicized, sensational trial with fully 600 citizens called as veniremen (or potential jurors), with testimony by elderly men and women describing how they were cheated of their life savings, with wire-tap evidence of conversations between Bevlen salesmen and their victims, and with aspects of the case even being debated in the Ontario Legislature. The trial set records for the longest criminal trial and longest jury deliberations in Middlesex County, and eight of the defendants were found guilty. Over one hundred separate newspaper stories, accompanied by major headlines and dramatic reporting of testimony, had been published in the county's leading newspaper.

Brunner was coming to trial on subsequent charges several months after the Bevlen case ended. Defence counsel applied for a change of venue, believing that the previous Bevlen case would have resulted in continuing prejudice in the community. The Crown contested the application.

The defence submitted two surveys bearing on the claim that Brunner could not receive a fair trial in Middlesex County. The first survey sampled the population with approximately the same procedures as that which would be used to select a jury. (This and other attempts to simulate the "real-life" aspects of the survey were later used to explain its success.) A 19-item questionnaire was designed. The following were the important questions: "Does the Bevlen conspiracy trial mean anything to you?" If the answer

was "yes", respondents were asked to tell the interviewer about it as a check on accuracy of recall. If the answer was "no", or inaccurate recall, the interviewer provided a prompting statement and question: "The Bevlen trial involved salesmen for the Bevlen Building Products Company who were accused of fraudulent practices in selling people siding and other home improvements; does this information make the Bevlen trial familiar to you?"

Thereafter, four questions assessed presumptions of guilt toward an accused involved in Bevlen who was subsequently charged with additional fraudulent practices; the questionnaire moved from general attitudes toward more specific beliefs as to how the respondent would behave in a courtroom. A follow-up experiment was designed (it is useful to note that it was designed as a controlled experiment, rather than as a representative survey) to interpret the source of the biasses discovered in the first survey. Overall, the two market tests indicated that approximately three and a half months after the end of the main publicity and headlines following the Bevlen conspiracy, it remained a well-known, notorious event in Middlesex County. The presiding judge ordered the trial to be moved to another venue.

Subsequent successes with applications for change of venue have typically been applied to homicide cases. An example is provided in the 1990 trial of a 26-year-old Kincardine, Ontario mother who was accused — and later acquitted — of murdering her 11-month-old son. Kincardine-area residents were interviewed about their attitudes towards the accused woman. Community sentiments were decidedly against her. Based on the findings, the judge agreed to move the trial to Toronto.

Another example is found in *R. v. Theberge* (summarized 27 W.C.B. (2d) 44), in which James Theberge of Tameness, Ontario was accused of murdering 17-year-old Susan Hall. Evidence showed that the Tameness newspaper, *The Daily Press*, published 15 stories about the murder. Justice Robert Boissonneault found the articles to be objective and non-prejudicial to the accused. However the victim's father was a local doctor who saw more than 400 patients per month. He was also on retainer for the town's largest corporate employer. Expectations of potential community bias were confirmed in a survey of 250 people, in which 33% admitted to a biassed predisposition, and 18% claimed to have an open mind when other of their responses indicated they did not. An expert witness called by the Crown testified that the poll was not valid because of certain debatable technical flaws. The judge, however, rejected the prosecution's witness because of his lack of experience in jury selection, and allowed a change of venue,

writing (at p. 5): "I conclude it is improbable a fair and impartial jury can be chosen."

Judges may turn down requests for change of venue, but still consider the survey evidence used in the request to have weight in the proceedings. In such cases, they may be amenable to a request for "challenge for cause". Challenge for cause entails questioning potential jurors as to their prejudices, and requesting their exclusion on those grounds. Such challenges have been common in many American jurisdictions, and American lawyers are known to take a great deal of licence in the nature of their questioning to potential jurors. Until recently, such challenges have been rare in Canada. However, according to Vidmar and Melnitzer (1984), there is a growing awareness that Canadian society is marked by racism and other prejudices that might jeopardize the right of an accused to a fair trial. There has also been a growing awareness of the power of the mass media to create a climate of prejudice against an accused. These conditions gave Canadian criminal defence lawyers more inclination to use challenge for cause, as a tool in helping to mollify the condition of widespread pretrial prejudice.

A case in point is *R. v. Iutzi* (1980). In May, 1978, a 14-month-old boy was found dead of head injuries in Thamesford, Ontario. Both parents were charged with second degree murder, each denying having done the killing. An image of vagrant irresponsibility surrounded them: for example, neither had had a stable job history, they were frequently seen hitchhiking, and they had become subjects for community gossip. Prior to the trial they reported threats against themselves, and law students working for defence counsel were also threatened by citizens in the street.

Suspecting community prejudice through word-of-mouth rumour, defence counsel commissioned a telephone survey to assess the degree of community prejudice. Based upon the findings, the defence counsel was granted the right to challenge for cause. This involved putting up to 15 questions to each potential juror, and having two peers assess whether the juror could be expected to judge the case in an unbiassed manner. The challenge for cause process then became the final basis for selecting jurors, though that process itself is thought to be imperfect (Vidmar and Melnitzer, 1984).

2.6 *Decisions of trial by judge alone*

Another solution to the problem of not being able to find an impartial jury is to have a trial by judge alone. The Charter of Rights gives accused persons the right to a trial by an indepen-

dent and impartial tribunal (ss. 11(*d*) and 7). But what if an impartial jury is unlikely to be found? The *Criminal Code* allows for a solution in stating that all murder trials must be heard by a judge and jury *unless* the provincial Attorney General waives that provision. And even the Crown's refusal to waive has been overruled in at least one case where the judge decided the accused could not get an impartial jury trial.

The case was as follows. In November, 1991, Colin McGregor was accused of killing his estranged wife with a crossbow in broad daylight on an Ottawa street. The killing sparked an avalanche of publicity, exacerbated by the broader public sentiment regarding female victims of male violence. Mr. McGregor's lawyer, Normal Boxall, used survey evidence to successfully argue for a trial by judge alone. The survey revealed high awareness of the murder, high concern about crime and violence against women, and a pre-existing bias against McGregor's intended defence of insanity.

2.7 *"Marketing" a verdict*

A related area of survey development is research that tests out various arguments on mock juries, to find out what is likely to "win" in the courtroom. The field is reasonably well-developed in the United States, and received wide publicity in the preparation of the O. J. Simpson trial. The extent of its development in Canada is unknown, except from anecdotal evidence that points to its selective use.

According to the president of U.S. Behavioral Science Research (see Schwartz, 1993, p. 52), various demographic groups and people with different types of jobs have shown different reactions to arguments that the defence may plan. This may help in jury selection, to the extent that defence counsel can influence it. And advance testing of arguments "gives trial attorneys a sense of confidence . . . They can prepare targeted arguments rather than guess which ones are going to work . . . Your stuff has to be bulletproof". Reports another executive of an American research agency, "[Attorneys] can't change the facts, but they can present them in a variety of different ways. We can help by letting attorneys test their arguments and find the best way of convincing the jury" (Schwartz, 1993, p. 53).

Research on testing arguments before mock juries is run just as an advertising agency might run a campaign past a focus group. Its justification is comparable to corporate marketers' needing to know the customers they communicate with.

The field in the United States is sufficiently advanced that researchers have already determined the types of cases where

investment in research is warranted. In particular, when the evidence in a case is strong, or when the case is to be tried in a homogeneous community, jury research is thought to be a waste of time and money. But a controversial case that polarizes a diverse community is the type that is more likely to benefit from jury research, because of the potential for high variance in perceptions among potential jurors.

2.8 *Evidence of community standards in disseminated material*

Survey research has been used to argue community standards, particularly in obscenity cases. The leading case is *R. v. Prairie Schooner News Ltd. and Powers* (1970), 1 C.C.C. (2d) 251 (Man. C.A.), which dealt with the possession of obscene matter for the purpose of distribution. In that case, an opinion poll was submitted by the defence to establish the relevant community standard regarding obscenity. The survey was eventually rejected for poor sampling quality, among other things, but it did give the court the opportunity to confirm that survey evidence on public views on obscenity would be considered relevant and acceptable under appropriate sampling standards.

A similar outcome occurred in *R. v. Times Square Cinema Ltd.* (1971), 4 C.C.C. (2d) 229 (Ont. C.A.): a rejection of survey evidence due to poor sampling, but, importantly, an endorsement of the value of survey evidence (if properly collected) in deciding community standards of tolerance.

3. *Getting past the rules of evidence*

A columnist in *Marketing Magazine* (Swetsky, 1993), complained that accepting well-conducted survey research in the courtroom ought to have been a "no-brainer", but it was not: Accepting survey research as evidence was taken as a rather "bold step", he wrote, because of our very conservative courts. It was probably the rise of inferential statistics, and the increasing dependence by business and governments on survey methods that have raised the quality standards and resulting credibility of survey research over the past 30 years. It is now at a stage of development that scientists of any field would likely acknowledge that survey research lives up to all of the process standards that good science demands. For that reason, it has become as legitimate a candidate for legal evidence, as any other field of scientific endeavour.

But though survey research may have earned its way past the perceptual barriers concerning scientific integrity, there were

other reasons that courts were slow to accept it. Rules of evidence, on the surface, appeared to preclude its use.

a The preclusion was not a result of statute. In neither the federal *Canada Evidence Act*, R.S.C. 1985, c. C-5, nor the Ontario *Evidence Act*, R.S.O. 1990, c. E.23, are there statutory provisions dealing specifically with the admissibility of survey evidence. But from common law, there are two principles which have apparently b provided obstacles to the early growth of survey evidence: the hearsay rule, and the opinion evidence rule. The availability of "experts" in the field of survey research appears to have helped overcome the obstacles presented by those two common law principles. The role that each has played in the history of survey c research in the courtroom — the hearsay rule, the opinion evidence rule, and the emergence of experts — is briefly reviewed next.

3.1 *The hearsay rule*

Hearsay evidence is evidence proceeding from repetition of d what one has heard others say, rather than evidence arising from that individual's personal knowledge. According to the hearsay rule, such evidence is inadmissible because the party making the statement has not made it under oath and is not available for cross-examination. Surveys are, by definition, reports of what e other people say, and this fact led them to be initially treated as violations of the hearsay rule. Except for the 1954 *Aluminum Goods Ltd. v. Registrar of Trade Marks* case (19 C.P.R. 93 (Ex. Ct.)), all trade mark proceedings prior to 1973 appear to have rejected survey evidence as inadmissible, because of hearsay, f including, for example, *Imperial Oil Ltd. v. Superamerica Stations Inc.* (1965), 47 C.P.R. 57 (Ex. Ct.), and *Paulin Chambers Co. v. Rowntree Co.* (1966), 51 C.P.R. 153 (Ex. Ct.).

There is an important nuance regarding whether a report about a third party is hearsay or not, and this nuance eventually helped g in allowing surveys to be acceptable as evidence. A statement such as "Mary told me that she had seen John steal the money" would be hearsay if Mary's statement was used as proof that John had stolen the money. But it would not be hearsay as evidence that Mary had in fact made that statement. (The witness has direct h knowledge of Mary's making the statement.)

Thus, if survey evidence is offered merely to show that certain statements were made by the interviewees, regardless of their truthfulness, then such evidence is not hearsay.

Lawyers Stitt and Huq (1988) argue that the hearsay rule is usually not violated in trade mark surveys, because the very

The criteria for such qualification have never been formally documented, though judges will often allude to the nature of a witness's background which has given the judge confidence to accept the witness as being expert. Wilson (1993) assembles empirically persuasive standards for experts that have been useful to the law profession.

Experts have also been given latitude in interpreting the hearsay rule, beyond the limits described earlier. In particular, they have been permitted to substantiate their own opinions about "the truth" based on what respondents have said in surveys. In *City of Saint John v. Irving Oil Co.* (1966), 58 D.L.R. (2d) 404 (S.C.C.), an expert witness conducted a survey regarding the value of a certain parcel of land, and then used the results to draw conclusions of his own regarding the true land value.

Concerns about the dependence on hearsay evidence in such circumstances can still be addressed by limiting the weight given to the expert's opinion.

3.3 *Emerging reliance on experts*

As indicated above, the recognition that the survey research field could produce "experts" appeared to give confidence to the courts in permitting reliance on survey evidence.

For example, expert survey evidence was the subject of discussion by the Ontario Court of Appeal in *R. v. Times Square Cinema Ltd.* (1971), 4 C.C.C. (2d) 229, [1971] 3 O.R. 688, McGillivray J.A. said at p. 233 C.C.C., p. 692 O.R.: "I am not prepared to say that expert evidence based upon a poll should in no case be received." And at p. 235 C.C.C., pp. 693-4 O.R.: "It is my opinion that, subject to strict limits, expert evidence based upon a poll might be allowed by a Judge to go before a jury. . . . The manner of taking the poll and the manner in which questions are asked is of substantial importance."

From the time of that judgment, the court attitude appears to have shifted from mere "tolerance" of experts and the offering of some latitude to their evidence, to insistence that no survey research be tendered without them. This has been the case even when there is no criticism that has been levelled against the quality of the survey evidence. For example, in *Noxzema Inc. v. Navana Manufacturing Ltd.* (1985), 5 C.P.R. (3d) 509 (Hearing Officer-T.M.), the hearing officer rejected the survey evidence as inadmissible, because the person presenting the reports was not qualified as an expert, and had no firsthand knowledge of the surveys. Similarly, in *R. v. Prairie Schooner News Ltd. and Powers* (1970), 1 C.C.C. (2d) 251 (Man. C.A.), opinion poll evidence

was rejected by the trial judge and later by the Court of Appeal because, among other criticisms, the person conducting the poll was not acceptable as an expert in the science of opinion research (nor, in the alternative, as an expert on the subject of obscenity). In that case, Dickson J.A. stated (at p. 265): "Essential to admissibility is the requirement that the witness testifying be possessed of expert knowledge." See also *Irwin Toy Ltd. v. Marie-Anne Novelties Inc.* (1986), 12 C.P.R. (3d) 145 (Ont. H.C.J.); *McDonald's Corp. v. McTaco Enterprises Ltd.* (1984), 3 C.P.R. (3d) 130 (T.M. Opp. Bd.); and *Seligco Food Corp. v. Becker Milk Co.* (1984), 3 C.P.R. (3d) 506 (T.M. Opp. Bd.), for similar rejections of evidence due to the absence of an expert to defend them.

3.4 *The de rigueur status of surveys today*

The previous sections reviewed the relatively slow history of acceptability of survey evidence in litigation proceedings. Ironically, most trade mark lawyers today claim they would not dare enter litigation about reputation or confusion without a survey in hand — unless they had a powerful case to begin with. Not only is there a concern about insufficient evidence (when it is readily collectable), but also about an adverse inference that might be drawn by not filing such evidence in appropriate circumstances.

For example, Bereskin writes (p. 49): "the use of research in trade mark litigation has become so prevalent ... that a judge might be suspicious of any litigant who did not offer a survey to prove likelihood of confusion or the converse".

Certain judges appear to agree. Mr. Justice MacFarland stated in *Sun Life* (at p. 249):

> Without such evidence, how am I to otherwise determine whether there is likely to be confusion ... what I think personally is immaterial.
>
> * * * * *
>
> To attempt to make such a determination without regard to evidence of what others may think or have said would to my mind be nothing more than an exercise in pure judicial fantasy and of not much assistance at all.

At the same time, it is recognized that introducing surveys as evidence introduces risk. As Potvin and Leclerc write (1992, p. 163), "a learned opponent will do his or her best to initiate controversies in every facet of the survey evidence. [Details] will be probed to no end". Therefore the importance of quality controls and attention to detail cannot be overemphasized in this sphere of application. The research must stand up to the closest scrutiny.

4. *What constitutes "good" survey evidence, in the view of the courts*

a To this point in the paper, we have dealt with two standards which appear to have been met in the history of applying survey research to litigation: first, the acknowledgement of the scientific legitimacy of survey research, and second, the admissibility as to rules of evidence. So there is a basic receptiveness to surveys as b legitimate measurements of perceptions and experiences of large populations, in legal proceedings where such measurements *should* bear on the outcome.

Potvin and Leclerc, writing in the field of trade mark cases in 1992, come to the same conclusion, that by now, "Canadian c jurisprudence clearly [allows] survey evidence as admissible" (p. 161).

But now come into play two important questions: has the evidence been collected with appropriate quality controls on measurement (essentially, is the evidence reliable)? Are the right d things being measured (is the evidence valid)? From the lawyer's point of view, the answers to these two questions influence the weight which will be given to the survey evidence in the court's decision.

In this section, we will discuss how these questions have been e addressed, and highlight, in particular, a broad issue concerning the distinction between "reliability" and "validity". The latter two terms are defined more formally in the section after this, where we lend greater scrutiny to the need to distinguish between them.

Writers in legal journals have taken pains to collect judges' f criteria for what constitutes a well-conducted survey, usually beginning from the *Schenley* case referred to earlier. Survey researchers reading these lists of criteria may find them rudimentary — they are the same as those which might be found in most market research textbooks. But for the law profession, an accumulation and endorsement of these standards appears to have been g an important step in legitimizing this new field of evidence.

Examples of review articles where lists of criteria have been compiled, vis-à-vis good survey research, include the following: Stitt and Huq (1988), Bereskin (1988), Potvin and Leclerc (1992), and Wilson (1993). Chakrapani and Deal (1992) bring them to the h organized attention of the market research student population. With variations, the lists typically comprise the following criteria:

1. The survey sample should be representative of the relevant universe.

2. The survey sample should be sufficiently large to draw reasonable conclusions.
3. Questions should be free from bias.
4. Responses should allow interviewees freedom of expression, not unduly restrict their answers.
5. Coding of open-ended questions should be thorough and not overly restrictive.
6. All answers must be disclosed.
7. Interviewers should have no knowledge of the litigation or purpose of the survey.
8. Interviewer instructions should be disclosed.
9. Data should be accurately reported.
10. The data should be analyzed in accordance with accepted statistical principles.
11. The objectivity of the entire process should be assured.

The above list is noteworthy for two reasons. First, it does not separately categorize items that address reliability as opposed to those that address validity. Secondly, the number of items which address validity (really only questionnaire bias in the above list — one out of eleven) is too few to do justice to where the most difficult standards exist in designing effective market research.

The reason we believe it to be useful to make this distinction is that reliability problems are easy to fix, or at least to measure quantitatively. It is well-established, on most questions of reliability, what the "right" answer is. Therefore, judges may wish to apply a higher standard to expert survey evidence in this regard: reliability standards are sufficiently well-taught and well-known, that survey researchers should not be submitting evidence that does not thoroughly address issues of reliability. Validity issues, on the other hand, entail more ambiguity and more creative challenge, and are more open to debate. This has two consequences: first, judges should recognize the importance of their own considered opinion in weighing arguments on both sides when it comes to issues of validity; second, parties to a litigation may find it useful to recognize where the opinion and experience of experts is most likely to be needed. That is, for many validity issues, there are no 100% "right" answers.

5. *Emerging issues: Reliability v. Validity*

Imposing measurement on some of the terms contained in legal statutes is no easy feat, especially when those terms are acknowledged by law practitioners themselves to be sometimes ambiguous

in their application — terms such as "confusion", "genericism", "reputation", "business connection", "associated with", "passing-off" and others. As Jolliffe (1994) points out, such terms may have their interpretations extended as case law unfolds.

Measurement is a learned expertise, with certain established criteria, including in particular, the criteria of reliability and validity. In most introductory textbooks to measurement in the social sciences, one would find a discussion about the importance of attending to reliability and validity, in order to produce accuracy: see *e.g.*, Krech *et al.*, 1982; Van Minden, 1987.

But one seldom finds the distinction made when measurement methods have been applied to surveys in legal settings.

Indeed, there is sometimes the appearance of the assumption that the two are interchangeable. In the following statement of Mr. Justice MacKay in *Seagram*, he uses the term "reliability" when survey researchers might prefer the word "validity" (at p. 472):

> Another concern I have about the reliability of the appellants' public opinion survey is that the questions and responses were given in an artificial environment which can hardly be described as reflective of reality. Those questioned were shown a card with the design mark of the appellant including the trade mark SEAGRAM REAL ESTATE LTD but they were not shown the marks as used by the respondent, in the form of a sign, stationery or advertisement ...

More generally, published articles and judgments in legal contexts do not separate reliability and validity in assessing whether survey research meets standards of acceptability. As indicated in the previous section, there is good reason for doing so.

Reliability

Reliability refers to the likelihood of getting the same results if one were to repeat the measurements on another sample, on another day, etc. using the same instrument. Therefore, if the questionnaire test is done with a serious degree of non-representativeness with respect to population, its reliability should be called into question. If there is lack of consistency in interviewer style, or inconsistent interviewer training, then reliability is also threatened. If coding is not done with strict rules, or if there is any lack of objectivity in the survey process, reliability is not assured. If, on the other hand, such conditions are reasonably well-controlled, then the reliability of the survey sample is adequately described by the margin of error.

Reliability standards are almost always under the control of the survey researcher, in so far as making design decisions and overseeing the quality controls of the interviewing process. In reviewing survey evidence submitted in litigation, it is

straightforward to evaluate adherence to reliability standards. In most cases, it should be possible to attach quantitative estimates (*e.g.*, margin of error) to reliability. While there can never be 100% reliability, the standard of 90-99% is usually considered adequate to give confidence to the results.

There are still some debates in sampling situations where reliability could be measured, but generally has not been. Mall research provides an example. Many survey researchers would argue that mall surveys would likely undermine reliability, as the type of people who frequent malls may not be representative of the population relevant to a particular trade mark proceeding.

Mr. Justice MacKay in *Seagram* wrote in support of this position (at p. 473):

> I am not satisfied that the results of this survey are representative; a survey for a short period of time (one day) conducted among shops in four shopping centres in one area (the Muskoka region) of Canada ... cannot be considered to represent the response of average Canadians of ordinary intelligence ...

The appeal judge in the Walt Disney case (re the Fantasyland Amusement Park (53 C.P.R. (3d) 129 at p. 137)) believed otherwise: "A shopping mall is a good place to encounter a diverse group of people. Such persons are chosen at random." She further cited an explanation of expert witness John Senders that malls allow one to, "obtain a sample of people who [are] mobile ... and probably able to utilize facilities of either West Edmonton Mall Fantasyland or Disney Fantasyland".

The controversy regarding the acceptability of mall surveys has been heightened by the Walt Disney (Fantasyland) decisions, especially given that the amusement park dispute and the hotel dispute treated the survey with different weight. Survey researchers and others who wish to maintain their arguments against mall surveys should probably conduct, once and for all, a statistical demonstration that people who frequent malls are dissimilar from the Canadian population. This demonstration would be quite straightforward, though expensive, to carry out.

We reiterate that such debate over reliability issues is rare, and one would find general agreement among survey experts about the basic conditions for ensuring reliability in a survey.

Validity

Validity of a survey refers to the extent to which a test or questionnaire meets its intended purpose. Is the concept which requires measurement *being* accurately measured by means of the test questions? What *is* being measured?

The issue of validity bears on whether the right questions have been asked in the right way in the right circumstances — in order to provide the measures essential to the inquiry.

Defining and understanding validity is more than a linguistic nuance. Assurance of validity in surveys is at the heart of circumventing the hearsay rule. Recall from a discussion in an earlier section that the hearsay rule has been judged to pose no problem for survey evidence, because survey experts only report on what people say (not whether their statements are "true"). Yet, in order for survey evidence to play a role in deciding legal matters, we are often obliged to assume that people's statements regarding their impressions and purchase intentions *are* true. Thus, unless survey questions are "valid", unless they accurately measure the concept at issue in the case, the results should be discounted. In short, we have to design questions which encourage people to say what they mean.

At least two measurement issues have surfaced in the psychology literature which provide insight into problems of validity. One has been labelled a "social desirability bias". For example, it has long been observed that asking people, "How much money did you give to charity in the past year?", produces overestimations of the actual money which charities receive. Validity of the measure is undermined by a social desirability bias, according to which people do not wish to appear uncharitable or without social conscience, and so attempt to make themselves appear to be good citizens to the interviewer. Speaking more generally, people are sometimes inclined to give answers that are consistent with what they perceive to be the normative or desirable thing to say, regardless of their personal feelings or behaviour.

The misrepresentation is not necessarily intentional. The social psychology literature is filled with examples of inconsistencies between expressed attitudes and underlying attitudes or behaviour: see *e.g.*, Fishbein and Ajzen, 1975. This literature challenges survey researchers who strive to develop legitimate measures of attitude or perception relevant to litigation. It is especially germane in issues of misleading advertising, where evidence is required that people's behaviour will materially change as a result of exposure to an offending ad. Can survey evidence of what people say be used to predict what they will do (and therefore support the argument of "materially" misleading)? In some circumstances, the answer is "yes", but explanatory arguments will clearly be required by the expert witness.

The survey environment is another factor that may lead people to answer in ways other than how they might behave when put

into a real life situation. Consider the following commentary by Vidmar and Judson (1981) on attempts to measure pretrial bias among potential jurors: a

> After all, survey interviews, whether obtained over the telephone or face-to-face are conducted under conditions dissimilar to the courtroom. For example, in the former instance, the respondent is at home, the interviewer is not a legal authority figure, consent to the interview is voluntary, the respondent is not under oath, and answers are given under conditions where jury duty is not imminent. Thus critics of survey evidence have argued that b respondents' answers are only hypothetical and perhaps frivolous, or given in the belief that by expressing prejudice they can avoid possible jury duty.

The authors argue that to enhance the probative value of surveys in jury bias assessment, one should include specific and direct questions about intended behaviour in the courtroom. c

In certain trade mark surveys, the survey's validity may be related to how closely the survey environment resembles the situation in which consumers make their buying decisions. For example, if the legal issue is whether there is confusion in the appearance of diet cola cans, the survey testing for confusion d should be conducted not only with prospective purchasers of diet cola, but ideally in a market area where such products are sold. If the test is done outside this arena, the expert should be asked to defend his or her anticipation that results would *not* depend on the setting. e

Another question of validity pertains to "word association quizzes" which attempt to test reputation and confusion by asking consumers "what do you think of when you see this word [or name]?" In the author's experience, word association is a poor method for proving the thought patterns of consumers in every- f day life which might lead to their commercial loyalties. There is a considerable body of research in the field of psychology which establishes that people make judgments based on contextual cues, and if stimuli are taken out of context, their judgments are unreliable: see *e.g.*, Corbin, Olson and Abbondanza, 1975; Levy, g 1960; Poulton, 1973. Word association tests have been used in a dispute between Toronto Dominion Bank and Canada Trust, concerning Canada Trust's "Green your Account" campaign (unreported), in *New Balance Athletic Shoes, Inc. v. Matthews* (1992), 45 C.P.R. (3d) 140 (T.M. Opp. Bd.), and in *Walt Disney* h *Productions v. Triple Five Corp.* (1992), 43 C.P.R. (3d) 321 (Alta. Q.B.); affirmed 53 C.P.R. (3d) 129 (Alta. C.A.), to name three in Canada. Generally they are not well-regarded, and have been heavily criticized by expert witnesses, though the judge in *Walt Disney* (1992) was more receptive than others have been.

American courts have also been negative about word association as a proof of confusion: see *Amstar Corp. v. Domino's Pizza Inc.*, 615 F.2d 252 (1980); *Ideal Toy Corp. v. Kenner Products Division of General Mills Fun Group, Inc.*, 443 F.Supp. 291 (1977); *Wuv's Intern., Inc. v. Love's Enterprises, Inc.*, 208 U.S.P.Q. 736 (1980).

Finally, validity of results has been challenged when words may carry multiple connotations, depending on the perception of the respondent. In the American case *Coca-Cola Co. v. Tropicana Products Inc.*, 538 F.Supp. 1091 (1982), Coca-Cola submitted a survey purporting to show that an advertisement misled consumers into believing that Tropicana juice was unprocessed. The survey indicated that 43% of respondents characterized Tropicana juice as being "fresh". But it failed to elicit evidence of what people meant by the freshness concept. Coca-Cola's own expert witness admitted under cross-examination that the word "fresh" could be capable of several connotations, including "not processed", "not made from concentrate", "refreshing" and 100% pure". It was largely on the basis of this ambiguity that the preliminary injunction was denied.

6. *Validity issues coming to the fore*

There is recent evidence that courts are concerning themselves more with the validity of tests brought to bear on litigation, although they do not explicitly allude to the validity criterion.

The case of *New Balance Athletic Shoes, Inc. v. Matthews* (1992), 45 C.P.R. (3d) 140 (T.M. Opp. Bd.), is a case in point. While it appears not to have created excitement on precedents for legal issues, it appears to be an important case for precedents on validity of survey research.

In that case, Matthews filed to register the mark BALANCE & Design, based on proposed use for men's clothing. New Balance Athletic Shoes Inc. opposed the application because it had registered a similar name, mainly NEW BALANCE, for certain categories of clothing and luggage.

Matthews relied on a consumer survey conducted in the Vancouver area. Interviewers presented individuals with two cards, each card containing six different trade marks. One of the six marks on one card was the applicant's mark BALANCE & Design, and one of the six marks on the other card was the word mark NEW BALANCE. Respondents were asked the name of the company that they associated with each mark. They were then asked what products they associated with each mark. The researcher presenting the results argued that the 11% confusion

result was insufficient to warrant rejection of Matthews application.

a In rejecting the survey evidence, Mr. D. J. Martin of the Trade Marks Opposition Board listed a number of problems. Some were standard issues of reliability, such as:

- the survey being restricted to the Vancouver area, despite the reach of the application being all of Canada;
- b the bias of the sample towards females, despite the application being for men's clothing;
- the insufficient interviewer instructions.

However, more important are his decisive comments on a number of issues concerning validity. First (p. 141 (headnote)), he suggests c that words taken out of context limit the validity of the test:

> The applicant's mark was presented to consumers as it appears in use but the opponent's mark was presented as two words "new balance" when the evidence reveals that its mark usually appears in a different format.

Second (pp. 145-6), he identifies questions as "leading" if they put d the respondent in a frame of mind they might otherwise not be in:

> The initial question asked in the survey was leading. That question was: "What is the name of the company you associate with that trade mark?" Where a trade mark includes or comprises ordinary words, it seems likely that a number of people would respond to that question by assuming that the e name of the associated company incorporates the words of the trade mark whether or not they have any knowledge of the actual company that is associated with the mark. In other words, if consumers were shown a card with the trade mark RHINOCEROS on it and were asked the survey question, a certain number would answer "Rhinoceros" even though they had no knowledge of any specific associated company.

f Psychologists would probably phrase the same argument as a "context effect", or taking cues from the environment to make judgments. As discussed earlier, it is how the human brain works in everyday circumstances, and will continue to work when put in the artificial circumstances of an experimental test.

g Third, Mr. Martin's comments (cited above) also suggest a disapproval of word association quizzes.

And finally, he sets guidelines for implementing a test for confusion:

> The test is whether or not a consumer familiar with one trade mark and the associated goods [note importance of familiarity or reputation] is likely to h infer that the goods associated with a second trade mark come from the same source, whether or not that source is known.

(Page 141 (headnote).) And later (p. 148), "it is a matter of first impression and imperfect recollection".

He also gives rather more explicit direction to the survey profession for implementation of these tests than we have seen before (p. 147):

> It is preferable to design a survey that elicits a consumer's first impression by the use of open-ended questions such as "What do you think of when you see (or hear) this mark?" or "What word comes to mind when you see this mark?" This allows a respondent to reply in any number of ways. He might state that the mark reminds him of another mark, that it reminds him of a particular company, that he associates it with particular wares or services, that he associates it with a particular emotion or feeling, etc. Such a question should be followed up by one or more prompts in which the respondent is asked if there is anything else he thinks of when he sees the mark. This allows for a more complete assessment of the respondent's first impression which is the essence of the test for confusion.

The *New Balance* case is noteworthy because of the lengths to which the presiding officer went in commenting on how to validly measure the disputed issues in the litigation. The case makes important progress in bringing validity issues to the attention of the legal profession, at least in the sector of intellectual property.

7. *Summary and conclusions*

Survey research has had to battle four levels of assessment by the legal profession to be given its full due in the courtroom:

- scientific legitimacy;
- admissibility as to rules of evidence;
- admissibility as to quality control;
- weight.

The field has reached a level of professionalism where there is now no excuse for unsound research to be filed that would not pass the first three tests. The debates which now surround the use of surveys as evidence concern "weight". We have argued that the most difficult questions surrounding appropriate weight will be raised by validity issues. The survey may be soundly conducted (and therefore "reliable"), but has it correctly translated the pivotal legal issues into numerical measurements? In short, is it "valid"?

Our summary conclusion on the weight that should be accorded survey evidence, with respect to the validity question, is as follows: it is the best measurement instrument currently available to the courts in drawing conclusions about broad populations. Writes Bereskin (1988) in support, p. 49, "a survey is probably the most effective way to test the mental state of the public . . .". It is certainly superior to hand-waving arguments that rely on logic

alone, or that leave judgments about community opinion to the sole discretion of the judge. Moreover, advances in sophistication and rigour of survey methodology assure that the results are as scientifically valid as those professed by any science that relies on the classic "experimental method" (hypothesis — controlled testing — conclusions — statistical inference). However, as with any measurement instrument, survey methodology introduces artifice which threatens to undermine validity. Rather than allowing this question to weaken the respect for survey methodology altogether, we argue that it presents the best opportunities for lawyers, and their expert witness, to challenge the strength of evidence presented by the opposition. Since questions of validity require judgment and experience to assess, these are the type of questions where an expert's opinions and appreciation of the social science literature will need to be most relied upon. They are also the questions where a judge may be most pressed to deliberate between strong arguments presented by both parties to a dispute.

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Ray Plastics Ltd. et al. v. Canadian Tire Corp. Ltd.*

[Indexed as: Ray Plastics Ltd. v. Canadian Tire Corp.]

Court File No. 55207/90Q

Ontario Court (General Division), Hoilett J. *July 14, 1995.*

Civil procedure — Preliminary question of law — Stating question of law for opinion of court — Trade mark — Passing-off — Damages — Plaintiff having recovered by accounting of profits from manufacturer, seeking confirmation of right to obtain same relief from distributor — Distributor claiming to be joint tortfeasor — Question answered in affirmative.

Damages — Passing-off — Accounting of profits — Recovery from different parties in same manufacturing-distribution chain — Preliminary question of law — Plaintiff having recovered by accounting of profits from manufacturer, seeking confirmation of right to obtain same relief from distributor — Distributor claiming to be joint tortfeasor — Question answered in affirmative.

In a previous action, the plaintiff sued the manufacturer of a snowbrush for passing-off. The plaintiff prevailed and elected and received an accounting of the manufacturer's profits. In this action the plaintiff sought the same relief against the distributor of the snowbrush.

The plaintiff claimed that to deny such a claim would allow the distributor to profit from its own wrongdoing. The defendant claimed that the maker and the distributor are joint tortfeasors and that recovery against one tortfeaser disentitled the plaintiff from pursuing the others.

The defendant brought this motion raising the issue as a question of law for the opinion of the court, namely, can a plaintiff who has recovered judgment for an accounting of profits in respect of an action for passing-off against a manufacturer, recover judgment for an accounting of profits against another party in the chain of distribution of the product.

Held, the plaintiff was entitled to recover an accounting of profits against another party in the chain of distribution; otherwise, other infringers could securely enjoy substantial profits.

As a question of law, the court confirmed that a plaintiff can seek the relief of an accounting of profits against different parties in the manufacturing, distribution chain.

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* Notice of appeal to the Ontario Court of Appeal was filed August 10, 1995.

TAB 31

TAB 3

Comité d’examen de la rémunération des juges militaires

Military Judges Compensation Committee

31 JANUARY 2024

Report of the Military Judges Compensation Committee

EXECUTIVE SUMMARY

The Military Judges Compensation Committee (MJCC) is established as a matter of constitutional imperative relating to the independence of the judiciary. Sections 165.33 and 165.34 of the *National Defence Act*, R.S.C. 1985, c. N-5 (*NDA*), which establish the composition of the MJCC and its mandate, were enacted to comply with the constitutional requirement for an independent advisory body to "inquire into the adequacy of remuneration of military judges" (s-s. 165.34(1) *NDA*) and advise the Government of its findings and conclusions. Pursuant to the jurisprudence of the Supreme Court of Canada, the purpose of this process is to take judicial compensation out of the political sphere and avoid unseemly conflict between Parliament and the judges. While the Supreme Court's vision was that this process would be effective, the Committee observes that this vision has unfortunately not been realized. The Government of Canada (the Government) has rejected the compensation recommendations of the last two Committees, and this raises legitimate concerns about the effectiveness of the process.

Under section 165.34 of the *NDA*, we are required to consider four statutory factors in our inquiry into the adequacy of judicial compensation: economic conditions, financial security securing judicial independence, attracting outstanding candidates, and other objective criteria the Committee considers relevant. We have done so, as we will explain in detail in the pages that follow.

For reasons that we will set out at length, our consideration of all the relevant factors leads us to share the views of two previous Committees that the military judges should receive the same remuneration as all other federally appointed judges.

The economics of remunerating four federally appointed judges around 15% more to gain parity with the other approximately 1200 federally appointed judges do not, we conclude, impair the overall economic and current financial position of the Government, and takes account of the prevailing economic conditions in Canada. The role of financial security in ensuring judicial independence favours parity, given the risk of perception that the military judges are not of the same quality or value as other federally appointed judges. The necessity of attracting the best

candidates also favours parity lest some of the best candidates for an appointment as a military judge opt instead for appointments to other branches of the federally appointed judiciary on the basis of the higher remuneration of those other posts. In short, we conclude that the same remuneration that has been considered adequate for all other federally appointed judges is also the adequate remuneration for the military judges.

TABLE OF CONTENTS

I. INTRODUCTION

A. The Constitutional Basis for the Committee's Work

B. The Statutory Scheme

II. COMMITTEE'S COMPOSITION, APPOINTMENT AND CONSIDERATION PROCESS

A. The Purpose and Object of the Report

B. Composition of Committee, Members and Administrative Support

C. Military Judges: Who They Are, How Many, Where Do They Sit, and Nature of Their Work

D. Counsel for Military Judges and Counsel for the Government

E. Written Submissions Received by the Committee and Expert Testimony

F. In-Person Hearing

G. Acknowledgment of Contributions and Assistance to the Committee

H. Effectiveness of the Committee Process

a. 2012 MJCC Report Majority Recommend Remuneration Parity with Other Federally Appointed Judges

b. 2019 Report Unanimous in Recommending Remuneration Parity with Other Federally Appointed Judges

c. Government's Consistent Acceptance of JCBC Reports Recommendations

III. STATUTORY CONSTRUCTION OF GOVERNING LEGISLATION

IV. OVERVIEW OF 2023 PARTIES' POSITIONS

A. The Military Judges

B. The Government

V. ANALYSIS OF THE STATUTORY FACTORS

A. The Statutory Framework for the Committee's Work

a. The Prevailing Economic Conditions in Canada

i. The position and argument of the Government on economics

ii. The position and argument of the military judges on economics

iii. Analysis of the economic factor

b. The Role of Financial Security

i. The position and argument of the Government on financial security

ii. The position and argument of the military judges on financial security

iii. Analysis of the financial security factor

c. The Need to Attract Outstanding Candidates to the Military Judiciary

i. The position and argument of the Government on outstanding candidates

ii. The position and argument of the military judges on outstanding candidates

iii. Analysis of the outstanding candidates factor

d. Other Relevant Factors

i. Pension scheme comparisons

ii. Comparisons with other federally appointed judges

iii. Comparisons with provincial court judges and federally appointed associate judges

VI. THE INCIDENTAL ALLOWANCE

VII. CONCLUSIONS AND RECOMMENDATIONS

I. INTRODUCTION

A. The Constitutional Basis for the Committee's Work

Military judges are federally appointed members of a federal judiciary by an Order-in-Council who are also commissioned officers in His Majesty's Canadian Armed Forces (CAF). They devote their full-time work and attention to their service as military judges.

Parliament established the Military Judges Compensation Committee to provide independent, impartial advice to the Government on military judges' remuneration. The role of the independent MJCC is to inquire into the adequacy of the remuneration for military judges and to recommend remuneration for the period of its review – in this case, 1 September 2019 to 31 August 2023. The establishment of an independent Committee to recommend remuneration is a direct result of the decision of the Court Martial Appeal Court in *R. v Lauzon* (1998) 6 CMAR 19, which stipulated that judicial independence and depoliticization of the salary determination process must be ensured. In *Lauzon,* the court also stipulated that the remuneration must be fair and reasonable, objective, and guided by the public interest. The court followed the earlier decision of the Supreme Court of Canada in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island,* [1997] 3 SCR 3, which established that there must be an independent committee which must make a recommendation to the governing authority, and that negotiations between Government and the judges are prohibited. Most importantly, it established that the salary level of judges must not be one that risks putting a judge in a situation where they may be subject to financial manipulation.

The process for salary determination of military judges parallels the process for federally appointed judges where, pursuant to the *Judges Act*, R.S.C. 1985, c. J-1 (*Judges Act*), an independent Commission recommends appropriate remuneration to the governing authority. It is notable that the statutory language Parliament used in creating the Judicial Compensation and Benefits Commission (JCBC) is almost identical to that which establishes the MJCC.

The central task of the Committee is to "inquire into the adequacy of the remuneration of military judges" (s. 165.34 *NDA*). This focus on "adequacy" is also found in the mandate of the JCBC under the *Judges Act* which is to "inquire into the adequacy" of the salaries and other amounts

payable to other federally appointed judges. It follows that the jurisprudence about "adequacy" within the meaning of the *Judges Act* provides a useful guide to how to approach that same term in the *NDA*.

The Supreme Court of Canada jurisprudence teaches that the process by which judicial remuneration is established must be independent, effective, and objective and that the Committee's work must have a "meaningful effect" on the determination of compensation (*Bodner v. Alberta*, 2005 SCC 44). The Committee is a vehicle to help assure that these objectives are attained. With respect to the amount of remuneration, the Supreme Court of Canada has held that the mandate to determine adequate remuneration "is neither to determine the minimum remuneration nor to achieve maximal conditions." Rather, the mandate is to recommend "an appropriate level or remuneration" (*Bodner* at para. 67). This is done considering the constitutional requirement of judicial independence, including financial security, and having regard to the factors set out in the statute. Adequacy is, therefore, neither the bare minimum amount necessary to meet the constitutional requirement of financial security nor the ideal maximum amount. Adequacy must be assessed by placing remuneration somewhere between these two polls guided by the statutory factors.

B. The Statutory Scheme

When the *NDA* was amended to include sections 165.33 through 165.37 establishing the MJCC's mandate and procedure, Parliament's aspirations appeared to be both clear and efficient: every four years, the MJCC would make recommendations to the Government on military judges' salaries, focused on prevailing economic conditions, the financial security of the judiciary that ensures judicial independence, and the need to attract outstanding candidates. While the Committee's mandate was limited to recommending to Government rather than making binding decisions, the Committee's mandate and procedure as a core part of the *NDA* establishes the importance of the MJCC's role in the overall administration of the "the Canadian Forces and of all matters relating to national defence" as specified in section 4 of the *NDA* under the Minister's responsibilities.

Unfortunately, we observe that the process established by Parliament has neither been followed with vigour nor proved to be effective. This is the sixth Committee to be convened under *NDA* authority. As we will describe in more detail, the long delay in appointment of the members of the Committee and the Government's rejection of the key remuneration recommendation of the past two Committees have undermined the intended effectiveness of the process.

II. COMMITTEE'S COMPOSITION, APPOINTMENT AND CONSIDERATION PROCESS

A. Purpose and Object of the Report

The Committee is mandated by Parliament in s. 165.33 of the *NDA* to enquire into the adequacy of the remuneration of military judges in Canada. Its governing legislation specifies:

Military Judges Compensation Committee

Composition of Committee

165.33 (1) There is established a Military Judges Compensation Committee consisting of three part-time members to be appointed by the Governor in Council as follows:

(a) one person nominated by the military judges;

(b) one person nominated by the Minister; 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 for a term of four years, and may be removed for cause at any time by the Governor in Council.

Reappointment

(3) A member is eligible to be reappointed for one further term.

Absence or incapacity

(4) 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).

Vacancy

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

Quorum

(6) All three members of the compensation committee together constitute a quorum.

Remuneration

(7) The members of the compensation committee shall be paid the remuneration fixed by the Governor in Council and, subject to any applicable Treasury Board directives, the reasonable travel and living expenses incurred

Comité d'examen de la rémunération des juges militaires

Constitution du comité

165.33 (1) Est constitué le comité d'examen de la rémunération des juges militaires, composé de trois membres à temps partiel nommés par le gouverneur en conseil sur le fondement des propositions suivantes :

a) un membre proposé par les juges militaires;

b) un membre proposé par le ministre;

c) un membre proposé à titre de président par les membres nommés conformément aux alinéas a) et b).

Durée du mandat et révocation

(2) Les membres sont nommés à titre inamovible pour un mandat de quatre ans, sous réserve de révocation motivée du gouverneur en conseil.

Mandat renouvelable

(3) Leur mandat est renouvelable une fois.

Remplacement

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

Vacance à combler

(5) Le gouverneur en conseil comble toute vacance suivant la procédure prévue au paragraphe (1). Le mandat du nouveau membre prend fin à la date prévue pour la fin du mandat de l'ancien.

Quorum

(6) Le quorum est de trois membres.

Rémunération et frais

(7) Les membres ont droit à la rémunération fixée par le gouverneur en conseil et sont indemnisés, en conformité avec les instructions du Conseil du Trésor, des frais de

by them in the course of their duties while absent from their ordinary place of residence.

2013, c. 24, s. 45.

déplacement et de séjour entraînés par l'accomplissement de leurs fonctions hors de leur lieu habituel de résidence.

2013, ch. 24, art. 45.

Mandate

165.34 (1) The Military Judges Compensation Committee shall inquire into the adequacy of the remuneration of military judges.

Fonctions

165.34 (1) Le comité d'examen de la rémunération des juges militaires est chargé d'examiner la question de savoir si la rémunération des juges militaires est satisfaisante.

Factors to be considered

(2) In conducting its inquiry, the compensation committee 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 committee considers relevant.

Facteurs à prendre en considération

(2) Le comité 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 de l'administration fédérale;

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

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

d) tout autre facteur objectif qu'il considère comme important.

Quadrennial inquiry

(3) The compensation committee shall commence an inquiry on September 1, 2015, and on September 1 of every fourth year after 2015, and shall submit a report containing its recommendations to the Minister within nine months after the day on which the inquiry commenced.

Examen quadriennal

(3) Il commence ses travaux le 1er septembre 2015 et remet un rapport faisant état de ses recommandations au ministre dans les neuf mois qui suivent. Il refait le même exercice, dans le même délai, à partir du 1er septembre tous les quatre ans par la suite.

Postponement

(4) The compensation committee may, with the consent of the Minister and the military judges, postpone the commencement of a quadrennial inquiry.

2013, c. 24, s. 45.

Report

(4) Il peut, avec le consentement du ministre et des juges militaires, reporter le début de ses travaux.

2013, ch. 24, art. 45.

B. Composition of the Committee, Members and Administrative Support

The Committee was composed of one Chairperson and two Members. The Chair of the Committee was the Honourable Clément Gascon, C.C., Ad. É. The Members were the Honourable Thomas A. Cromwell, C.C., and Mr. James E. Lockyer, O.N.B., C.D., K.C. The Committee was administratively supported by Gordon S. Campbell as Executive Secretary.

C. Military Judges: Who They Are, How Many, Where They Sit and Nature of Their Work

There is a roster of four military judges appointed in Canada who sit throughout Canada and as required around the world wherever His Majesty's Canadian Armed Forces are deployed. Their

duties are established by the *NDA*. They are federally appointed judges having a specialized role, as is the case with other federally appointed judges in specialized roles such as those who have been appointed to the Tax Court of Canada. Military judges are commissioned military officers within the Canadian Armed Forces.

D. Counsel for Military Judges and Counsel for the Government

Counsel for the Military Judges were Me Michel Jolin, Me Sean Griffin, Me Catherine Martel and Me Jean-Philippe Dionne. Counsel for the Government were Me Jean-Robert Noiseux and Me Sara Gauthier. They all most ably represented their respective clients and advocated for their positions.

E. Written Submissions Received by the Committee and Expert Testimony

The Committee received voluminous well-drafted written argument and supporting documentation from both the Government and military judges. The submissions for the Government and their dates of receipt by the Committee were:

a) 2 December 2022, the “Memorandum”;

b) 30 March 2023, the “CV of Yann Bernard”;

c) 17 February 2023, the “Mémoire du Gouvernement”;

d) 17 February 2023, the “Cahier de Documents” (Volumes 1 through 4);

e) 3 March 2023, the “Réplique”;

f) 3 March 2023, the “Cahier de Documents” (Volume 5);

g) 29 March 2023, the “Cahier d’autorités”; and

h) 29 March 2023, the “Cahier de Documents” (Volume 6).

The submissions for the military judges and their dates of receipt were:

a) 13 January 2023, the “Lettre de M. André Sauvé”;

b) 17 February 2023, the “Mémoire des juges militaries”;

c) 17 February 2023, the “Cahier d’autorités”;

d) 17 February 2023, the “Cahier d’annexes”;

e) 3 March 2023, the “Réplique:;

f) 3 March 2023, the “Cahier d’annexes supplémentaires”; and

g) 29 May 2023, the “Documents additionels.”

Mr. Yann Bernard was presented as an expert witness for the Government, who the Committee duly recognized as a qualified expert in his field. He is the Director of the Office of the Chief Actuary. He presented an analysis of the compensation of the Military Judges of Canada as of 2 December 2022. In his analysis, Mr. Bernard explained the results of his calculation on determining the value of compensation for the military judges compared to the other federally appointed judges of Canada.

Mr. André Sauvé is a consulting actuary and was presented as the expert for the military judges. He was likewise duly recognized by the Committee as an expert. He presented and explained his 13 January 2023 report, in which he sought to rebut several of Mr. Bernard’s findings, such as the rank available after Lieutenant-Colonel. He also calculated the value of military judges’ pension benefits and proposed some economic and demographic hypotheses. The experts especially diverged over whether total remuneration of salary and pension values resulted in military judges or other federally appointed judges being more highly remunerated.

F. In-Person Hearing

An oral in-person hearing took place in Gatineau, Quebec on the 14th and 15th of June, 2023, which proceeded in three parts:

1) the presentations of the expert witnesses Mr. Sauvé and Mr. Bernard by way of sworn *viva voce* testimony before the Committee;

2) the presentation of military judge Pelletier J. before the Committee;

3) oral argument made by counsel for the Government and the military judges.

At the end of the hearing, the Committee indicated that it would take the matter under consideration. This report is the result of the deliberations of the Committee, based upon all of the evidence and argument presented by the parties.

G. Acknowledgment of Contributions and Assistance to the Committee

The Committee wishes to thank Mr. Campbell for his skilled and dedicated assistance.

H. Effectiveness of the Committee Process

The Military Judges noted the long and unexplained delay in appointing the Committee. Their factum presented to this Commission at paras. 100-104 sets out the relevant facts:

> [translation] This Committee should have been set up shortly after 1 September 2019. Yet, it was only on 20 June 2022, after the military judges had sent a draft application for mandamus to the Federal Court, that the members of this Committee were appointed by Order in Council.
>
> The military judges do not understand and furthermore condemn the considerable time the Minister has taken in establishing this Committee, despite the clear and express terms of the NDA and the QR&O regarding the required deadlines.
>
> The legislative intent is for the Compensation Committee to operate on a permanent basis. However, the failure to respect the applicable deadlines and process has left the military judges without a formal process for determining their compensation, thereby undermining the independence of the military judiciary.
>
> That forces the Committee to engage in an essentially retroactive exercise, which affects public confidence in the independence and effectiveness of a process that is required pursuant to constitutional principles and the NDA.
>
> The military judges deplore the fact that this Committee was not set up until almost two years after all the administrative steps and documentation required by the Governor in Council for the appointment of the three Committee members had been completed…

The Committee notes that such delays are not consistent with the constitutional imperative that it be effective and converts our role into recommending remuneration retrospectively rather than prospectively. We urge the Government to appoint future Committees in a timely way so that they

may report their recommendations before the beginning of period to which they relate rather than after that period has passed.

The Government's recent consistent rejections of the MJCC's core recommendations also undermine the effectiveness of the Committee's process as envisaged by the Supreme Court of Canada. While the Government is not bound by the recommendations, consistent refusal to implement independent recommendations saps confidence in the process.

The two most recent Committees recommended parity of remuneration for the military judges with other federally appointed judges. It is instructive to consider their views.

a. 2012 MJCC Report Majority Recommend Remuneration Parity with Other Federally Appointed Judges

The 2012 MJCC Report emphasized the following at pages 12 and 14:

> It is quite stunning to realize that **only four of more than a thousand judges are singled out for much lesser remuneration if one accepts that they are indeed just as qualified as the others and paid from the same sources**.
> ...
>
> judges who would qualify for military appointments and are selected according to a similar process as members of another superior court are paid 31% more than military judges, from the same public purse … We agree that **the rationale of the government does not stand up to scrutiny**. [emphasis added]
> ...

b. 2019 Report Unanimous in Recommending Remuneration Parity with Other Federally Appointed Judges

The 2019 MJCC Report noted at pages 8 and 9:

> If the Government of Canada is fine with equal remuneration for judges working in different provinces or for specialized courts, it is difficult to understand why, as a matter of principle, it would be any different for the military Courts …

The 2019 MJCC Report concluded at pages 10 and 11:

> 1. economic conditions are not the primary factor for the Committee to consider as they are “not an obstacle to setting adequate remuneration; this was admitted by the government.”
>
> 2. financial security in preserving judicial independence should not simply aspire to the absolute bare minimum: “we should not be satisfied with the minimum requirement and that it is impossible to set adequate remuneration on the basis of this standard alone.”
>
> 3. for attracting outstanding candidates “When one considers appointments to the superior courts … It has already been established that many candidates will earn much more than what they earned previously. There is no need to make a distinction for military judges. Our finding on this criteria is simply to accept that an adequate salary is one that allows for reasonable and stable recruitment.”
>
> 4. “military judges’ salaries should be increased with a view to equating their salaries with those of those of other federally appointed judges … there is nothing to justify paying military judges less when they have equivalent training.”

We note that the Government’s responses to these reports were concerned that the Committees appeared to focus only one benchmark or criterion, namely parity, rather than inquiring into the adequacy of the remuneration having regard to all the statutory factors. In our deliberations, we have taken those concerns to heart and carefully and fully considered all the statutory factors in coming to our conclusions.

c Government’s Consistent Acceptance of JCBC Reports Recommendations

The Government’s treatment of the JCBC recommendations relating to other federally appointed judges stands in sharp contrast to that given by the Government to the previous MJCC reports. The Committee notes that the “Response of the Government of Canada to the Report of the 2021 Judicial Compensation and Benefits Commission” (11 May 2022) accepted 100% of the eight recommendations made by the Commission: “The Government will take steps to ensure the timely implementation the Commission’s recommendations ” This included improvements to judicial allowances such as a 50% increase in the annual “incidental allowance” (from $5,000 to $7,500). There the Commission rejected the Government’s proposal for “a 10 percent limit on salary increases attributable to IAI above the salary payable as of April 1, 2020” notwithstanding an

"unusually large increase at April 1, 2021," while also rejecting "proposals put forward by ... the judiciary (i.e. 2.3 percent increases in salary in the third and fourth years of the Commission's inquiry period, in addition to indexation)."

The Committee notes that the Government likewise accepted 100% of the recommendations of the Rémillard Commission in its "Response of The Government of Canada to the Report of the 2015 Judicial Compensation and Benefits Commission," even finding that "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." The Government's responses to the last two Judicial Benefits and Compensation Commissions thus stand in stark contrast to the Government's response to the last two MJCCs.

The Government noted in its response to the Sixth Judicial Compensation and Benefits Commission (Turcotte Commission) that the Commission is "a manifestation of one of the protections constructed around the constitutional principle of judicial independence, which the Supreme Court of Canada has found to be the lifeblood of constitutionalism in democratic societies and a principle that is fundamental to maintaining public confidence in the administration of justice." This is equally true for the MJCC, which is statutorily governed by precisely the same principles as direct the JCBC.

III. STATUTORY CONSTRUCTION OF GOVERNING LEGISLATION

We must address two points of interpretation in relation to our statutory mandate. The first concerns the meaning of "adequacy" of the remuneration. The English term "adequacy" - the adjective form of the noun "adequate" - in some definitions has the sense of bare minimum, but in others it does not, leading to some ambiguity in Parliament's intentions in using the English term. The *Concise Oxford Dictionary,* 8th ed. (Oxford: Clarendon Press, 1990) at p. 14 defines "adequate" as "sufficient, satisfactory" (often with the implication of being barely so). *Black's Law Dictionary*, 6th ed (St. Paul: West Publishing, 1990) at p. 39 defines "adequate" as "sufficient, commensurate, equally efficient; equal to what is required; suitable to a case or occasion; satisfactory." We find the term "satisfaisant" in French used in the French statutory text of both the *NDA* and the *Judge's Act* has a more precise and broader meaning, with an equivalency in

English of "satisfactory." See *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice); Ontario Judge's 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 paras. 65-67,

R. Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworth, 2002), at pp. 80-81, notes:

> The basic rule governing the interpretation of bilingual legislation is known as the shared or common meaning rule. Where the two versions of bilingual legislation do not say the same thing, the meaning that is shared by both ought to be adopted unless the meaning is for some reason unacceptable ... The law is the abstract rule or provision that the legislature 'intends' to enact. The words in which the law is expressed may or may not be well chosen; they may be well chosen in one language version but not in the other. The court's job is to construct, or reconstruct, the rule relying on the meaning of both language versions ..."

Here, we find the French meaning is more precise than the English meaning, but the English meaning overlaps the French meaning. As such, they can each have a shared meaning of "satisfactory" in the context of compensation for military judges as mandated by the *NDA*, which is quite different than merely the bare minimum.

A statutory comparison of the *NDA*'s provisions in establishing the Committee and the *Judges Act* provisions in establishing the Commission is also useful, as we observe that Parliament's drafting of the *Judges Act* contains the same key English-French version issue at s-s. 26(1) as does the *NDA* at s. 165.34. Thus, what the JCBC has found to be satisfactory for the approximately 1200 other federally appointed judges is highly relevant to this Committee's determination of what will be satisfactory for four federally appointed military judges. It is helpful to apply the golden rule of modern statutory construction as endorsed numerous times by the Supreme Court of Canada, such as in *R. v. Ulybel Enterprises Ltd*., 2001 SCC 56 at paras. 28-19:

> In numerous cases, this Court has endorsed the approach to the construction of statutes set out in the following passage from Driedger's *Construction of Statutes* (2nd ed. 1983), at p. 87:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> This famous passage from Driedger "best encapsulates" our Court's preferred approach to statutory interpretation: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at paras. 21 and 23. Driedger's passage has been cited with approval by our Court on frequent occasions in many different interpretive settings which need not be mentioned here.

Here, the Committee determines that the intention of Parliament in establishing both the JCBC and MJCC was to provide for independent advisory bodies in compliance with Parliament's constitutional obligations on the remuneration that should be provided to the federal judiciary. The object of both the *NDA* and the *Judges Act* in respect of establishing a judiciary was in part to guarantee "judicial independence" as confirmed in s-s. 165.34(2)(b) of the *NDA*, where "outstanding" judges would preside, having "financial security" by way of "adequate" remuneration. We therefore find that the JCBC's findings - and the Government's responses to them - although not binding, are relevant to our work in assessing the adequacy of compensation of military judges, on the basis that Parliament's intention in establishing the scheme of both Acts was the same.

The second interpretative point concerns the third statutory criterion of attracting "outstanding candidates" in s-s. 165.34(2)(c) of the *NDA*. The statutory language in both official languages can be harmonized by giving them a common meaning of "the best" in English. We elaborate on the implications of these statutory construction findings below, in analyzing the application of the evidence to the third criterion.

IV. OVERVIEW OF 2023 PARTIES' POSITIONS

A. The Military Judges

The military judges, as summarized especially at paragraphs 8 and 204 of their factum, took the position that:

- the Government misconceives the roles of the military judges, who are in fact and law judges first who happen to also be military officers, and not the other way around;

- military judges are part of the federal justice system where there is no reason to treat the four of them any different from the other approximately 1200 federally appointed judges;
- parity of remuneration with other federally appointed judges has been recommended since 2012 by the Committee, but consistently ignored by the Government;
- there is no reason to depart from parity for military judges (see judges' brief at paras. 154-166);
- the pension plan of military judges is not relevant to the assessment of remuneration, and even if there is relevance it should not be given the value attributed to it by the Government.

The military judges have long argued, before successive remuneration committees, that their remuneration should be the same as for other federally appointed judges. They argue that their current salary is fifteen percent less. They argue strenuously that this disparity, which has been condemned by the previous committees, impinges on the independence of military judges. They maintain the disparity is not experienced by other federally appointed judges. Those judges are treated differently, from a salary point of view, and that lessens judicial independence.

The military judges argue that to ensure public confidence in the independence of the military judiciary they should be paid a salary commensurate with the other federally appointed judges. They argue that the criteria set out in section 165.34 of the *NDA* would allow for salary parity with other federally appointed judges and that the section does not prohibit "parity."

B. The Government

The Government, as summarized especially at paragraphs 1 to 3 of their factum, took the position that:

- military judges already receive satisfactory treatment;
- adequacy of remuneration should be assessed globally, taking into account particularly the value of the pension plan (paras. 140-159), workload (paras. 122-139), and a comparison with provincially appointed judges' remuneration (paras. 160 and following);
- parity with federally appointed judges is not justified, as they are governed by a different statute, their remuneration recommendations come from a different Commission, and different factors are involved.

The position of the Government is that the current salary structure is adequate. The salaries of military judges are increased each year on April 1st based on the CIAI (Canada Industrial Aggregate Index), as is the case with other federally appointed judges. That provision will bring military judges' salaries to $339,183.00 for the year 2023-2024, which constitutes a 19.4% increase over the four-year period of this review. The Government also relies heavily on the assertion that military judges will benefit from their CAF pensions as military officers, which it is claimed by the government's expert witness will bring the global value of their remuneration package to $545,034.00. The Government argues these figures assure that the criteria for an increase in salary as set out in the legislation (s. 165.34 *NDA*) is fully respected and that no increase to their salary apart from this feature is necessary. The Government argues that military judges receive this salary through the existing process, and therefore there is no need to link their salary to that of other federally appointed judges. The current process is supposedly quite adequate.

The parties take a common position on the issues of CIAI and Chief Justice differential remuneration, but diverge on remuneration and the incidental allowance.

V. ANALYSIS OF THE STATUTORY FACTORS

A. The Statutory Framework for the Committee's Work

For military judges, the determination of remuneration is a process founded in the *NDA*. Section 165.34(2) of the *Act* sets out the criteria which the Committee must consider in determining the adequacy of the remuneration of military judges for the period under review.

Succinctly put, the four factors the Committee must consider are as follows:

- The Prevailing Economic Conditions in Canada;
- The Role of Financial Security;
- The Need to Attract Outstanding Candidates to the Military Judiciary;
- Other objective criteria that the committee considers relevant.

The Committee heard representations from both the Government and the military judges on each of these criteria.

a. The Prevailing Economic Conditions in Canada

i. The position and argument of the Government on economics

The Government argues that any increase in the remuneration of military judges must reflect the current economy and the financial situation of Canadians. The pandemic caused a distortion in the CIAI in 2021 when 2.9 million Canadian workers lost their employment in the spring of 2020. Most who lost their work during the pandemic occupied positions that were subject to lower remuneration rates. At the same time, inflation was projected for 2023 at 4.3% and approximately 2.9% annually until 2027.

The Government argues that throughout this period military judges' salaries benefited from an increase in the CIAI at 6.6%. Therefore, and contrary to most Canadians, the salary of military judges increased considerably during this period. The Government argues, consistent with the *PEI* case, that the reputation of the judiciary would be damaged if the public perception was that judges, including military judges, were not carrying their fair share of the burden of the economic difficulties. The Government points out that consistent with the Turcotte Commission, which set the increase for the other federally appointed judges as a function of the CIAI, military judges received the very same increase as the other federally appointed judges.

The Government argues that during the period from 2020 to 2022, there was a fall in GDP and CPI, as well as a recession and exploding budget deficits. There was also a recovery, with rising inflation and CPI, falling unemployment and high debt producing, at a minimum, uncertainty in the marketplace and in the economy. In these circumstances, the increase in the cost of living was largely offset by the increase (CIAI) in the salaries of military judges. Accordingly, the military judges have been insulated from the economic pressures through the increase in salary provided by the annual increase based on the CIAI.

The Government argues that the uncertainty in the economy, which will be experienced at least until 2027, requires caution in any determination of salary; meaning the existing formula provides a sufficient salary and the formula should be maintained. The Government argues that a salary increase to that of the other federally nominated judges is not warranted, given the present economic circumstances.

ii. The position and argument of the military judges on economics

The military judges maintain that the percentage increases brought about by the CIAI are not an increase in salary but simply a provision to ensure that military judges do not lose the value of their existing salary. They argue that the three and four-year delay in which the Government has addressed the issue of military judicial salaries is a violation of the spirit of Section 164.34 of the *NDA*. They maintain that the Act requires a prospective approach to the issue and is not one to recommend salaries retroactively. They argue that this is a blatant and unjustifiable disregard of the structure put forward in the *NDA*. The military judges point out that this exercise should have begun in September 2019. This inordinate and unacceptable delay risks impinging upon the independence of the military judiciary and is sufficient to negatively impact the confidence of the public in the efficacy of the process to recommend military judicial remuneration. In other words, the Government is not following the relevant legislation, and this disrespect of the governing legislation is therefore an impingement of judicial independence.

The military judges argue that the issue of the strength, or weakness, of the economy was discussed by the Turcotte Commission in its report of 2021. They maintain that the Turcotte Commission concluded that the state of the economy should not constitute a restrictive factor in the establishment of judicial remuneration notwithstanding the economic difficulties presented by COVID-19. They point out that the Commission stressed that temporary budget deficits have the goal to stimulate the economy. They are not structural deficits and that the legislative criteria (Sec.165.34 *NDA*) should not be interpreted as a restriction on what should be considered as a satisfactory remuneration for judges. The Turcotte Commission concluded that the state of the economy could not be a limiting factor in setting the remuneration of federally appointed judges, despite the turmoil caused by the COVID-19 pandemic.

The military judges maintain that the effects of the uncertainty of the Canadian economy are temporary. They point out that during 2019 and 2020, which forms part of this review period, the Government of Canada was indicating publicly that Canada would be the leader in economic activity amongst the G7 group of nations. The four military judges maintain that the Government cannot reasonably suggest that the requested increase in salary to parity with other federal nominated judges would seriously prejudice the state of Canadian public finances. They say that

the Government cannot credibly claim that the implementation of their proposal, for four judges, is financially harmful to the Canadian economy.

The military judges submit that the Turcotte Commission's conclusions are perfectly applicable in this matter. On the one hand, the effects of the pandemic on the Canadian economy are of a temporary nature, and on the other, the Government has presented no evidence of the adoption or implementation of a policy of general application to reduce the deficits generated during the pandemic period.

iii. Analysis of the economic factor

The prevailing economic conditions in Canada appear to have stabilized after the COVID pandemic. The 2019 Budget of the Government of Canada foresaw the strengthening of the Canadian economy through 2019 and estimated that Canada would become the leader of economic growth in 2019 and into 2020 amongst the G7 Group of Nations.

As the military judges have argued that the determination of the salary for the period of the mandate of this committee (2019 to 2023) should have been undertaken by September 2019 and completed shortly thereafter, as is required by the *NDA* and KR&Os (King's Regulations and Orders). Had that determination been completed, as it was supposed to have been, it would have fallen within the time frame set out in 2019 and 2020 precisely when Canada was projected to be a leader in economic growth amongst the world's most developed nations. That economic projection was current through to 2021 because, as was pointed out by the Turcotte Commission, the 2021 Federal Budget, which is a statement reflective of the Canadian economy, was not an austerity budget and did not impose measures to limit discretionary spending of departments and federal agencies.

As was pointed out by the military judges, the Turcotte Commission concluded in their analysis of the state of the Canadian economy in 2021, that the "state of the economy" should not be considered a restrictive factor in the determination of the remuneration of federally appointed

judges notwithstanding the challenges posed by the COVID-19 pandemic. The JCBC concluded at paras. 78-79 (footnotes omitted):

> 1. As argued by the Canadian Bar Association, section 26(1.1) "does not give dominance to any criterion. It suggests that each one must be given due weight and consideration."[49]
> 2. Given that,
>   a. the temporary fiscal deficits were meant to stimulate the economy rather than being structural deficits;
>   b. the Budget 2021 is not an austerity budget. Unlike Budget 2009, it did not "outline measures to manage expenditures, including actions to limit discretionary spending by federal departments and agencies";
>   c. the Government presented no evidence of deficit reduction policies of general application; and
>
>   d. statutory indexing was maintained by the Government following each of the Block and Levitt Commissions despite the prevailing economic conditions;[51]
>
> We are of the view that the first criterion under section 26(1.1) of the *Judges Act* should not inhibit or restrain us from making recommendations we would otherwise consider necessary to ensure the adequacy of judicial compensation.

The same would be true of the evidence presented to the MJCC in 2023. If anything, the economy has been slowly recovering since the pandemic, which was at its height in 2021 for the JCBC Turcotte Committee. Thus, for the MJCC in 2023, the first factor should not inhibit or restrain the MJCC from making recommendations we would otherwise consider necessary to ensure the adequacy of military judicial compensation. Finally, the salary increase requested by the military judges, which is parity with other federally appointed judges, cannot be credibly or reasonably said to compromise in any realistic manner Canadian public finances.

b. The Role of Financial Security

i. The position and argument of the Government on financial security

The Government accepts that financial security is an essential condition of judicial independence and is designed to ensure that judges do not succumb to interference in their decision-making process through the exercise of financial manipulation. The Government agrees with the *PEI* case

which states that public confidence in the independence of the judiciary requires salaries that ensure that judges do not become vulnerable to pressures brought about by financial manipulation. The Government agrees military judicial salaries should be maintained at a level that insulates judges from such pressures.

The Government argues that while the current salary is eighty-five percent of that paid to other federally nominated judges, the value of the pension adds another $219,835 to the annual value of the salary providing an overall value of $545,034. The Government asserts that the current value of the salary and pension of military judges is such that a reasonable well-informed person would conclude that the salary and benefits of military judges is far superior to that which would make them susceptible to bias through economic manipulation. We note that the military judges have advanced their own expert evidence which disputes the Government's pension numbers, which are based on several assumptions.

ii. The Position and Argument of the Military Judges on Financial Security

A military judge is both a federally appointed judge and an officer of the Canadian Armed Forces. The *Report of the Third Independent Review Authority to the Minister of National Defence Pursuant to subsection 273.601(1) of the* National Defence Act, *RSC 1985, c N-5* (30 April 2022) authored by the Honourable Morris J. Fish indicated that this fact could erode confidence in the independence of military judges because of the public perception of their inclusion as an officer in the CAF and their proximity to both the decision-making process inherent in the chain of command and to the Judge Advocate General's (JAG) Branch which provides prosecution and defence services to members of the CAF. The military judges argue that one factor in dispelling this perception is to equate the remuneration of military judges to that of other federally appointed judges. In other words, treat military judges equally to superior court judges.

The military judges also argue that the systematic refusal of the Government to follow the salary recommendations of "parity" found in the decisions of this Committee of 2008, 2012 and 2019 is ministerial confirmation that military judges are not equal in stature to other federally appointed judges. This, they argue, amounts to a statement from the Government that federally appointed military judges do not have the same judicial standing, status, and independence of other federally

appointed judges. They argue that members of the CAF and potentially civilians who appear before them would have the perception military judges are judges of a lesser stature. They stress that the problem of financial security and independence, taken together, is exacerbated by the refusal of the Government to accept the principal recommendations of the Military Judges Compensation Committees of 2008, 2012, 2019 with respect to remuneration.

The military judges say that the disparity between the salaries of military judges and other federally appointed judges undermines the independence of military judges. The remuneration of current military judges is fifteen percent lower than that of other federally appointed judges with no explanation given by the Government to justify the existence of this disparity. The military judges argue that they are fulfilling the same responsibilities, following the same training, attending the same conferences and workshops as their federally appointed counterparts. And yet, amongst approximately 1200 federally appointed, four military judges have been singled out to receive a lesser remuneration than their federally appointed colleagues. Finally, the military judges argue that the Committee should recommend, consistent with the committees that preceded it, that "parity" in the financial treatment of military judges as other federally appointed judges is required.

iii. Analysis of the Financial Security Factor

The Government and the military judges appear to agree on one aspect – that the current salary should not make military judges susceptible to bias through economic manipulation. The military judges stress that the eighty-five percent remuneration of other federally appointed judges is a minimum to ensure the independence of the military judiciary. But their argument goes further. Within the context of a federally appointed judiciary, no one has explained to them, or others, why military judges should be treated differently than other appointees in the federally appointed judiciary. Currently, that difference is approximately fifteen percent.

The Government asserts at para. 81 of its factum that: [translation] "The current salary … is far above the minimum level required to protect the military judiciary from political interference through economic manipulation." However, this Committee believes that the three criteria statutorily mandated by Parliament must be considered in their totality, and not in isolation from each other, or from the overall mandate of the Committee.

The Government appears to be advocating for a "bare minimum" interpretation of s. 165.34 of the *NDA*. For the reasons noted above, we have come to the conclusion that application of proper principles of statutory interpretation lead to the conclusion that Parliament in creating s. 165.34 of the *NDA* was not tasking the Committee with a bare minimum model, but rather with determining what satisfactory remuneration would be. We determine that satisfactory financial security would be parity with the remuneration of other federally appointed judges.

We agree with the submission of the military judges at paras. 117 of their factum: [translation] "Therefore, in order to meet the constitutional standard, the Committee's recommendations take on additional importance. These recommendations must be expressed in such a way as to foster the perception that military judges enjoy full judicial independence despite the fact that they belong to the CAF."

"Judicial independence" as articulated by Parliament in s. 165.34(1)(2) *NDA* has both an objective and subjective component to it. The judiciary must not only remain independent but be perceived to be independent. The salary differential between military judges and other federally appointed judges promotes a perception of difference to the disadvantage of the perception of the independence and impartiality of the military judges. We believe that public perception of independence is especially important within a hierarchical organization like the CAF, where clearly military judges remain integral parts of the CAF, unlike other federally appointed judges.

c. The Need to Attract Outstanding Candidates to the Military Judiciary

i. The position and argument of the Government on outstanding candidates

The Government states that the current remuneration of military judges does not deter the recruitment of the best candidates for appointment to the military judiciary. Since 2005, for each of the five appointments between 7 and 10 candidates were classified as either "recommended" or "highly recommended" for appointments to the military judiciary. The Government maintains that these figures are certainly comparable or superior to those of federally appointed judges working in the civilian system. The Government maintains that the results of the processes for appointing military judges have achieved success overall.

By comparative analysis, the salary of a military judge is certainly attractive to CAF members who are regular force or reserve lawyers working in the military justice system. The comparison of military judge salaries with JAG officer salaries displays an attractive advantage to pursuing an appointment as a military judge.

Comparing the available information, the Government argues there is nothing to suggest that the remuneration of a military judge is dissuasive for applications from reserve force lawyers. The Government points out that in 2018 there were candidates from the reserve force who applied for military judicial positions. The Government indicates thirty percent of officers who applied for military judicial positions were reservists and seventy percent were members of the regular force – a proportion which has remained stable across the years. The Government maintains that while there could be other factors which may dissuade reservists from applying to be a military judge, salary would not be one of them.

ii. The position and argument of the military judges on outstanding candidates

The military judges argue that the Government has adopted an unjustifiably restrictive view of the pool of candidates for the military judiciary. The military judges stress that it is essential the best possible candidates be attracted to service in the federally appointed military judiciary. They state that remuneration is a major factor in promoting this attractiveness. They maintain the converse is also very true: low remuneration must not become an obstacle to the attraction of the best candidates. The salary must not be sufficiently low as to dissuade potential candidates from applying for a federal appointment as a military judge. This must be true for military lawyers working in the JAG Branch, as well as other officers in the regular force who may be lawyers not practicing military law as their daily responsibility, and finally for members of the reserve force who practice law in their civilian occupation. The military judges say this salary must be such that members of the CAF are attracted to the call for service as a military judge. The salary must be attractive to a broad spectrum of potential candidates including satisfying the requirements for diversity and inclusion.

The military judges say that given the salary disparity between other federally appointed judges and military judges, the best candidates are more attracted to a federal appointment in the civil judicial system than service in the military justice system. They point out that any qualified lawyer of the CAF, regular or reserve, is eligible to be a federally appointed judge in the civilian justice system. As an example, the military judges maintain that CAF reservists who practice law as their civilian occupation would be far more attracted to a superior court appointment rather than a military judicial appointment. This preference could be largely due to the discrepancy in remuneration.

The military judges argue that salary "parity" with federally appointed judges in the civil system would negate that disadvantage, thereby ensuring that for all military judicial appointments the very best candidates from the Canadian Armed Forces, and the private sector, would be assured. It might also have the added benefit of having a non-member of the Canadian Armed Forces who is a specialist in military law make an application for a military judicial position.

iii. Analysis of the outstanding candidates factor

The Government, as noted, argues that there are plenty of qualified candidates for the posts of military judges and it follows that remuneration must already be adequate: [translation] "The current remuneration of military judges has no deterrent effect on the recruitment of the best candidates for the military judiciary" (factum para. 86). But as we explained above, our statutory interpretation is that Parliament intended in drafting s. 165.34 to attract "the best" candidates, not just well- qualified candidates. The "best" means that the top candidates will not be diverted to higher-paying judicial positions elsewhere. With the current salary differential in place between military judges and all other federally appointed judges, the best candidates are likely to seek appointment to other parts of the federal judiciary.

We conclude that this criterion favours remuneration parity with other federally appointed judges.

d. Other Relevant Factors

Under s. 165.34(2)(d), the Committee "shall consider … any other objective criteria that the committee considers relevant" to its mandate to inquire into "the adequacy of the remuneration of

military judges." The military judges submitted that we ought to consider the remuneration of other federally appointed judges under the heading of other objective criteria. As part of the comparison with federally appointed judges, the Government invites us to consider the pension scheme for the military judges as compared with the annuity for other federally appointed judges. The Government also invites us to consider the increases in remuneration of others in the federal public service, the role of the military judges and their workload.

i. Pension scheme comparisons

There was disagreement between the parties over whether the Committee has the authority to consider pension/annuity provisions in its inquiry into the remuneration of military judges. We find that we do have authority to examine the adequacy of "remuneration" and should not be blind to the reality of the totality of that remuneration in making our recommendation as to its adequacy. However we do not have authority to make recommendations dealing with the pension scheme.

The Committee has considered the Government's argument that including their pensions, the remuneration of military judges is in fact more than that of other federally appointed judges. In our view, the evidence does not bear this out.

The Government has insisted during the hearings of the Committee that the salaries of military judges are $545,034 when their pensions are accounted for, according to the evidence presented by their actuary who claims they receive an additional 67.6% of their salary by way of pension benefits. It is also argued by the Government that military judge pensions have a greater value than other federal judges because they retire 14 to 16 years earlier than other judges, and that provincial judges only receive $287,136 per year and Superior Court Associate Judges $297,700 by way of annual salary.

The Committee was presented with dueling expert evidence from the military judges and the Government concerning pension comparisons. By comparison, there was no debate over what the actual salaries of military judges and other federally appointed judges are. We do not believe it necessary to choose a winner in the war of experts over pension valuations. That military judges may retire with greater pensions than other federally appointed judges may simply be a function of most military judges having devoted themselves to a career life of public service prior to being

appointed to the judiciary, rather than federal judges where a significant proportion of other federally appointed judges came from the private sector where if in private practice, they may have had not been benefitting from any pension regime, and thus be starting their pension contributions at a much later age than military judges did.

However, this ignores the fact that other federally appointed judges may have been earning much higher salaries in the private sector prior to being appointed a judge, and some might be taking pay cuts upon appointment to the bench, which would help offset their fewer pensionable years, particularly if they were setting aside significant portions of their incomes as investments for retirement. There are too many variables in pension values for there to be apt comparisons between the pension values of military judges and other federally appointed judges.

It is not disputed that both military judges and other federally appointed judges benefit from significant indexed retirement schemes. Military judge pension amounts payable upon retirement could be greater than other federally appointed judges if they had contributed longer to pension schemes, but then again, they might not be. Military judges might also retire at much younger ages than other federally appointed judges. A variety of life factors can affect pension values including taking early retirement for reasons of health.

The calculations of both experts involved several assumptions to advance the arguments that either military judges including pensions were already paid more or less than other federally appointed judges. Pension values are not an obligatory factor we must consider according to our mandate from Parliament. We do not find the comparison of the pension schemes useful for several reasons:

- the retirement regimes are completely different (counting of years of service, retirement ages, accumulation of benefits);
- the value of the benefit swings wildly depending on the assumptions used in the calculations;
- some of the pension value is based on subjective factors, such as choice of retirement date or the choice to elect supernumerary status.

Thus, while we concluded that the comparative value of pension schemes is a relevant factor, the evidence presented before us does not materially assist in applying this factor in investigating the adequacy of the military judges' remuneration.

ii. Comparisons with other federally appointed judges

The Government asserts at paras. 121 of its factum: [translation] "Tying the salaries of military judges to those of federally appointed judges or provincial court judges would run counter to the mandate and requirements of the NDA." The sole authority cited for that assertion is the Committee's 2008 Report at p. 15. However, when one examines the wording the 2008 Report used, it does not support the Government's submission:

> The parties have both agreed that the previous Committees' determination that the salary of military judges should not be tied directly to that of the average of provincial court judges was not an appropriate approach to or method for the determination of adequate compensation of military judges. This Committee agrees. Among other problems, this would constitute an abdication of the responsibility of this Committee to make its own determination, by linking the outcome to the conclusions of the various other judicial compensation committees in Canada. This would also entail a degree of circularity. It is up to each judicial compensation committee to make its own assessment, rather than to predicate its conclusion on those of others. Furthermore, the salary of military judges cannot be determined in reference to any one single comparator.

Thus, the Committee was talking about avoiding abdicating its statutory responsibilities in favour of other committees, not that the remuneration of other federally appointed judges was irrelevant. As the 2008 Committee said, and we agree one and a half decades later, it falls to each Committee to come to its own conclusions, and those conclusions must be based on the evidence and consideration of all statutory factors. From the evidence presented before us, we conclude that the remuneration of military judges is less advantageous than that of other federally appointed judges. This may give rise to the impression that military judges are "second-class" judges. As we have noted above, we do not consider parity with other federally appointed judges to be a "factor" under s-s. 165.34(2)(d) of the *NDA*, rather, it is a conclusion under s-s. 165.34(1) of the *NDA*.

iii. Comparisons with provincial court judges and federally appointed associate judges

We do not believe that the remuneration of federally appointed Associate Judges is a useful comparison for determining the adequacy of the remuneration of military judges. This comparison, if anything, suggests that military judges should be compared with judicial officers who, like the Associate Judges, are not judges but rather have more limited jurisdiction and authority than judges. That would mean classing military judges effectively as judicial officers who are not full-fledged judges, which is neither legally nor factually correct. Similarly, we find the comparison of provincial court judge remuneration throughout Canada to be of limited value, given the differing economic situations of the various jurisdictions.

If one is to take provincial court judges' salaries presiding over more than 38% of Canada's population in the province of Ontario, Schedule A - Order in Council 1273/2018, "Salaries for Judges of the Ontario Court of Justice," they are already tied to 95.27% of federal Superior Court judge's salaries:

> In respect of service from April 1, 2018 to March 31, 2022, the annual salary of a provincial judge set out in subsection 1(3), following the adjustment in Section 3, shall also be increased to align with a percentage of the salary rate of judges of the Ontario Superior Court of Justice set out in Part I of the Judges Act (Canada), R.S.C., 1985, c. J-1, ("Superior Court Judge salary rate") as follows:
>
> > ...
> > From April 1, 2021 to March 31, 2022, to equal 95.27% of the Superior Court Judge salary rate for that period.

By comparison, military judges' salaries rest at 85% of federal judges' salaries, over 10 percent below provincial court judge salaries in Canada's largest province. We particularly caution against comparing the remuneration of civil servants to that of judges. While it is true that both are paid with tax dollars, judges occupy constitutionally vital positions in Canadian society which places them differently than civil servants. As the Supreme Court of Canada said in *British Columbia (Attorney General) v. Provincial Court Judge's Association of British Columbia*, 2020 SCC 20 at para. 85: "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."

We do not give workload significant weight as an additional factor. Workload varies tremendously among other federally appointed judges. We do not find days of sitting a useful point of comparison. For example, the Supreme Court of Canada sat for 35 days in 2020 and issued 45 decisions (Supreme Court of Canada Year in Review 2020, online: https://www.scc-csc.ca/review-revue/2020/index-eng.aspx).

VI. THE INCIDENTAL ALLOWANCE

The military judges' position at para. 203 of their factum is that considering that military judges receive certain reimbursements from the budget allocated to the Office of the Chief Military Judge, it is appropriate to grant them a lesser incidental allowance in the amount of $3,000 as compared to the $7,500 incidental allowance granted to other federally appointed judges. Whereas the Government is of the view at para. 148 of their brief that it is not necessary, nor justified, to change entirely the manner in which the operating expenses of military judges are reimbursed. Just as the Chief Military Judge may refuse to reimburse military judges for certain costs, the Government asserts that other federally appointed judges may be denied certain costs under the line directors.

This Committee finds that currently all incidental funds payable to the military judges are under the control of the Department of National Defence chain of command, whereas the military judges in order to preserve their independence require an independent guaranteed source for an incidental allowance. Therefore, this Committee agrees that fixing an annual incidental allowance of $3,000 for the military judges would be most appropriate.

VII. CONCLUSIONS AND RECOMMENDATIONS

It is the Committee's conclusion that only parity of remuneration between military judges and other federally appointed judges will comply with Parliament's direction to us to determine what adequate remuneration for military judges would be. The conclusions of this sixth Committee are based in constitutional imperatives reflected through proper statutory construction which reflect Parliament's intent in enacting s. 165.34 of the *NDA*. This Committee's conclusions are not based on a "single factor." Indeed, it is a global consideration of all the factors mandated by Parliament in s-s. 165.34(2) of the *NDA* that leads the Committee to its conclusions.

To sum up, parity of remuneration with other federally appointed judges is not just a "factor" under s-s. 165.3(2)(d), rather it is a product of the Committee's careful analysis under s-s. 165.34(2) which takes into account all factors to be considered pursuant to s-s. 165.34(2). There is nothing philosophical about our conclusions, we considered the evidence and arguments before us, applied the test established for us by Parliament, and arrived at a conclusion. This is not an exercise of attempting to compare apples to oranges, to somehow find a judicial position outside the military that most closely fits the duties of military judges, and then seize upon that remuneration as what the Committee should recommend, rather the Committee must consider all evidence, arguments and statutory direction in their totality in coming to conclusions.

TAB 4

COURTS ADMINISTRATION SERVICE

ANNUAL REPORT 2020-21

Courts Administration Service 2020 21 Annual Report
Catalogue No. JU16E-PDF
ISSN 1926-4771
This document is available on the Courts Administration Service website at:
https://www.cas-satj.gc.ca/en/publications/ar.shtml

TABLE OF CONTENTS

MESSAGE FROM THE CHIEF ADMINISTRATOR	4
HIGHLIGHTS OF THE PAST YEAR	6
ABOUT US	9
THE COURTS WE SERVE	14
THE YEAR IN REVIEW 2020–21	20
LOOKING AHEAD	28
FINANCIAL STATEMENT HIGHLIGHTS	31
APPENDIX I – ACRONYMS	36
APPENDIX II – GLOSSARY	37
CONTACT US	39

MESSAGE FROM THE CHIEF ADMINISTRATOR

DARLENE CARREAU

> *"Judicial administration has been indelibly marked by the pandemic and there is a tremendous opportunity for us to significantly and thoughtfully transform our services to the Courts and Canadians."*

It is my pleasure to present the Courts Administration Service 2020–2021 Annual Report. The report highlights the achievements of the Courts Administration Service (CAS) over the past fiscal year providing judicial, registry and administrative services to the Federal Court of Appeal (FCA), Federal Court (FC), Court Martial Appeal Court of Canada (CMAC) and Tax Court of Canada (TCC) collectively the "Courts"- in support of the delivery of justice to all Canadians.

The past year presented great challenges to court operations and court administrations worldwide. When I began my mandate in December 2020, the country was in the midst of the second wave of the COVID-19 pandemic, with the Courts continuously having to adapt to new realities. I am immensely proud of CAS and all its employees who delivered timely, innovative and effective services, both virtually and in-person throughout the pandemic, while at the same time turning these challenges into unique opportunities for improved service delivery.

Our work not only made certain the Courts remained open during the pandemic, but also positively contributed to Canada's justice system by ensuring continued access to justice for all Canadians. We implemented robust, multi-layered, health and safety measures in all our court facilities and courtrooms across Canada to safely support in-person appearances, and delivered digital solutions for the conduct of virtual and hybrid hearings. Providing uninterrupted access to justice throughout the pandemic is a testament to the exemplary dedication, resilience, and agility of our highly skilled and talented employees.

In responding to the pandemic, CAS staff rethought how we deliver our services, perform our work, and serve the Courts and Canadians. During the year, the move to virtual operations accelerated the implementation of information technology infrastructure and systems crucial for digital courts, as well as the electronic management of court business. We expanded our e-court capacity, enhanced the e-filing capabilities of the Courts and accelerated the digitization of Court documents. We also advanced our multi-year project to implement a new digital Courts and Registry Management System, built two new fully digitally equipped courtrooms and advanced plans for the construction of a modern, equipped and accessible federal courthouse in Montréal. I am confident that lessons learned will help us seize future opportunities to further modernize and improve access to justice in the future.

It is a very exciting time to be working with the Courts. Looking to the future, we will build on the innovations we implemented in response to the pandemic as we move forward with sustainable solutions that address some of the longstanding challenges in the justice system. We will continue to improve the quality and timeliness of our services, serve the Courts with excellence and support the delivery of justice for all Canadians.

I am grateful for the close collaboration of the Chief Justices, the Associate Chief Justices, and all members of the Courts, whose partnership is instrumental to our continued success.

Darlene H. Carreau LL.B.
Chief Administrator

HIGHLIGHTS OF THE PAST YEAR

HIGHLIGHTS OF THE PAST YEAR

- PANDEMIC MANAGEMENT

Over the course of last year, we provided innovative ways of delivering justice remotely and online as well as ensuring safe access to our court facilities and courtrooms for in-person appearances.

- DIGITAL COURTS AND VIRTUAL HEARINGS

We very successfully transitioned to working virtually and delivering services to the Courts and Canadians through various digital means to enable continued access to justice. The capacity of the Courts to receive the electronic submission of documents was enhanced with the release of a new e-filing portal on the FC website and improvements made to the TCC's e-filing portal. An online payment option for filing fees was also introduced as part of the FC e-filing portal. Two new fully digital e-courtrooms were built in Ottawa this year for the FC and CMAC. These courtrooms are equipped with fully integrated IT infrastructure to support virtual hearings and trials, including video conferencing, digital screens, computer workstations, internet connectivity, and digital audio recording systems.

We accelerated the digitization of court documents and converted active and priority files to digital format to support virtual proceedings. We also expanded our e-trial toolkit and implemented SharePoint allowing litigants and the Courts to share and access digital court files in virtual proceedings. Our multi-year project to implement a new Courts and Registry Management System (CRMS) advanced with preparatory work to define court requirements and activate the procurement process, including a request for information from the industry.

- NATIONAL COURT FACILITIES AND COURTROOMS

We advanced our plans to build a new state-of-the-art federal courthouse in Montréal by 2027. In Ottawa, we built new judicial chambers for the FC, constructed three new courtrooms for the FC and CMAC, and acquired and set-up additional office space for the TCC. We also improved the security and accessibility at our Calgary court facilities.

- OUR WORKFORCE

CAS's diverse and skilled workforce is the foundation of our success. We are committed to providing employees with the knowledge, tools, and the work environment they need to perform

their jobs effectively and efficiently. Over the past year, we continued our recruitment efforts and invested in the training and well-being of our workforce. We launched a mental health series providing employees with events, training, and services offered monthly to promote mental health and wellbeing at CAS. A new corporate learning management system was introduced, empowering employees to better track training needs based on their career paths and aspirations. A five-year Anti-Racism Strategy was developed and implemented to take action to build a workplace that fosters diversity and inclusion by addressing systemic racism, unconscious biases and other forms of discrimination.

ABOUT US

ABOUT US

CAS was established on July 2, 2003, with the coming into force of the *Courts Administration Service Act*, S.C. 2002, c. 8 (CAS Act). Our role is to support Canada's justice system by providing innovative, timely and efficient judicial, registry, corporate and digital services to the Courts. By delivering these services, CAS enables the Courts to hear and resolve the cases before them fairly, without delay and as efficiently as possible. Our services also facilitate access to justice for all Canadians by enabling litigants and legal counsel to submit disputes and other matters to be heard before the Courts. As described in section 2 of the CAS Act, our mandate is to:

- Facilitate coordination and cooperation among the four Courts for the purpose of ensuring the effective and efficient provision of administrative services;
- Enhance judicial independence by placing administrative services at arm's length from the Government of Canada and by affirming the roles of Chief Justices and judges in the management of the Courts; and
- Enhance accountability for the use of public money in support of court administration while safeguarding the independence of the judiciary.

OUR MISSION

Providing innovative, timely and efficient judicial, registry, corporate and digital services to Courts.

OUR GOAL

We are a national and international model of excellence in judicial administration.

OUR VALUES

Transparency – We aim to provide timely and unfettered access to clear and accurate information.

Respect – We recognize that our employees are entitled to work in a harassment-free environment where everyone can freely express their opinions without fear of recrimination or reprisal.

Innovation – We encourage a work environment that fosters creativity and new ideas to improve our business practices and the quality of our services.

Wellness – We advocate attitudes and activities in the workplace that generate a sense of spirit and belonging, that have a potential to improve overall physical and mental health, and that facilitate, encourage and promote fun and a balanced work and personal life.

Excellence – We strive to be exemplary in everything we do.

OUR PRIORITIES

Four strategic priorities will shape our activities over the next five years.

OUR 2021-26 PLAN

DIGITAL COURTS

Deliver information technology solutions that provide for the effective management of court business, offer self-service to litigants and improve access to justice.

WORKFORCE OF THE FUTURE

Attract, retain and develop a highly skilled, diverse and engaged workforce.

Optimize our work environment and strengthen management excellence.

NATIONAL COURT FACILITIES AND COURTROOMS

Deliver modern, equipped, accessible and secure federal court facilities across Canada.

SERVICE EXCELLENCE

Provide consistent, quality and timely client-centric services.

Modernize our practices, processes and tools, and integrate new business and technological solutions.

AREAS OF ACTIVITY

JUDICIAL SERVICES

We provide legal services and legal administrative support to assist members of the Courts in the discharge of their judicial functions. Our judicial services are delivered by legal counsel, judicial administrators, law clerks, jurilinguists, judicial assistants, library personnel and court attendants, under the direction of the four Chief Justices.

REGISTRY SERVICES

We provide registry services under the direction of the Courts. Our registries process legal documents, provide information to litigants on court procedures, maintain court records, participate in court hearings, support and assist in the enforcement of court orders. Our registry staff also work closely with the offices of the four Chief Justices to ensure that matters are heard and decisions are rendered in a timely manner.

CORPORATE SERVICES

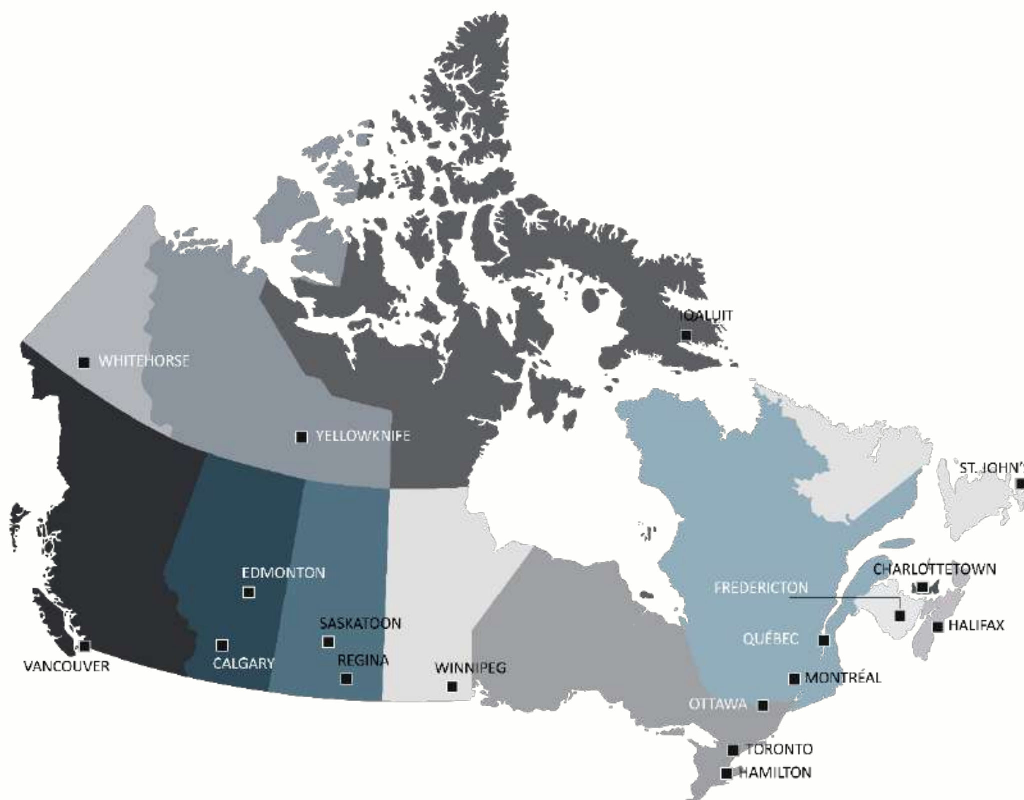
We provide the full range of corporate services to support the Courts and their respective registries in carrying out their activities. Specifically, our corporate services include: Finance, Human Resources, Contracting, Materiel Management, Information Management and Information Technology (IM/IT), Security, Facilities, Strategic Planning, Communications, Internal Audit and Investment and Project Management.

JUDICIAL INDEPENDENCE

Judicial independence is one of the cornerstones of the Canadian judicial system. Under the Constitution, the judiciary is separate from and independent of the executive and legislative branches. Judicial independence enables judges to make decisions free of influence based solely on facts and law. It has three components: security of tenure, financial security and administrative independence. Safeguarding the principle of judicial independence is a key operational consideration when providing services to the Courts, as well as in supporting the roles of the Chief Justices in the management of the Courts.

SERVICE DELIVERY ACROSS CANADA

We have 750 employees providing services to some 95 members of the Courts. The Courts are itinerant, sitting in various locations across the country to reach Canadians wherever they are. We support members of the Courts in preparing files, conducting hearings and writing decisions "anywhere, anytime" and maintain 57 courtrooms across Canada. Judicial and registry services are offered in every province and territory through a network of thirteen permanent offices and agreements with seven provincial and territorial courts. The headquarters of the Courts are located in Ottawa. Our main regional offices are located in Vancouver, Toronto and Montréal, and local offices are located in Calgary, Edmonton, Winnipeg, Hamilton, Québec City, Halifax, Fredericton and St. John's.



GOVERNANCE AND ACCOUNTABILITY

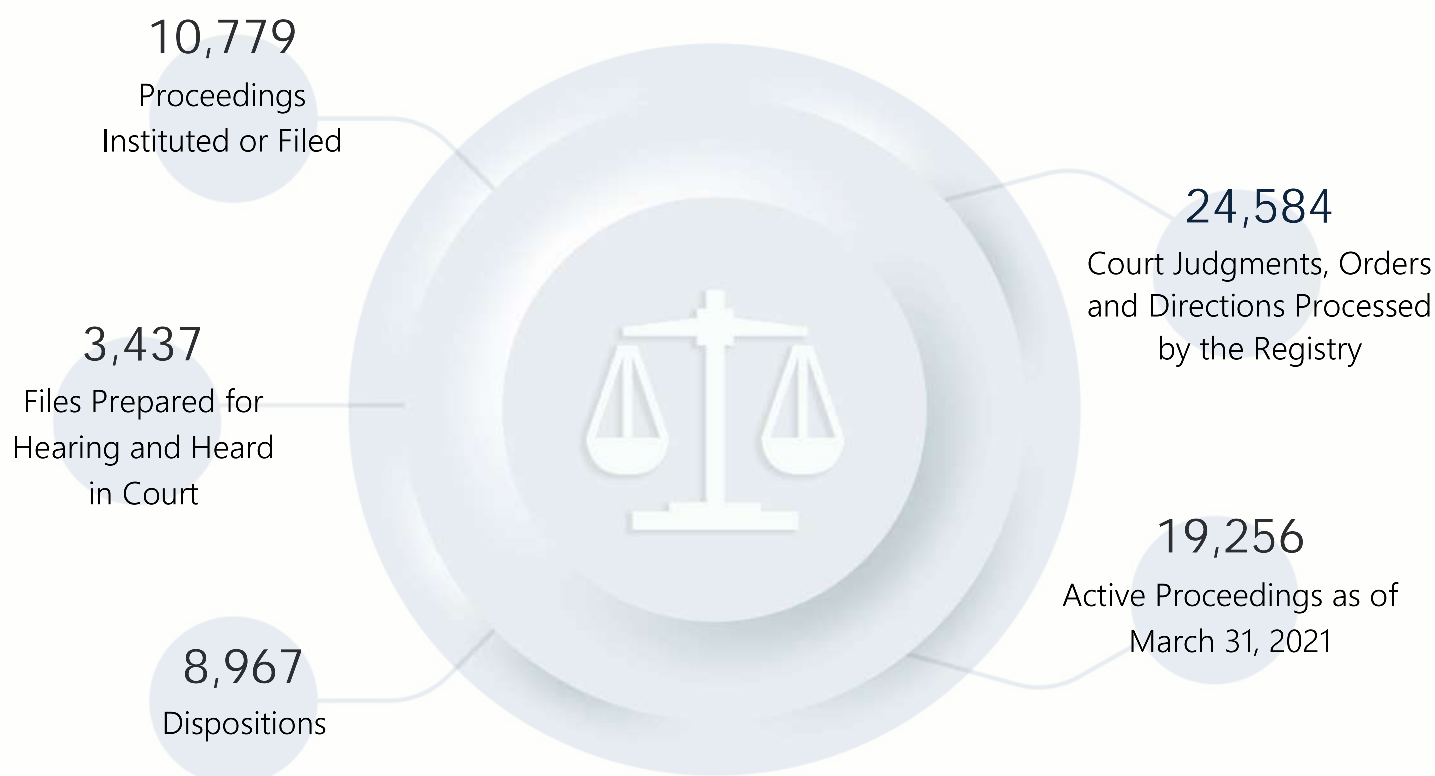
CAS is an agency within the Justice Canada portfolio. As the Chief Executive Officer of the organization and Deputy Head, the Chief Administrator has supervision over and direction of the work of CAS, with all the powers necessary for the overall effective and efficient management and administration of court services. Our accountabilities are maintained through this annual report to Parliament. In addition, committees with members of the Courts ensure our accountabilities are maintained, including quarterly meetings of the Chief Justices Steering Committee.

THE COURTS WE SERVE

THE COURTS WE SERVE

The Courts we serve were established by the Parliament of Canada pursuant to its authority under section 101 of the *Constitution Act, 1867* "for the better administration of the Laws of Canada". In the exercise of their respective roles, the Courts make decisions, interpret and establish precedents, set standards and decide questions of law.

THE COURTS STATISTICS IN 2020–21 AT A GLANCE



FEDERAL COURT OF APPEAL (FCA)

The FCA is a national, bilingual, bijural, superior court of record, which has jurisdiction to hear appeals of judgments and orders, whether final or interlocutory, of the FC and the TCC. It may also review decisions of certain federal tribunals pursuant to section 28 of the *Federal Courts Act*, R.S.C., 1985, c. F-7 and hear appeals under other federal legislation. Further information on the FCA can be found at www.fca-caf.gc.ca.

Table 1 below provides an overview of the workload of the FCA by fiscal year.

TABLE 1: FEDERAL COURT OF APPEAL WORKLOAD

	2020–21	2019–20	2018–19	2017–18	2016–17
Proceedings instituted or filed	342	490	463	422	527
Court judgments, orders and directions processed by the registry	1,350	1,965	1,444	1,395	1,711
Files prepared for hearing and heard in court	163	239	200	244	305
Days in Court	147	191	156	174	217
Recorded entries	16,208	22,632	20,294	18,645	22,107
Total dispositions	357	532	357	428	539
Active proceedings as of March 31					
Appeals from the FC (final judgment)	188	170	168	151	157
Appeals from the FC (interlocutory judgment)	63	76	76	49	53
Appeals from the TCC	103	136	182	126	112
Applications for judicial review	100	80	91	88	97
Others	23	35	23	27	31
Total	477	497	540	441	450
Status as of March 31					
Not perfected	255	276	290	260	247
Perfected	134	89	71	76	61
Consolidated	18	31	43	20	28
Reserved	22	34	49	39	46
Scheduled for hearing	31	32	40	27	51
Stayed	17	35	47	19	17
Total	477	497	540	441	450

Source: Proceedings Management System

FEDERAL COURT (FC)

The FC is a national, bilingual, bijural, superior court of record, which hears and decides legal disputes arising in the federal domain. Its jurisdiction derives primarily from the *Federal Courts Act*, R.S.C., 1985, c. F-7, although over 100 other federal statutes also confer jurisdiction on the Court. It has original, but not exclusive jurisdiction, over proceedings by and against the Crown (including Aboriginal law claims), and proceedings involving admiralty and intellectual property law. It has exclusive jurisdiction to hear certain national security proceedings and applications for judicial review of the decisions of federal commissions, tribunals and boards. Further information on the FC can be found at www.fct-cf.gc.ca.

Table 2 below provides an overview of the workload of the FC by fiscal year.

TABLE 2: FEDERAL COURT WORKLOAD

	2020 21	2019–20	2018–19	2017–18	2016–17
Proceedings instituted or filed	8,100	33,727	33,088	25,961	28,304
• General proceedings and immigration	7,732	9,511	8,866	7,440	7,329
• *Income Tax Act* certificates	18	14,966	15,394	11,580	13,551
• *Excise Tax Act* certificates	98	8,981	8,513	6,620	7,111
• Other instruments and certificates	252	269	315	321	313
Court judgments, orders and directions processed by the registry	16,140	22,851	19,599	17,157	17,826
Files prepared for hearing and heard in court	2,981	4,010	3,602	3,506	3,476
Days in Court	2,347	2,905	2,741	2,463	2,885
Recorded entries	170,612	263,652	245,497	212,787	233,241
Total dispositions – General proceedings and immigration	5,981	8,417	7,370	8,377	7,547
Active proceedings as of March 31					
Aboriginal	252	238	244	233	240
Other appeals provided for by law	71	68	57	64	60
Citizenship	45	33	27	52	351
Admiralty	181	178	181	190	204
Intellectual property	472	516	552	547	520
Immigration and refugee	5,821	4,140	3,264	2,161	3,238
Crown	624	781	689	492	376
Judicial review	777	893	858	927	763
Patented Medicines Regulations	68	63	32	45	20
Total	8,311	6,910	5,904	4,711	5,772
Status as of March 31					
Not perfected	4,327	4,310	3,799	3,266	3,405
Perfected	2,694	653	577	289	236
Consolidated	125	145	118	81	909
Reserved	151	222	214	101	137
Scheduled for hearing	501	501	354	404	453
Stayed	513	1079	842	570	632
Total	8,311	6,910	5,904	4,711	5,772

Source: Proceedings Management System

COURT MARTIAL APPEAL COURT OF CANADA (CMAC)

The CMAC is a national, bilingual, superior court of record, which hears appeals of court martial decisions. Courts martial are military courts established under the *National Defence Act*, R.S.C., 1985, c. N-5, which hear cases under the *Code of Service Discipline*. The judges of the CMAC are appointed by the Governor in Council from the FCA, the FC, and the trial and appellate justices of provincial superior courts. Further information on the CMAC can be found at www.cmac-cacm.ca.

Table 3 below provides an overview of the workload of the CMAC by fiscal year.

TABLE 3: COURT MARTIAL APPEAL COURT OF CANADA WORKLOAD

	2020–21	2019–20	2018–19	2017–18	2016–17
Proceedings instituted or filed	12	7	5	3	4
Court judgments, orders and directions processed by the registry	51	12	7	30	15
Files prepared for hearing and heard in court	20	3	3	6	5
Days in Court	12	3	3	6	5
Recorded entries	361	227	135	218	267
Total dispositions	3	8	4	11	2
Active proceedings as of March 31					
Application for review of a decision	0	0	0	0	0
Notice of appeal	11	3	5	3	14
Application for review of an undertaking	1	0	0	0	0
Notice of motion commencing an appeal	0	0	0	0	0
Total	12	3	5	3	14
Status as of March 31					
Not perfected	2	2	2	1	0
Perfected	1	0	2	1	1
Consolidated	0	0	0	0	0
Reserved	6	0	1	1	12
Scheduled for hearing	2	1	0	0	1
Stayed	1	0	0	0	0
Total	12	3	5	3	14
Status as of March 31					
Complaint against a military judge*	0	0	0	0	0

* Pursuant to subsection 165.31(1) of the *National Defence Act*, the Chief Justice of the CMAC has the power to appoint three judges of his Court to serve as members of the Military Judges Inquiry Committee. This committee has jurisdiction to commence an inquiry in relation to a complaint filed against a military judge of a court martial.

Source: Proceedings Management System

TAX COURT OF CANADA (TCC)

The TCC is a national, bilingual, superior court of record, which has exclusive original jurisdiction to hear appeals and references pursuant to 14 federal statutes. Most of the appeals filed with the Court are on matters arising under: *Income Tax Act*, R.S.C., 1985, c. 1, Part IX of the *Excise Tax Act*, R.S.C., 1985, c. E-1 (GST/HST), Part IV of the *Employment Insurance Act*, S.C. 1996, c. 23, and Part I of the *Canada Pension Plan*, R.S.C., 1985, c. C-8. The constitution of the TCC is established by section 4 of the *Tax Court of Canada Act*, R.S.C., 1985, c. T-2. Further information on the TCC can be found at: www.tcc-cci.gc.ca.

Table 4 below provides an overview of the workload of the TCC by fiscal year.

TABLE 4: TAX COURT OF CANADA WORKLOAD*

	2020–21	2019–20	2018–19	2017–18	2016–17
Proceedings instituted or filed	2,325	4,684	5,211	5,132	6,390
Court judgments, orders and directions processed by the registry	7,043	13,603	13,759	12,968	14,482
Files prepared for hearing and heard in court	273	883	888	774	887
Recorded entries	91,329	177,820	181,006	177,431	183,351
Total dispositions	2,626	4,935	4,968	5,359	5,347
Active Proceedings as of March 31					
Goods and Services Tax / Harmonized Sales Tax (GST/HST)	1,539	1,453	1,390	1,529	1,592
Income Tax	8,576	8,727	8,680	8,431	8,586
Employment Insurance and Canada Pension Plan	301	298	347	378	336
Others	40	31	54	40	42
Total	10,456	10,509	10,471	10,378	10,556
Status as of March 31					
Not perfected	820	918	1,086	1,003	1,271
Perfected	4,719	3,513	2,719	2,387	2,861
Reserved	47	669	143	81	88
Awaiting timetable	107	151	188	193	180
Scheduled for hearing	740	963	1,536	1,818	1,572
Specially managed cases	1,964	2,014	2,571	2,410	2,383
Awaiting another decision	2,059	2,281	2,228	2,486	2,201
Total	10,456	10,509	10,471	10,378	10,556

* Data limitations prevent reporting on TCC Days in Court.
Source: Appeals System Plus

THE YEAR IN REVIEW 2020–21

THE YEAR IN REVIEW 2020–21

WHAT WE ACCOMPLISHED

In 2020–21, four priorities served as the focal point for our efforts—pandemic management, transition to digital courts, the workforce of the future and national court facilities and courtrooms. First and foremost, we continued to innovate to offer quality, timely services that are responsive to the evolving needs of the Courts and those that appear before them, ultimately providing improved access to justice for all Canadians. The following summarizes what we accomplished during the fiscal year.

PANDEMIC MANAGEMENT

The COVID-19 pandemic significantly affected the Courts and CAS's operations during 2020–21. We adapted our service delivery model to best support the Courts given the risks posed by the pandemic and the public health restrictions in effect across the country. Our response to COVID-19 involved implementing a multi-layered health and safety approach, in all our court facilities and courtrooms across Canada utilizing a combination of mitigation strategies concurrently. We safeguarded the health of everyone entering our facilities and courtrooms across Canada while ensuring access to justice and continuing court operations as effectively and as efficiently as possible. Our efforts ensured the Courts could safely conduct in-person hearings and proceedings, as required throughout the pandemic. Many of our employees across the country worked on-site and alongside the members of the Courts to ensure the Courts remained operational and resilient throughout. The dedication of these employees is nothing short of exemplary.

We established measures to mitigate the potential transmission of COVID-19 and protect those working or accessing court services and our court facilities and courtrooms in-person. Across the country, we added protective barriers in courtrooms and in workspaces where physical distancing was not possible, enhanced the cleaning of facilities and courtrooms, and distributed personal

COVID-19 PREVENTATIVE MEASURES ADOPTED BY CAS

- Installation of protective barriers in courtrooms and court facilities
- Signage and floor markers to promote physical distancing
- Mandatory use of blue disposable procedural masks at all times including in the courtroom unless directed otherwise by the presiding judge
- Occupancy limits in operational and public zones
- Indoor air quality monitoring
- Enhanced court screening procedures for COVID-19
- Enhanced cleaning and sanitization of courtrooms and surrounding areas following each hearing

protective equipment to employees and those accessing court or registry services. Our measures reflected the requirements of applicable federal, provincial, and territorial occupational health and safety legislation to minimize the risk of introducing, transmitting and spreading the virus. They also aligned with the expert health advice received from the Public Health Agency of Canada; best practices and guidelines of the Action Committee on Court Operations in Response to Covid-19; as well as advice and guidance from Treasury Board Secretariat and the Office of the Chief Human Resources Officer for the Government of Canada. An independent firm conducted site visits in Ottawa and all regional offices to validate these measures.

Comprehensive guidance on the application of preventative measures and protocols were drafted. A COVID-19 workplace preventative measures guide was distributed to managers and employees. A guide for in-person court operations was also published on the CAS website. This guide outlined the procedures and protocols that apply to all members of the public attending in-person hearings or visiting the registry counter.

Our measures were actively monitored and adjusted continuously in keeping with the evolution of the pandemic and the latest advice from public health agencies across Canada. Modifications were also reflected in the guidance documents to provide managers, employees and the public with the most current and up-to-date guidance and information.

TRANSITION TO DIGITAL COURTS

CAS pivoted to operating virtually with the majority of our employees successfully working and providing services through various digital means. In addition, we supported the Courts to prepare for and conduct hearings, case management, settlement conferences and other matters virtually.

To enable employees to be productive in a digital environment, we supplied them tools required to operate under this new normal. Laptops, mobile phones, related accessories and software were distributed to facilitate remote work. IT infrastructure was increased to accommodate virtual operations. Platforms such as MS Teams and Zoom were implemented to allow employees across the organization to communicate and collaborate virtually.

We undertook several initiatives to deliver IT solutions to the Courts, legal counsel and litigants that facilitated the digital management of court business. The electronic submission of court documents was enhanced with the release of a new e-filing portal on the FC website and improvements made to the TCC's e-filing portal. An online payment option was also introduced as part of the FC e-filing. We also expanded our e-trial toolkit and implemented the use SharePoint to allow litigants and the Courts to share and access digital court files, including during virtual proceedings.

54% of all court documents were filed electronically in 2020–21.

We also expanded the Courts' capacity to accommodate virtual hearings and trials. Two new fully digital e-courtrooms were constructed in Ottawa for the FC and CMAC, and several upgrades were made to facilitate the integration of digital audio equipment in courtrooms. Wi-Fi was installed at each of the four Courts and CAS headquarters in Ottawa. A planned second phase, to permit access for guest and personal devices in court facilities and courtrooms, was delayed due to COVID-19.

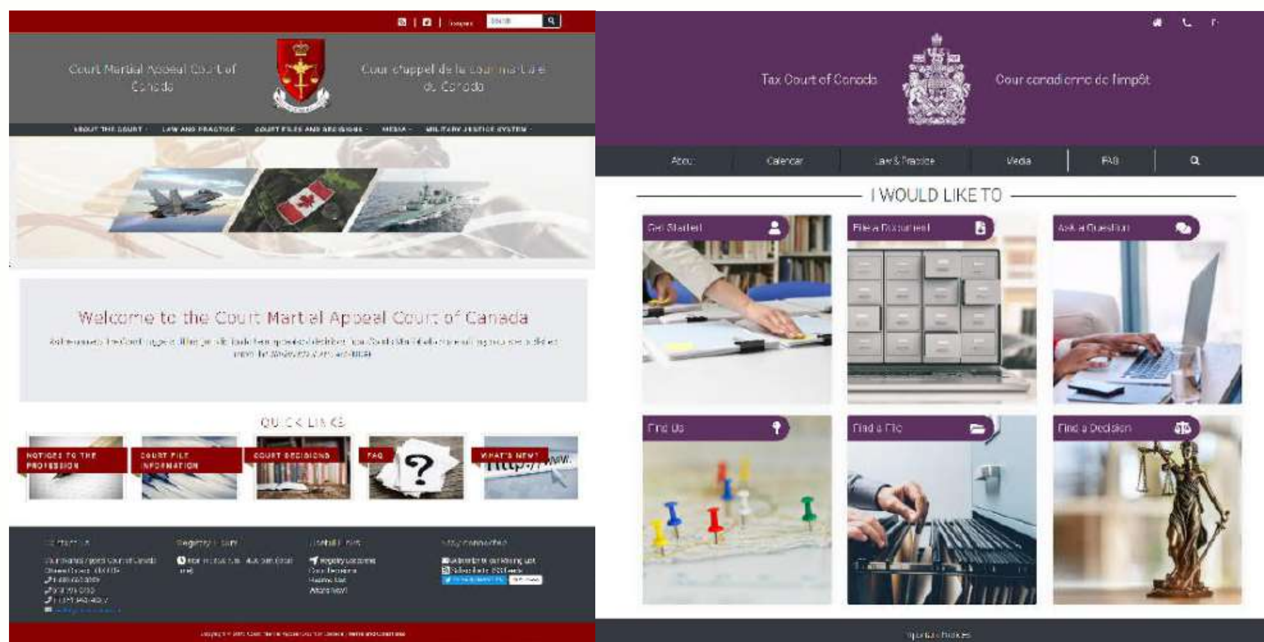
E-courtrooms are equipped with integrated IT infrastructure to support virtual hearings and trials, including video conferencing, digital screens, computer workstations, internet connectivity, and digital audio recording systems.

Our multi-year project to implement a new CRMS saw significant progress during the fiscal year with preparatory work to define system requirements and activate the procurement process. A request for information from industry helped identify potential solutions for the new CRMS and formulate a plan for additional industry engagement to evaluate requirements against products available on the market before finalizing a request for proposal.

The digitization of in-coming court documents was prioritized. During the fiscal year, active and priority files at the TCC were converted to digital format. Digitization of court documents is essential for the more efficient management of the large volume of paper documents received by the Courts and support a smooth transition to digital courts and the implementation of the new CRMS.

We assisted CMAC and the TCC with the redesign and reconfiguration of their public-facing websites with new user-friendly interfaces and updated content. The TCC website included a "chat with us" function where website visitors could live chat with a registry officer to have their questions answered in real time. As well, a second release of the FC's Electronic Judicial Calendar containing additional functionally was completed to assist with managing the scheduling of proceedings and the assignment of members of the Court.

New [CMAC] and [TCC] websites.



WORKFORCE OF THE FUTURE

In 2020–21, we also advanced our priority to build an innovative, agile and high-performing organization to best support the evolving requirements of the Courts and Canadians. Our initiative to modernize the registries' operational training model advanced with the help of a project steering committee established to lead the effort. Furthermore, the training strategy for the FC was also initiated, and CAS worked to document the current learning path and to determine future learning requirements for a new CRMS.

A new learning management system was introduced for CAS. This system allows employees to manage their learner files autonomously. The first phase of the launch enabled employees to track all courses related to mandatory training required for their position. Additional functionality in subsequent updates will allow employees to tailor learning and development to their career paths and aspirations.

The COVID-19 pandemic led to unexpected challenges and opportunities that necessitated a rapid shift in service delivery, business processes and work environment. Since many employees had not worked remotely before the pandemic, CAS offered training and online resources throughout the

year to help employees adapt and succeed. Specialized training and resources were made available to managers to help them effectively support their teams in a work environment affected by the pandemic.

Mental health remained a priority in 2020–21 and gained increased importance with the pandemic. As a result, we delivered several training courses, information sessions, newsletters, and bulletins to employees on improving mental health, dealing with stress in a healthy way, self-care practices, and being resilient. In addition, virtual events were organized to promote mental health, such as online meditation and check-in sessions. Advice and guidance were also provided to managers to help them identify the signs of mental health and engage in an open dialogue with employees.

A Mental Health Calendar was launched on the CAS Intranet providing employees with choices of events, training, and services offered monthly to promote mental health and wellbeing.

Several Canadian and worldwide events in 2020–21 shed light on systemic racism and its effects on racialized and marginalized individuals. Following engagement and dialogue with employees, an anti-racism champion for CAS was appointed, and we developed and implemented FACES: Anti-Racism Strategy 2020-2025. This strategy outlines our commitment to address systemic racism, unconscious biases and other forms of discrimination. In support of the strategy's implementation, a Chief Administrator Anti-Racism Consultation and Action Committee was established. Additionally, we advanced the development of a diversity and inclusion plan to foster a representative workforce at CAS reflective of the Canadian population.

Our Anti-Racism Strategy is entitled FACES as it aims to promote the multitude of diverse "faces" within CAS.

Work was also initiated to develop a multi-year strategic plan for CAS. This plan will be an integral tool in helping to shape our service and business transformation. It will guide our efforts to provide innovative, timely and efficient services that are responsive to the evolving needs of the Courts and those that appear before them, ultimately improving access to justice for all Canadians. During the fiscal year, consultations with the Courts and senior managers from the organization's key business areas were conducted to define the plan's scope, objective, and critical initiatives. The strategic plan will be further refined and finalized over the next fiscal year and, once approved, will be implemented for 2021–26.

NATIONAL COURT FACILITIES AND COURTROOMS

Our facilities projects and plans were challenging during COVID-19 given public health restrictions and global supply chain issues. Additionally, it was necessary to prioritize efforts to ensure our court facilities and courtrooms across Canada remained safe to protect those working or accessing

services in-person. Nevertheless, several projects were completed to ensure national court facilities and courtrooms are modernized, equipped, secure and accessible.

In Ottawa, new judicial chambers for the FC were built, and three new courtrooms, including two e-courtrooms, were constructed for the FC and CMAC. We acquired and established additional office space for the TCC in Ottawa to accommodate registry and judicial employees ensuring appropriate physical distancing for those working on-site. Our Calgary court facilities were renovated to improve the security posture and accessibility in our courtrooms and at the registry counter.

In addition, we worked during the fiscal year to plan the long-term facilities requirements of the Courts to ensure they have the requisite capacity and national presence to offer the level of services required by Canadians across the country. An analysis was also conducted to inform the prioritization of funding for projects identified in our National Accommodations Strategic Plan. We collaborated with Public Services and Procurement Canada to plan the construction a state-of-the-art federal courthouse in Montréal by 2027 and participated in a national working group established to review the future of the judicial precinct area in the National Capital Region.

MANAGING OUR RISKS

As with prior fiscal years, in 2020–21, we continued to assess and mitigate potential risks that may impact the business operations of the Courts and CAS. In particular, special attention was given to five critical areas of risk.

COURTS AND REGISTRY MANAGEMENT SYSTEM (CRMS)

The inefficiency of legacy systems to meet current needs, growing public demands for digital services, susceptibility of system failure, and potential of IT security incidents drove this risk in 2020–21. Mitigation strategies to address this risk were increased as we implemented immediate digital solutions enabling the Courts to conduct business digitally during the pandemic. As well, we progressed with our efforts to implement a new CRMS to provide an integrated, user-centric digital solution for the effective management of court business, self-service to litigants and improved access to justice.

ORGANIZATIONAL TRANSFORMATION

The COVID-19 pandemic led to an unexpected rapid shift in service delivery, business processes and the work environment. We supported employees in adapting to these changes and deployed tools to enable them to function in a digitalized environment (laptops, mobile phones, MS Teams and Zoom); disseminated employee communications and promoting resources on workplace wellness, mental health and resiliency; and supported managers to lead their teams in the new working environment effectively.

ACCESS TO JUSTICE

During the last fiscal year, there were many competing demands on our limited reference-level. Off-cycle funding was secured to cover expenses related to measures implemented to respond to

COVID-19. However, there were other unforeseen, non-discretionary expenses that will continue to cause strain on existing budgets as our operating and business model has changed due to the pandemic.

INFORMATION MANAGEMENT

With a large number of employees working and handling information remotely due to COVID-19, mitigation measures to protect our information of business value were substantially increased. In part, this risk was mitigated through the continued rollout and onboarding of staff to the corporate document management system to allow for better storage, management and access to corporate documents. Long-term options for the digitization of court records were developed, and a pilot project to test proposed digitization processes and collect metrics was implemented. Training on best practices for handling classified information remotely was also provided to employees and members of the Courts.

IT SECURITY

In 2020–21, CAS continued to take action to ensure the security of its IT infrastructure. These included providing enabling infrastructure and tools to support safety, confidentiality, integrity and privacy of information. Several other security projects and activities were also implemented to enhance CAS's IT security posture and mitigate potential IT risks.

PHYSICAL SECURITY

Maintaining the physical security of the organization's infrastructure and personnel is always a priority for CAS. Last fiscal year, we continued to adapt our strategic risk-based approaches to security management, as well as made enhancements to the physical security of facilities where required.

LOOKING AHEAD

LOOKING AHEAD

Judicial administration has been indelibly marked by the pandemic and there is a tremendous opportunity for us to significantly and thoughtfully improve and transform our services to the Courts and Canadians. We are privileged and honoured to work closely with the Courts as we define the advancement of access to and the delivery of justice. CAS has an important opportunity to be a part of this development and ensure that Canadians will benefit from "…. a fully integrated online and physical court service, well-suited to the twenty-first century". [1]

Our continued response to the COVID-19 pandemic will significantly shape efforts in the immediate term. As the country recovers, we will work closely with the Courts to develop plans and strategies for the full resumption of court operations.

We will continue to deliver digital solutions, including implementing a new CRMS to enable the Courts to deliver electronic services and conduct court business digitally. Investments will also be made to expand e-filing, digitizing court documents and equipping additional courtrooms to hold virtual hearings and electronic proceedings.

We will continue to implement our National Accommodation Strategic Plan, delivering on the Courts' requirements for modern and equipped court facilities and courtrooms that ensure a national presence, and the level of service required by Canadians across the country.

Providing consistent, efficient, quality and timely client-centric services will remain our primary focus. We will enhance our culture of quality client service, modernize our procedures and processes and integrate new business and technological solutions to better serve the Courts and Canadians. By investing in the development and well-being of our employees, we will ensure our workforce is engaged, equipped and ready to meet the current and future needs of the Courts and Canadians. We will build the intellectual capital and capacity required to leverage evolving technology and support digital service delivery. In addition, we are committed to management excellence and ensuring sound financial stewardship.

The pandemic brought about momentous changes that have reshaped how we deliver our services, perform our work, and interact with Canadians. These lessons learned over the last year

[1] Susskind, Richard. *Online Courts and the Future of Justice*. Oxford University Press, 2019 at page 64.

provide valuable insights moving forward to help us meet anticipated opportunities for enhanced access to justice created by the new realities of our post-pandemic world.

FINANCIAL STATEMENTS HIGHLIGHTS

The highlights presented in this section are drawn from CAS's financial statements (unaudited) for the fiscal year ended March 31, 2021, and are prepared on an accrual basis. These financial statements have been prepared using Government of Canada accounting policies, which are based on Canadian public sector accounting standards.

Courts Administration Service

Condensed Statement of Operations (unaudited)

As at March 31, 2021 (dollars)

Financial information	2020–21 Planned results	2020–21 Actual results	2019–20 Actual results	Difference (2020–21 Actual results minus 2020–21 Planned results)	Difference (2020–21 Actual results minus 2019–20 Actual results)
Total expenses	123,507,021	132,648,308	125,225,550	9,141,287	7,422,758
Total revenues	3,111	5,334	3,376	2,223	1,958
Net cost of operations before government funding and transfers	123,503,910	132,642,974	125,222,174	9,139,064	7,420,800

Note:

The 2020–21 planned results are those reported in the future-oriented statement of operations included in the 2020–21 Departmental Plan.

Expenses: CAS's total expenses were $132,648,308 in 2020–21 ($125,225,550 in 2019–20). The largest components of the increase of $7,422,758 (5.93%) were mainly increases in salaries and wages, transportation and telecommunication, and materials and supplies. This increase in expenditures was the result of an increase in funding for the following initiatives: $5,500,849 in off-cycle funding received for Restarting the Court System and Supporting Access to Justice (COVID-19) and $4,948,583 in compensation for collective bargaining and payments for Phoenix damages. The increase also includes: $2,310,604 in new

funding for the delivery of justice through the CAS; $800,000 in program integrity funding; $430,776 for CRMS; $1,260,483 in contributions to employee benefit plans. The above increases are partially offset by funding decreases of $943,010 to enhance the integrity of Canada's Borders and Asylum System, $1,112,544 in the operating budget carry-forward, $880,000 to implement a new comprehensive Intellectual Property Strategy, and other adjustments for increases and reductions for the residual balance.

- *Salaries and employee benefits:* Salaries and employee benefits expense was $79,496,213 in 2020–21 ($70,552,919 in 2019–20). The $8,943,294 (12.68%) variance is due to increases of $7,589,076 in salaries and wages, $1,260,484 in employer contributions to employee benefit plans, $175,951 in the provision for severance benefits and $269,685 in employer contribution to the health and dental insurance plans (related party transaction). More than half (59.93%) of CAS's total expenses in 2020–21 consisted of salaries and employee benefits.

- *Operating:* Operating expenses totaled $53,152,095 in 2020–21 ($54,672,631 in 2019–20). The $1,520,536 (2.78%) variance is mainly attributable to decreases of 2,380,385 in professional and special services, $1,163,221 in transportation and telecommunications, $366,453 in repairs and maintenance and $250,985 in machinery and equipment. These decreases were partly offset by increases of $1,362,743 in materials and supplies, $586,738 in the amortization of tangible capital assets, $500,552 in rentals, $87,175 in accommodation, $18,940 in printing and publishing and $13,360 in other miscellaneous operating expenses.

Revenues: The majority of CAS's revenues are earned on behalf of Government. Such revenues are non-respendable, meaning that they cannot be used by CAS, and are deposited directly into the Consolidated Revenue Fund (CRF). CAS earns a small amount of respendable revenue from the sale of Crown assets. CAS's gross revenues were $1,927,736 in 2020–21 ($2,804,651 in 2019–20) and net revenues were $5,334 in 2020–21 ($3,376 in 2019-20).

Courts Administration Service

Condensed Statement of Financial Position (unaudited)

As at March 31, 2021 (dollars)

Financial information	2020–21	2019–20	Difference (2020–21 minus 2019–20)
Total net liabilities	24,540,516	21,967,990	2,572,526
Total net financial assets	17,500,552	15,882,578	1,617,974
Departmental net debt	7,039,964	6,085,412	954,552
Total non-financial assets	27,516,039	21,647,927	5,868,112
Departmental net financial position	20,476,075	15,562,515	4,913,560

Note:

Liabilities: CAS's net liabilities as at March 31, 2021, were $24,540,516 ($21,967,990 as at March 31, 2020). The increase of $2,572,526 (12%) is the result of the following:

- **Accounts payable and accrued liabilities (47.32% of total liabilities):** Increase of $679,904 includes increase of $872,987 in accounts payable to external parties and $871,708 payable to other government departments and agencies. Increase offset by a decrease of $1,065,791 in accrued liabilities related to salaries and wages.
- **Vacation pay and compensatory leave (19.40% of total liabilities):** Increase of $1,395,195 mainly due to $1,405,501 increase in vacation pay.
- **Deposit accounts (24.75% of total liabilities):** Increase of $563,106 in deposit accounts reflects many separate decisions of the Courts. Deposits cannot be projected and the balance in the deposit accounts can vary significantly from year to year.
- **Employee future benefits (8.53% of total liabilities):** Decrease of $65,680 due to an increase in full time employee.

Assets: The composition of financial and non-financial assets is as follows:

Financial assets:

- Due from the Consolidated Revenue Fund (36.15% of gross assets)

Non-financial assets:

- Tangible capital assets (57.75% of gross assets)
- Inventory (2.10% of gross assets)
- Prepaid expenses (2.69% of gross assets)

Net financial assets: This is comprised of financial assets net of accounts receivable held on behalf of Government. Accounts receivable held on behalf of the Government of Canada consist primarily of accounts receivable from other governmental organizations. The increase of $1,617,974 is mainly due to an increase in the amount due from the CRF.

Non-financial assets: The increase of $5,868,112 is mainly due to an increase of $4,699,348 in tangible capital assets related to physical security enhancement projects, facilities renovation design, informatics, $716,568 in prepaid expenses and $452,196 in inventory.

Departmental net debt: This provides a measure of the future authorities required to pay for past transactions and events.

Departmental net financial position: This represents the net resources (financial and non-financial) that will be used to provide future services to the Courts and thereby to benefit Canadians.

FURTHER FINANCIAL INFORMATION

The Financial Statements and Financial Statement Discussion and Analysis are available online at: http://www.cas-satj.gc.ca/en/publications/dpr.shtml.

APPENDIX I – ACRONYMS

CAS	Courts Administration Service
CAS Act	*Courts Administration Service Act*
CMAC	Court Martial Appeal Court of Canada
COVID-19	Novel coronavirus
CRF	Consolidated Revenue Fund
CRMS	Courts and Registry Management System
FC	Federal Court
FCA	Federal Court of Appeal
GST/HST	Goods and Services Tax / Harmonized Sales Tax
IM/IT	Information Management and Information Technology
IT	Information Technology
NASP	National Accommodation Strategic Plan
R.S.C.	Revised Statues of Canada
S.C.	Statues of Canada
TCC	Tax Court of Canada

APPENDIX II – GLOSSARY

Term	Definition
Appeal from Federal Court (Final Judgment)	A proceeding instituted in the Federal Court of Appeal challenging a final judgment of the Federal Court.
Appeal from Federal Court (Interlocutory Judgment)	A proceeding instituted in the Federal Court of Appeal challenging an interlocutory judgment of the Federal Court.
Application for judicial review	A proceeding instituted in the Federal Court of Appeal challenging the decision of a federal board, commission or tribunal under section 28 of the *Federal Courts Act*.
Application for review of a direction	A proceeding instituted in the Court Martial Appeal Court of Canada to review a direction of a military judge (Rule 5(1) a) of the *Court Martial Appeal Court Rules* and section 159.9 of the *National Defence Act*).
Application for review of conditions of an undertaking	A proceeding instituted in the Court Martial Appeal Court of Canada to review the conditions of an undertaking (Rule 5(1) c) of the *Court Martial Appeal Court Rules* and section 248.8 of the *National Defence Act*).
Bijural	Applies to Canada's two systems of law: the common law and the civil law.
Consolidated	When different cases that have the same parties or have certain elements in common are heard together.
Days in Court	Each court sitting day where a registrar attends in person, by videoconference or by teleconference.
Directions	Instructions by the Court, written or oral.
Dispositions	Proceedings concluded by way of judgment, discontinuance or other documents.
Files prepared for hearing and heard in Court	Number of appeals, hearings, judicial reviews, motions and meetings heard by the Court.
Judgments	Decisions of the Court.
Notion of Appeal	A proceeding instituted in the Court Martial Appeal Court of Canada to appeal a decision from a court martial.

Term	Definition
Notice of motion commencing an appeal	A proceeding instituted in the Court Martial Appeal Court of Canada to appeal a decision or an order refusing an application to be released from detention or imprisonment or an order rendered under section 248.81 of the *National Defence Act*.
Orders	Decisions of the Court.
Perfected	When the parties have complied with the rules or orders of the Court, in order for the proceeding to be ready to be scheduled for a hearing.
Proceedings Instituted or Filed	A matter or cause before the Court which includes appeals, actions, applications, applications for leave and for judicial review and where provided for by federal statutes, administrative proceedings such as the ones instituted by the filing of certificates, decisions or orders of federal boards, commissions or other tribunals in the registry of the Courts for the purpose of enforcement.
Prothonotaries	Prothonotaries are appointed under the section 12 of the *Federal Courts Act*. They are full judicial officers and exercise many of the powers and functions of Federal Court judges. Their authority includes mediation, case management, practice motions (including those that may result in a final disposition of the case, regardless of the amount in issue), as well as trials of actions in which up to $100,000 is claimed (see Rules 50, 382, and 383 to 387 of the *Federal Courts Rules*).
Recorded Entries	Entry and identification of documents and events in the Courts and Registry Management System.
Reserved	Decision that is not rendered immediately after a case has been heard or argued.
Scheduled for hearing	Proceedings in which a hearing on the merits has been scheduled.
Specially managed cases	A proceeding that has been assigned to a specific judge.
Stayed	When a case is placed “on hold”. For example, where another related decision is to be made before the case can be continued.

CONTACT US

NATIONAL CAPITAL REGION

Courtrooms and Registry Operations of the Federal Court of Appeal (FCA), the Federal Court (FC) and the Court Martial Appeal Court of Canada (CMAC)

Thomas D'Arcy McGee Building
90 Sparks Street
Ottawa, Ontario
K1A 0H9

Telephone

FCA/CMAC: 613-996-6795
FC: 613-992-4238

Fax

FCA/CMAC: 613-952-7226
FC (Non-Immigration): 613-952-3653
FC (Immigration): 613-947-2141
TTY FCA/FC: 613-995-4640
TYY CMAC: 613-947-0407

Toll free numbers

FCA: 1-800-565-0541
FC: 1-800-663-2096
CMAC: 1-800-665-3329

REGISTRY AND COURTROOMS OF THE TAX COURT OF CANADA

Centennial Towers
200 Kent Street
Ottawa, Ontario
K1A 0M1

Telephone: 613-992-0901
Fax: 613-957-9034
TTY: 613-943-0946
Toll free number: 1-800-927-5499

Information on regional and local offices can be found on CAS's website at: https://www.cas-satj.gc.ca/en/operations/locations.shtml

TAB 5

COURTS ADMINISTRATION SERVICE

ANNUAL REPORT 2022-23

TABLE OF CONTENTS

MESSAGE FROM THE CHIEF ADMINISTRATOR AND CHIEF EXECUTIVE OFFICER 4

PART I: 2022–23 HIGHLIGHTS 8

- DIGITAL COURTS 8
- NATIONAL COURTHOUSES AND COURT FACILITIES 9
- WORKFORCE OF THE FUTURE 10
- SERVICE EXCELLENCE 12

PART II: WHO WE ARE 14

- MANDATE 15
- ORGANIZATIONAL VALUES 16
- POWERS, DUTIES AND FUNCTIONS OF THE CHIEF ADMINISTRATOR AND CHIEF JUSTICES 21

PART III: THE COURTS WE SERVE 22

- FEDERAL COURT OF APPEAL 24
- FEDERAL COURT 25
- COURT MARTIAL APPEAL COURT OF CANADA 26
- TAX COURT OF CANADA 27

PART IV: MANAGEMENT DISCUSSION AND ANALYSIS 28

- OPERATING ENVIRONMENT 29
- FUTURE PLANS 31
- KEY CORPORATE RISKS 35

PART V: FINANCIAL STATEMENT HIGHLIGHTS 36

APPENDIX I – ACRONYMS 41

APPENDIX II – GLOSSARY 42

CONTACT US 44

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DARLENE CARREAU

CHIEF ADMINISTRATOR
AND CHIEF EXECUTIVE OFFICER

> *From coast to coast to coast, we work together to ensure that Canadians have access to, and trust in, a fair, efficient, and effective justice system.*

It is my pleasure to present the 2022–23 Annual Report for the Courts Administration Service (CAS). CAS is a small department within the portfolio of the Minister of Justice that provides registry, judicial and corporate services to our 4 federally-constituted courts: the Federal Court of Appeal (FCA), the Federal Court (FC), the Court Martial Appeal Court (CMAC) and the Tax Court of Canada (TCC), known collectively as the Courts. It is playing a pivotal role in supporting the cost-effective delivery of justice to all Canadians, bolstering public trust in Canadian institutions and the rule of law, while also safeguarding judicial independence.

2023 marks CAS's 20th anniversary. The past 2 decades have ushered in significant changes, both in the expectations of those turning to the Courts and in the range of technological advancements that are available to streamline court operations and improve service delivery.

This report highlights CAS's achievements over the past fiscal year. I am proud to report that we continued to build on the innovative responses that we deployed in the pandemic to sustain and reimagine court administration. In 2022–23, CAS received an historic-level investment of $248M over 5 years to modernize and expand our court facilities across Canada. These important investments will ensure Canadians will have access to modern, equipped, digitally-enabled, accessible and secure court facilities across Canada for many years to come. Furthermore, we continued to prioritize the attraction, development, and retention of a high-performing and diverse workforce, and we implemented measures to further instill a service culture and a client-centric mindset.

In some cases, these achievements are associated with significant challenges from previous years that CAS continues to navigate. CAS was forced to revisit its approach to digital modernization, take stock of important lessons learned and address identified risks. Generally, we needed to establish a better, more resilient foundation to ensure future success. While such efforts are rarely glamorous, I believe that the work we have invested in this past year will pay dividends in the coming years.

CAS is a small organization with an ambitious agenda, operating in a complex environment with limited funding. In an age of constant change—where collectively Canadians and their institutions are navigating new technologies, evolving geopolitics and a challenging economy—CAS will continue to exercise sound financial stewardship while being innovative, agile, and resilient. Several measures are underway and will continue into 2023–24 to address specific funding pressures and work towards a more sustainable funding base. We are cognizant that without concerted efforts to both realize efficiencies and make the case for increased funding, there is a risk that current funding levels could impact our ability to meet the changing needs of the judiciary and Canadians, and ultimately undercut judicial independence and the rule of law. We are urgently seized with this work as a result.

We are commemorating our 20th anniversary by celebrating our achievements in support of our mandate, while also reflecting on the opportunities that lie ahead. More than 10% of our employees have worked at CAS since its creation; this is a testament to their dedication. I am incredibly proud of our workforce, particularly how every employee contributes to our success. From coast to coast to coast, we work together to ensure that Canadians have access to, and trust in, a fair, efficient, and effective justice system.

CAS has benefited immeasurably from the ongoing collaboration and support of the judiciary we serve. I extend my sincere gratitude to them, to my executive team, and to the dedicated employees of CAS who are key to our efforts to preserve and enhance access to justice, rule of law, independence of the courts and the public's trust—fundamental principles of democracy that breathe life into Canada's judicial branch of government.

Darlene H. Carreau, LL.B.
Chief Administrator and Chief Executive Officer

OUR PRIORITIES

DIGITAL COURTS

Deliver information technology solutions that provide for the effective management of court business, offer self-service to litigants and improve access to justice.

WORKFORCE OF THE FUTURE

Attract, retain and develop a highly skilled, diverse and engaged workforce.

Optimize our work environment and strengthen management excellence.

NATIONAL COURTHOUSES AND COURT FACILITIES

Deliver modern, equipped, accessible and secure federal court facilities across Canada.

SERVICE EXCELLENCE

Provide consistent, quality and timely client-centric services.

Modernize our practices, processes and tools, and integrate new business and technological solutions.

PART I: 2022-23 HIGHLIGHTS

CAS provides registry, judicial and corporate services to the Courts. This Annual Report highlights CAS's achievements and initiatives in the 2022–23 fiscal year.

We can look back on 2022–23 as a pivot year, where we exited the pandemic and started to prioritize longer-term strategic planning, identifying and addressing weaknesses in our foundations, and building on lessons learned. It was the first in what will be a series of transitional years, as CAS tackles an ambitious agenda of modernization and resiliency. In so doing, we continued to be guided by our 4 strategic priorities identified in the 2021–22 Annual Report: Digital courts, Workforce of the future, National courthouses and court facilities and Service excellence.

DIGITAL COURTS — *Deliver information technology solutions that provide for the effective management of court business, offer self-service to litigants and improve access to justice.*

In 2019, CAS launched a multi-year project to implement a new Courts and Registry Management System (CRMS) that would replace its legacy systems and enable the electronic management of court business. Almost immediately thereafter, CAS was confronted by the COVID-19 pandemic and was forced to fast track the implementation of a range of measures and technologies to deliver justice remotely and ensure continuity of court operations. While the solutions that were implemented aimed to meet urgent needs, they were seldom the best foundation on which to build a sustainable digital future or realize efficiencies and meet the expectations of the judiciary and Canadians.

In the summer of 2022, CAS closed the current iteration of the CRMS Project Definition phase to absorb lessons learned and determine a more viable way forward; one that would be more user-centric, iterative, and aligned with the Government of Canada's Digital Ambition and requirements of the Policy on Service and Digital. The experience also drove home the importance of aligning the Courts' expectations for digital projects, and of our internal capacity to manage and realize increasingly strategic and indispensable digital projects.

Along with CAS's regular maintenance of legacy systems, we began implementing a foundational reset to expand our internal digital capacity, work with the Courts to better align expectations, and incrementally deliver better digital tools and practices to improve court operations, including:

- **e-stamping** – enabling an electronic mechanism to stamp all court documents thereby further reducing the reliance on paper, including for the TCC's Appeals System Plus case management system
- **e-courtrooms** – upgrading courtrooms so that they are equipped to handle digital hearings; CAS now has 16 e-courtrooms, 6 of which were established in the 2022–23 fiscal year
- **e-filing** – making certain court documents available to the public, increasing the availability of information. Notably, significant work concluded in preparation for the planned launch of the FCA e-filing solution in the summer of 2023
- **Law Clerk Applicant System** – delivered a modern end-to-end system for law student applications for a Law Clerk position with our Courts and streamlining the selection process
- **TCC virtual proceedings** – allowing for the public and the Court to participate in virtual hearings, reducing the workload of the Registry

CAS is investing in, as well as levering, new technologies and emerging trends, not only to improve our services, but also to improve access to justice and meet the expectations of Canadians. Failure to do so would undermine the relevance of the Courts, and ultimately erode trust in the Courts and judicial system. In the coming year, CAS will further investigate emerging technologies, deploy automation to improve court and registry processes, and pilot the potential for artificial intelligence to add to our translation processes and capabilities.

NATIONAL COURTHOUSES AND COURT FACILITIES — *Deliver modern, equipped, accessible and secure federal court facilities across Canada.*

In 2022–23, CAS secured significant investments and set out a multi-year plan, referred to as the National Courts Facilities Modernization Program (NCFMP), to address medium to long-term

requirements for modern, equipped, accessible and secure courtrooms and court facilities across Canada. These investments will help ensure that our facilities continue to meet users' needs and expectations and improve access to justice. Notably, the National Judicial Complex in Montréal will be the first court facility dedicated exclusively to the Courts.

The scope of the NCFMP work is considerable and will be staged over 5 years. In 2022–23, we completed the following:

- conceptual design work for the new National Judicial Complex in Montréal
- enabling work in Toronto, including completing the first draft of the functional program, installing a high-density shelving system, studying vertical transportation, and painting public areas in need of a refresh
- pre-implementation planning for projects in Halifax, Ottawa, Southern Ontario, Winnipeg, Saskatoon and Victoria

Throughout the year, many smaller-scale, though necessary, facilities improvements were completed, including:

- refresh of the Fredericton and Vancouver court facilities
- construction of new judicial chambers in Ottawa

Over the course of the year, the preventative measures put in place in CAS facilities (public, staff working areas and courtrooms) in response to the pandemic were adjusted and ultimately removed to reflect the evolution of public health guidelines.

In 2022–23, CAS continued to equip more courtrooms with modern technology to improve the service experience of hearings through improved access to digital documents in courtrooms and an improved ability to conduct hearings virtually or in a hybrid format. As stated above, 6 courtrooms were upgraded to e-courtrooms: 3 in Toronto, 1 in Ottawa, 1 in Vancouver and 1 in Calgary. CAS also increased the use of service-design practices to ensure that technology investments truly improved the courtroom experience, for both members of the Courts and litigants.

WORKFORCE OF THE FUTURE — *Attract, retain and develop a highly- skilled, diverse and engaged workforce. Optimize our work environment and strengthen management excellence.*

CAS's ability to provide services to the Courts and Canadians is an expression of the strength of its workforce. Much of the work undertaken at CAS requires specialized skills and knowledge, and success necessitates high-achieving employees who are both agile and innovative, as well as diversity across our ranks. Consequently, both employee training and retention have emerged as key challenges to maintaining our high standard of service post-pandemic.

In this context, in 2022–23, CAS undertook initiatives to ensure it had the right people in place with the right skills to meet the Courts' needs. By prioritizing progress in the areas of accessibility, diversity, equity, inclusion, recruitment, wellbeing and mental health, CAS is building a workforce that represents the public we serve, and that has the skills, expertise, experience, and support to meet the evolving needs of the Courts, Canadians and the public service. Highlights for the fiscal year 2022–23 included:

- Streamlining staffing processes to gain efficiencies, for example, establishing collective hiring processes to create perpetual pools, as well as standing inventories for difficult to staff positions.
- Emphasizing both mental health and a psychologically-healthy and safe environment, particularly through the leadership of the Mental Health Champion and specialized training sessions on topics such as self-care, resilience and coping with stress.
- Focusing the efforts of CAS's Diversity, Inclusion and Anti-Racism Committee on establishing gender-neutral washrooms, renewing art installations within CAS facilities, and reviewing internal documentation such as policy instruments, plans, and tools. CAS also approved its Diversity and Inclusion Strategic Plan for 2022–25, which includes actions to eliminate all forms of racism and discrimination, and foster inclusion and a sense of belonging in our workplace. As a result, CAS has made significant strides in diversity, inclusion and equity, which respond to the Clerk of the Privy Council's Call to Action on Anti-Racism, Equity, and Inclusion in the Federal Public Service.
- Launching a change management strategy to build lasting organizational capacity to navigate and adapt to change. Workshops on emotional intelligence and on thriving through transitions were offered to all employees, and advisory services were made available for change initiatives and projects. Ultimately, CAS advanced the transition from a mindset of "how we do things now" to "how we will do things in the future."
- Introducing a new Innovation Champion to identify, celebrate and ultimately further drive innovation within CAS.

Message from CAS's Innovation Champion

Innovation is the lifeblood of CAS. In a context of stringent resourcing, aging information technology infrastructure and, not so long ago, pandemic limitations, our staff finds ways to deliver services that support the administration of justice. As we pursue modernization, we continue to rely on the ingenuity of our employees to realize positive change while maintaining operations at the Courts.

One challenge we face as an organization, however, is that we toil in silos. By default, our innovations are not common knowledge across the organization and the Courts because of our unique structure.

As Innovation Champion, I want the rising tide to float all boats. I want the can-do attitude and triumphs of our employees to blossom into a common culture of innovation.

The first step is to share. We are bringing simple stories of how employees made their work better from one corner of CAS and broadcasting them to the whole organization.

Once collected, these stories will help us ask some deeper questions. What made these successes possible? What got in the way? What can we do to keep it happening?

Making space to conceive, implement and champion innovation is a key to efficient and effective services, staff engagement and retention, and value for money. I look forward to sharing CAS's success stories and fertilizing others.

SERVICE EXCELLENCE — *Provide consistent, quality and timely client-centric services. Modernize our practices, processes and tools and integrate new business and technological solutions.*

CAS's guiding principle remains service excellence. By adopting a service-oriented mindset, applying service design principles, and placing justice system users at the center of what we do, CAS is improving how we deliver high-quality, modern, secure, accessible and reliable services to improve Canadians' access to and experience with the justice system.

In 2022–23, CAS continued to focus on driving a cultural shift towards service excellence. Initiatives for the past fiscal year included:

- Conducting a service review of immigration registry services and identifying opportunities to enhance and reimagine service delivery over the coming years, including development of "journey maps" outlining the end-to-end experience from a user's perspective to identify and eliminate pain points in the system.
- Establishing a new data science team and developing a preliminary data strategy to unlock the value of data as a strategic asset, including to continuously inform and

improve service delivery. By investing in obtaining quality data, gathering client insights, understanding user experiences, and measuring and improving service satisfaction, CAS will be able to improve how we work and make decisions, and thereby deliver better judicial and registry services.
- Reinvigorating strategic planning, risk management and governance with the aim of stabilizing and re-establishing more regular court operations. Notably, CAS improved workload distribution within and across regions and consolidated and integrated information management practices.

Providing our court decisions in both official languages continues to be a challenge that will increase in the coming years. Amendments to the Official Languages Act will come into force in June 2024, requiring CAS to release decisions in both official languages simultaneously when they are of precedential value. The impact on CAS's operations will be very significant and resource intensive.

In 2022–23, in preparation for the implementation of the new requirements, CAS reviewed internal translation processes, negotiated augmented capacity from the Translation Bureau, secured new contracts with private-sector translation services, established agreements with graduate programs in legal translation, improved capacity, refined a costing model for the anticipated increase in volume, and worked with Government of Canada colleagues to identify approaches to funding. Nonetheless, expanded obligations without commensurate funding creates a very real possibility that we will be unable to comply. Recognizing the importance of our official language obligations, CAS will prioritize securing appropriate funding to ensure Canadians are able to access court decisions in the official language of their choice, as part of our commitment to access to justice.

Protocol Services

Some of the most momentous occasions in the course of a year are the swearing-in ceremonies for new judges, individuals who have reached the pinnacle of their profession. These are both solemn and celebratory occasions, and CAS is proud to lead their coordination.

In 2022–23, CAS coordinated 5 such ceremonies: 1 for the FCA, 1 for the FC and 3 for the TCC. In consultation with the chief justices, CAS plans the ceremonies according to the Order of Precedence for Canada, and in keeping with protocol for special sittings of the Court.

Looking ahead, 2023–24 will be a busy year as CAS coordinates 9 ceremonies for judges appointed during the pandemic, as well any additional ceremonies for those newly appointed. CAS also leads other protocol events such as swearing-out ceremonies of chief justices, portrait unveiling ceremonies, and opening ceremonies of new court facilities.

PART II: WHO WE ARE

For almost 20 years, CAS has been integral to the shield that safeguards the judicial independence that is the foundation of Canada's judicial system. Our services support the Courts and facilitate access to justice for all Canadians by enabling litigants and legal counsel to submit disputes and other matters to be heard before the Courts. CAS safeguards and enhances the independence of the Courts, particularly through the provision of quality and efficient judicial, registry and administrative services.

MANDATE

CAS was established on July 2, 2003, with the coming into force of the *Courts Administration Service Act, S.C. 2002, c. 8 (CAS Act)*. As described in section 2 of the CAS Act, our mandate is to:

- facilitate coordination and cooperation among the 4 Courts for the purpose of ensuring the effective and efficient provision of administrative services
- enhance judicial independence by placing administrative services at arm's length from the Government of Canada and by affirming the roles of chief justices and judges in the management of the Courts
- enhance accountability for the use of public money in support of court administration while safeguarding the independence of the judiciary

Access to justice

In its philosophy and operations, CAS subscribes to a broad definition of access to justice shared by the Department of Justice:

> *Enabling Canadians to obtain information and assistance they need to help prevent legal issues from arising and help them to resolve such issues efficiently, affordably, and fairly, either through informal resolution mechanisms, where possible, or the formal justice system, when necessary.*

CAS's mandate is thus firmly anchored in access to justice, given the prerogative to both safeguard judicial independence and realize the effective and efficient provision of administrative services. In addition, each of our strategic priorities—digital courts, workforce of the future, national courthouses and court facilities, and service excellence—are designed to prioritize access to justice for all those who turn to the Canadian justice system.

OUR MISSION

Providing innovative, timely and efficient judicial, registry, e-court, security and corporate services to the Courts.

OUR GOAL

We are a national and international model of excellence in judicial administration.

OUR VALUES

Transparency

We aim to provide timely and unfettered access to clear and accurate information.

Respect

We recognize that our employees are entitled to work in a harassment-free environment where everyone can freely express their opinions without fear of recrimination or reprisal.

Innovation

We encourage a work environment that fosters creativity and new ideas to improve our business practices and the quality of our services.

Wellness

We advocate attitudes and activities in the workplace that generate a sense of spirit and belonging, that have a potential to improve overall physical and mental health, and that facilitate, encourage and promote fun and a balanced work and personal life.

Excellence

We strive to be exemplary in everything we do.

SERVICE DELIVERY ACROSS CANADA

The Courts that CAS serves are national and itinerant, holding hearings across Canada to reach Canadians wherever they are. The Chief Justices are responsible for the judicial functions of their Courts, including the direction and supervision of court sittings and the assignment of judicial duties.

As of March 31, 2023, CAS had 792 full-time employees providing services to 91 members of the Courts, including Chief Justices, Associate Chief Justices, Justices, Associate Judges and Supernumeraries.

Judicial and registry services are offered in every province and territory through a network of 13 permanent offices and agreements with seven provincial and territorial courts. CAS supports members of the Courts in preparing files, conducting hearings and writing decisions “anywhere, anytime,” and maintains 57 courtrooms across Canada. The headquarters of the Courts are located in Ottawa, with primary regional offices in Vancouver, Toronto and Montréal, and local offices in Calgary, Edmonton, Winnipeg, Hamilton, Québec, Halifax, Fredericton and St. John’s.

SERVICES OFFERED

- **JUDICIAL SERVICES**
  CAS provides legal services and administrative support services to assist members of the Courts in the discharge of their judicial functions. Our judicial services are delivered by legal counsel, judicial administrators, law clerks, jurilinguists, judicial assistants, library personnel and court attendants, under the direction of the four Chief Justices and members of the Courts.

- **REGISTRY SERVICES**
  Registry services are delivered under the direction of each the Courts through the respective registries, which process legal documents, provide information to litigants on court procedures, maintain court records, participate in court hearings, and support and assist in enforcing court orders. Our registry staff also work closely with the offices of the four Chief Justices to ensure that matters are heard and decisions are rendered promptly.

- **E-COURTS**
  The e-court program modernizes the administration of justice by providing a range of modern, scalable and fully integrated electronic court and registry management solutions. The e-court program includes electronic filing of documents, transmittal of judicial orders and reasons and electronic hearings.
- **SECURITY**
  The Court Security Program contributes to the safety of the Courts by developing, implementing and ensuring compliance with policies and procedures designed to ensure the safety and security of members of the judiciary, litigants and employees. The program also cultivates and enhances the organization's capacity to respond to threats through ongoing collaboration with law enforcement departments and agencies and the optimum use of security intelligence. Furthermore, the program identifies capability gaps and develops solutions to address deficiencies and enhance the organization's capabilities against potential threats.
- **CORPORATE SERVICES**
  CAS furnishes a full range of corporate services to support the Courts and their respective registries. These services include acquisitions; communications services; financial management; human resources management; information management; information technology; legal services; management and oversight services; material; real property; travel and other administrative services.
- **GOVERNANCE AND ACCOUNTABILITY**
  CAS is an independent organization within the portfolio of the Minister of Justice, with an arm's length relationship with the Minister of Justice and the Attorney General of Canada. As the chief executive officer of the organization and its deputy head, the Chief Administrator supervises and directs the work of CAS, with all the powers necessary to ensure the overall effective and efficient management and administration of court services. Our accountabilities are maintained through annual reports to Parliament. In addition, CAS's governance structure ensures meaningful consultation with the Courts and the participation of their members in key governance committees to discuss Court priorities. The Chief Justices Steering Committee (CJSC) advises the Chief Administrator on CAS's priorities, risks, budget allocations and other significant matters affecting the Courts. The CJSC is supported by three national judges committees (Security, Information Management/Information Technology and Accommodations), whose membership includes representatives of each of the Courts and CAS.

POWERS, DUTIES AND FUNCTIONS OF THE CHIEF ADMINISTRATOR AND CHIEF JUSTICES

The Chief Administrator is the deputy head and Chief Executive Officer of CAS and is accountable to Parliament through the Minister of Justice.

Subsections 7(2) and 7(3) of the CAS Act specify that the Chief Administrator has all the powers necessary for providing effective and efficient management and administration of court services, including court facilities, libraries, corporate services and staffing; and structuring registry operations and preparing budgets, in consultation with the chief justices of the Courts, for the requirements of those Courts and the related needs of CAS.

Section 8 of the CAS Act confirms that the chief justices are responsible for the judicial functions of their Courts. This includes the power to determine the sittings of the Court, assign judges to sittings, determine the sitting schedules and places of sittings for judges and determine the total annual, monthly and weekly workload of judges. Moreover, officers, clerks and employees of CAS discharge their duties at the direction of the respective Chief Justice in matters that are assigned by law to the judiciary.

Subsection 9(1) of the CAS Act provides that "[a] chief justice may issue binding directions in writing to the Chief Administrator with respect to any matter within the Chief Administrator's authority."

In 2022–23, the Chief Administrator received 3 subsection 9(1) directions from the Chief Justice of the TCC relating to the approach to communicating with staff on hybrid work, and the desire to create new corporate positions within the TCC support organization.

These directions were considered within the legislative framework of the CAS Act and other related legislation. It was concluded that a direction issued by a chief justice cannot extend beyond the power the Chief Administrator enjoys; cannot be a vehicle by which one Court binds another; and cannot be inconsistent with the purposes identified in section 2 of the CAS Act. Within this framework, the directions were not found to be fully binding; nonetheless, the issues they raised were taken into consideration and steps were taken to address some of the underlying issues raised.

Given their contents and implications, the TCC subsection 9(1) directions and the Chief Administrator's response thereto were shared with all the chief justices. This led to 2 directions from the Chief Justice of the FCA reinforcing the position of the Chief Administrator.

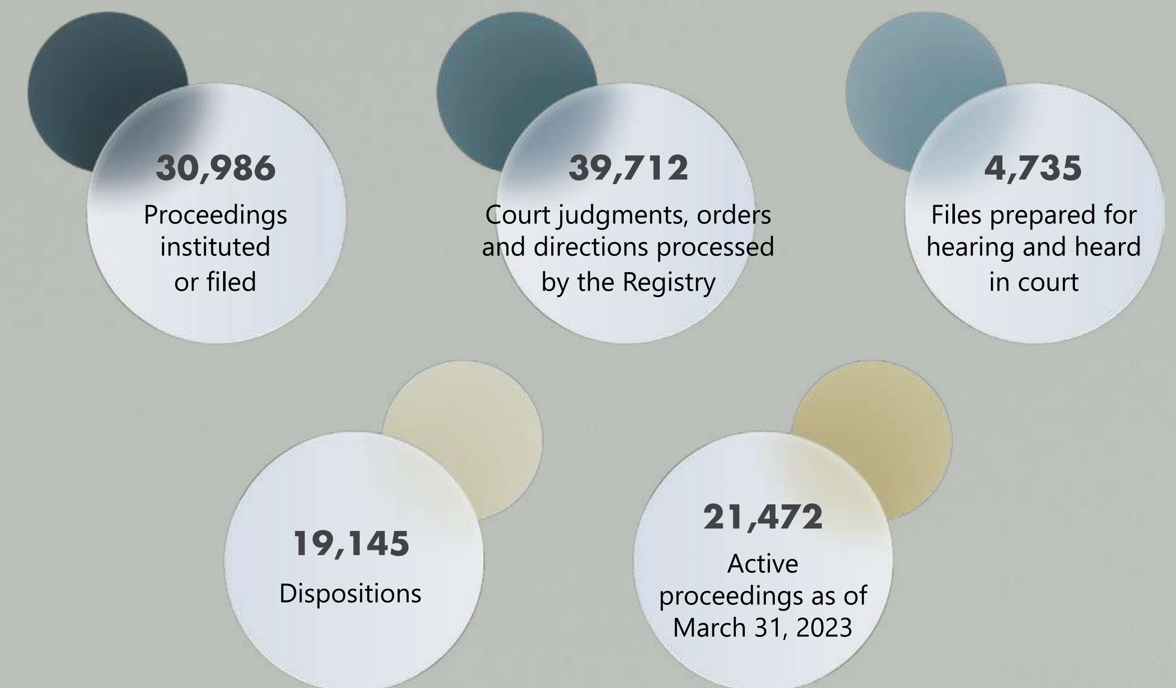
In addition, issues continued relating to a previous, 2020 TCC subsection 9(1) direction regarding the cleaning services. CAS continues to actively monitor and take action when necessary to ensure the direction is addressed appropriately.

PART III: THE COURTS WE SERVE

The Courts we serve were established by the Parliament of Canada pursuant to its authority under section 101 of the *Constitution Act, 1867* “for the better administration of the Laws of Canada”. In the exercise of their respective roles, the Courts make decisions, interpret and establish precedents, set standards and decide questions of law.

See Appendix II for a glossary of terms used in this section.

2022–23 STATISTICS AT A GLANCE



FEDERAL COURT OF APPEAL

The FCA is a national, bilingual, bijural, superior court of record that has jurisdiction to hear appeals of judgments and orders, whether final or interlocutory, of the FC and the TCC. It may also review decisions of certain federal tribunals pursuant to section 28 of the *Federal Courts Act, R.S.C., 1985, c. F-7* and hear appeals under other federal legislation. Further information on the FCA is available of the FCA website.

Table 1 below provides an overview of the workload of judicial and registry services in support of the FCA by fiscal year.

TABLE 1: FCA WORKLOAD

	2022-23	2021-22	2020-21	2019-20	2018-19
Proceedings instituted or filed	309	357	342	490	463
Court judgments, orders and directions processed by the registry	1,547	1,562	1,350	1,965	1,444
Files prepared for hearing and heard in court	224	216	163	239	200
Days in court	194	181	147	191	156
Recorded entries	16,358	17,947	16,208	22,632	20,294
Total dispositions	**386**	**356**	**357**	**532**	**357**
Active proceedings as of March 31					
Appeals from the FC (final judgments)	151	199	188	170	168
Appeals from the FC (interlocutory judgments)	63	80	63	76	76
Appeals from the TCC	88	92	103	136	182
Applications for judicial review	78	90	100	80	91
Others	24	18	23	35	23
Total	**404**	**479**	**477**	**497**	**540**
Status as of March 31					
Not perfected	214	259	255	276	290
Perfected	77	127	134	89	71
Consolidated	10	6	18	31	43
Reserved	60	44	22	34	49
Scheduled for hearing	26	28	31	32	40
Stayed	17	15	17	35	47
Total	**404**	**479**	**477**	**497**	**540**

Source: Proceedings Management System

FEDERAL COURT

The FC is a national, bilingual, bijural, superior court of record that hears and decides legal disputes arising in the federal domain. Its jurisdiction derives primarily from the *Federal Courts Act, R.S.C., 1985, c. F-7*, although over 100 other federal statutes also confer jurisdiction on the Court. It has original, but not exclusive jurisdiction, over proceedings by and against the Crown (including Aboriginal law claims), and proceedings involving admiralty and intellectual property law. It has exclusive jurisdiction to hear certain national security proceedings and applications for judicial review of the decisions of federal commissions, tribunals and boards. Further information on the FC is available on the FC website.

Table 2 below provides an overview of the workload of judicial and registry services in support of the FC by fiscal year.

TABLE 2: FC WORKLOAD

	2022-23	2021-22	2020-21	2019-20	2018-19
Proceedings instituted or filed	27,438	15,809	8,100	33,727	33,088
General proceedings and immigration	17,250	12,272	7,732	9,511	8,866
Income Tax Act certificates	6,315	1,660	18	14,966	15,394
Excise Tax Act certificates	3,615	1,542	98	8,981	8,513
Other instruments and certificates	258	335	252	269	315
Court judgments, orders and directions processed by the registry	25,753	24,302	16,140	22,851	19,599
Files prepared for hearing and heard in court	3,798	3,831	2,981	4,010	3,602
Days in court	2,888	3,137	2,347	2,905	2,741
Recorded entries	308,763	248,782	170,612	263,652	245,497
Total dispositions – General proceedings and immigration	**14,873**	**10,518**	**5,981**	**8,417**	**7,370**
Active proceedings as of March 31					
Aboriginal	248	238	252	238	244
Other appeals provided for by law	59	70	71	68	57
Citizenship	83	74	45	33	27
Admiralty	269	243	181	178	181
Intellectual property	450	453	472	516	552
Immigration and refugee	7,792	6,590	5,821	4,140	3,264
Crown	634	630	624	781	689
Judicial review	1,186	870	777	893	858
Patented Medicines Regulations	66	41	68	63	32
Total	**10,787**	**9,209**	**8,311**	**6,910**	**5,904**
Status as of March 31					
Not perfected	7,038	5,463	4,327	4,310	3,799
Perfected	2,098	1,652	2,694	653	577
Consolidated	268	152	125	145	118
Reserved	283	375	151	222	214
Scheduled for hearing	604	598	501	501	354
Stayed	496	969	513	1,079	842
Total	**10,787**	**9,209**	**8,311**	**6,910**	**5,904**

Source: Proceedings Management System

COURT MARTIAL APPEAL COURT

The CMAC is a national, bilingual, superior court of record that hears appeals of court martial decisions. Courts martial are military courts established under the *National Defence Act*, R.S.C., 1985, c. N-5 that hear cases under the Code of Service Discipline. The judges of the CMAC are appointed by the Governor in Council from the FCA, the FC and the trial and appellate justices of provincial superior courts. Further information on the CMAC is available on the CMAC website.

Table 3 below provides an overview of the workload of judicial and registry services in support of the CMAC by fiscal year.

TABLE 3: CMAC WORKLOAD

	2022-23	2021-22	2020-21	2019-20	2018-19
Proceedings instituted or filed	9	8	12	7	5
Court judgments, orders and directions processed by the registry	21	41	51	12	7
Files prepared for hearing and heard in court	9	7	20	3	3
Days in court	9	8	12	3	3
Recorded entries	444	407	361	227	135
Total dispositions	**10**	**11**	**3**	**8**	**4**
Active proceedings as of March 31					
Application for review of a decision	0	0	0	0	0
Notice of appeal	8	9	11	3	5
Application for review of an undertaking	0	0	1	0	0
Notice of motion commencing an appeal	0	0	0	0	**0**
Total	**8**	**9**	**12**	**3**	**5**
Status as of March 31					
Not perfected	5	5	2	2	2
Perfected	0	0	1	0	2
Consolidated	0	0	0	0	0
Reserved	3	3	6	0	1
Scheduled for hearing	0	1	2	1	0
Stayed	0	0	1	0	0
Total	**8**	**9**	**12**	**3**	**5**
Status as of March 31					
Complaint against a military judge*	0	0	0	0	0

* Pursuant to subsection 165.31(1) of the National Defence Act, the Chief Justice of the CMAC has the power to appoint 3 judges of his Court to serve as members of the Military Judges Inquiry Committee. This committee has jurisdiction to commence an enquiry in relation to a complaint filed against a military judge of a court martial.

Source: Proceedings Management System

TAX COURT OF CANADA

The TCC is a national, bilingual, superior court of record that has exclusive original jurisdiction to hear appeals and references pursuant to 14 federal statutes. Most of the appeals filed with the Court are on matters arising under the *Income Tax Act*, R.S.C., 1985, c. 1, Part IX of the *Excise Tax Act*, R.S.C., 1985, c. E-1 (GST/HST), Part IV of the *Employment Insurance Act*, S.C. 1996, c. 23, and Part I of the *Canada Pension Plan*, R.S.C., 1985, c. C-8. The constitution of the TCC is established by section 4 of the *Tax Court of Canada Act*, R.S.C., 1985, c. T-2. Further information on the TCC is available on the TCC website.

Table 4 below provides an overview of the workload of judicial and registry services in support of the TCC by fiscal year.

TABLE 4: TCC WORKLOAD

	2022-23	2021-22	2020-21	2019-20	2018-19
Proceedings instituted or filed	3,230	3,426	2,325	4,684	5,211
Court judgments, orders and directions processed by the registry	12,391	10,278	7,043	13,603	13,759
Files prepared for hearing and heard in court	713	166	273	883	888
Days in court*	—	—	—	—	—
Recorded entries	152,927	122,263	91,329	177,820	181,006
Total dispositions	**3,876**	**2,427**	**2,626**	**4,935**	**4,968**
Goods and Services Tax / Harmonized Sales Tax (GST/HST)	1,584	1,622	1,539	1,453	1,390
Income tax	8,328	9,470	8,576	8,727	8,680
Employment Insurance and Canada Pension Plan	316	344	301	298	347
Others	45	68	40	31	54
Total	**10,273**	**11,504**	**10,456**	**10,509**	**10,471**
Not perfected	902	962	820	918	1,086
Perfected	3,216	4,452	4,719	3,513	2,719
Reserved	206	60	47	669	143
Awaiting timetable	224	152	107	151	188
Scheduled for hearing	1,358	1,120	740	963	1,536
Specially managed cases	2,987	2,815	1,964	2,014	2,571
Awaiting another decision	1,380	1,943	2,059	2,281	2,228
Total	**10,273**	**11,504**	**10,456**	**10,509**	**10,471**

Source: Appeal System Plus
* Data limitations prevent reporting on TCC's Days in Court

PART IV: MANAGEMENT DISCUSSION AND ANALYSIS

OPERATING ENVIRONMENT

In 2022–23, the following factors affected the environment within which CAS operates:

- **JUDICIAL INDEPENDENCE**
  By establishing CAS, the CAS Act aims to enhance and safeguard judicial independence by placing administrative services at arm's length from the Government of Canada, while simultaneously enhancing accountability for the use of public money and facilitating coordination and cooperation between the Courts to ensure effective and efficient services. As a result, judicial independence is a key operational consideration for CAS when providing services to the Courts, as well as in supporting the roles of the chief justices and members of the Courts, but must be balanced alongside the obligations that are incumbent upon the Chief Administrator through the CAS Act and other legislative vehicles by virtue of her status as a deputy head. In Canadian jurisprudence, administrative independence is a key pillar of judicial independence, and services must be funded adequately to safeguard it.

- **COURT REQUIREMENTS**
  The national and itinerant nature of the Courts also requires CAS to provide support to members of the Courts and deliver court and registry services in various locations across the country. In addition, each Court maintains their own approaches, processes and practice directions. These are all factors that CAS must consider when delivering services to the Courts. As a result of the legislative framework, CAS is uniquely tasked with managing the competing demands and priorities of the Courts from a single, limited funding pool. We always seek to appropriately balance short and long-term investments and investments in support of the needs of the different Courts, with an eye to efficiency and efficacy, as well as to coordination between the Courts where possible to maximize return on investment. In times of fiscal restraint, alignment, cooperation and transparent and effective governance become even more vital to maintaining operations.

- **VOLUME AND COMPLEXITY OF CASES BEFORE THE COURTS**
  The volume of cases before the Courts is a critical determinant of the support required from CAS, particularly in terms of registry and judicial services. This volume can be somewhat unpredictable, as changes in legislation and regulations, policy decisions, and new precedents can all influence the number of cases submitted before the Courts. In addition, the nature and increasing complexity of the cases filed, particularly those related to national security, intellectual property, Aboriginal claims, taxation and immigration, can considerably impact the workloads of the Courts, which exacerbates pressures on staff, including judicial and registry services. Significant new volume of immigration cases is a specific pressure, which is exacerbated by CAS having yet to receive renewal of sunsetting asylum case funding from Budget 2019, as are current outstanding backlogs at the Courts.

- **DEMANDS FOR DIGITALLY ENABLED SERVICES**
  Today, people routinely conduct business online and demand the same services from the government as they receive from private sector organizations. Members of the Courts, litigants and the legal community expect modern technologies and electronic tools to be integrated with the Canadian legal system. Emerging technologies and new trends in delivering electronic services are key considerations for CAS in its service delivery and systems. However, legacy systems currently employed by CAS offer limited functionality to accommodate more nimble electronic services and e-courts in the short-term.

- **SERVICE DELIVERY CAPACITY**
  CAS's ability to provide the required services to meet the operational needs of the Courts, as well as associated services to litigants and their legal counsel, is dependent on available financial and human resources. CAS continues to enhance operational efficiency, but existing funding is insufficient to fully meet current demands and transform court operations. CAS will continue to pursue funding to ensure that the organization has the resources necessary to deliver the level of mandated services necessary to maintain access to justice and the Courts' legitimacy.

- **WORKFORCE**
  Much of the work undertaken at CAS requires specialized skills and a strong knowledge of the legal and judicial environment, as well as knowledge of the respective jurisdictions, legislation, rules, practice notices and processes of each Court. Given the unique skills set required, CAS must often compete with other courts and administrative tribunals across Canada or other federal departments to attract and retain skilled employees. CAS will accelerate efforts to invest in succession planning and talent management to staff areas and positions that are critical to ongoing operations and long-term goals. In this context, institutional memory, knowledge transfer and digital literacy are all vital considerations as we work to recruit, train, retain and ultimately maintain our workforce.

FUTURE PLANS

Digital courts — *Deliver information technology solutions that provide for the effective management of court business, offer self-service to litigants and improve access to justice.*

In 2023–24, CAS will accelerate the strategic development and incorporation of digital tools to improve the delivery of and access to justice in the Courts. Planned highlights for 2023–24 include:

- developing a service and digital strategy to guide the digital modernization and service improvement of the Courts, as well as the renewal of the Courts' legacy systems
- deploying new automated technological solutions to increase efficiency of the Courts operations
- incrementally migrating legacy system functionality to a more modern platform to mitigate risks resulting from an aging information technology infrastructure and improve the user experience for judges, registry staff and litigants
- refreshing digital governance and engagement frameworks to ensure alignment among the Courts, with more active engagement and collaboration to strengthen mutual trust and results
- launching an upskilling and engagement program to showcase emerging technologies and ensure employees have the skills and resources they need to lead the modernization of the Courts

Court facilities — *Deliver modern, equipped, accessible and secure federal court facilities across Canada.*

In 2023–24, CAS will continue to advance the NCFMP. Planned highlights for 2023–24 include:

- completing design work for the National Judicial Complex in Montréal and the Toronto court facility
- concluding the archeological exploration of the National Judicial Complex site in Montréal
- advancing design work for projects in Halifax, Ottawa, Southern Ontario, Winnipeg, Saskatoon, and Victoria

Workforce of the future — *Attract, retain and develop a highly skilled, diverse and engaged workforce. Optimize our work environment and strengthen management excellence.*

Planned highlights for 2023–24 include:

- accelerating multi-year plans to fully modernize and refresh registry training programs
- launching plans and directives, such as:
    - Diversity and Inclusion Strategic Plan
    - 2023–26 Official Languages Strategic Plan
    - Employment and Equity Plan
    - Updated CAS Code of Conduct
    - Directive on Conflict of Interest
    - Mental Health Strategy
    - Recruitment Strategy
- implementing new tools to eliminate bias and barriers in selection processes
- reviewing Public Service Employee Survey results to identify areas for further attention
- launching an upskilling program to ensure employees have the knowledge, skills and mindset to deliver a digital-first experience
- developing common approach to change management training
- celebrating CAS 20th anniversary

Service excellence – *Provide consistent, quality and timely client-centric services. Modernize our practices, processes and tools and integrate new business and technological solutions.*

CAS aims to enhance services and provide positive experiences for the Courts and those who appear before them. Planned highlights for 2023–24 include:

- deploying training to strengthen CAS's service culture
- compiling a service inventory and assessing the maturity and performance of CAS's top services to better prioritize service modernization investments
- developing service design components and blueprints to help reimagine CAS's future top services
- leveraging our newly-established data science team to strengthen the reliability of our current data capture mechanisms and convert more raw data into insights with the help of service performance dashboards and real-time reports to improve data-driven decision making
- implementing internal strategies to improve timely translation of Court decisions, including integrating artificial intelligence, continuing to build the case for increased funding, and procuring a third-party study to identify additional process improvements, to be ready to comply with the relevant provisions in Bill C-13 (*Act to Amend the Official Languages Act, to enact the Use of French in Federally Regulated Private Businesses Act and to make related amendments to other Act*) in June 2024

KEY CORPORATE RISKS

CAS operates in a complex, changing environment, characterized by a wide array of dependencies and interdependencies. In this context, CAS is exposed to a range of potential risks that, should they materialize, would make it more difficult to realize its planned results and outcomes.

In 2022–23, CAS launched a comprehensive process to identify most significant exposures, as well as their causes, potential impacts and current and future mitigation measures.

The key corporate risks are:

- the organization will not be able to attract, develop and retain an agile workforce with the skills needed to meet the evolving business practices and needs of CAS and the Courts
- legislative, functional and governance frameworks will prevent the organization from delivering its mandate
- organizational funding is inadequate to meet legislative requirements
- organizational capacity and resources will not allow the organization to keep up with the evolving expectations of its employees, Canadians and the Courts
- the organization will not meet the security and privacy expectations of members of the Courts, court users, and employees
- the organization will not be able to maintain an acceptable level of service in the event of disruption
- authoritative information to support decision making will not be available

In 2023–24, CAS will launch a corporate-wide program of active risk management. Not only will this ensure that key exposures are well-managed and results achieved, but it will also allow CAS to better understand which calculated risks should be accepted and still promote advancements, innovation and transformation. Risk management and strategic planning go hand in hand, and establishing a risk profile supports decision making and allocation of limited resources to the appropriate risks.

PART V: FINANCIAL STATEMENT HIGHLIGHTS

Condensed Statement of Operations (unaudited) for the year ended March 31, 2023 (dollars)

Financial Information	2022–23 Planned Results	2022–23 Actual Results	2021–22 Actual Results	Difference (2022–23 Actual Results minus 2022–23 Planned Results)	Difference (2022–23 Actual Results minus 2021–22 Actual Results)
Total expenses	131,122,575	145,940,614	130,920,683	14,818,039	15,019,931
Total revenues	0	159	307	159	(148)
Net cost of operations before government funding and transfers	131,122,575	145,940,773	130,920,990	14,818,198	15,019,783

Note:
The 2022–23 planned results are those reported in the future-Oriented Statement of Operations included in the 2022–23 Departmental Plan.

Expenses: CAS's total expenses were $145,940,614 in 2022–23 ($130,920,683 in 2021–22). The increase of $15,019,931 (11.47%) is mainly due to the increase of $8,410,595 in salaries and wages, and an increase of $6,609,336 in operating expenses.

- *Salaries and employee benefits:* The salaries and employee benefits expense was $82,602,089 in 2022–23 ($74,191,494 in 2021–22). The $8,410,595 (11.34%) variance is due to increases of $7,163,339 in salaries and wages, and $792,170 in employer contributions to employee benefit plans, both of which were a direct result of the increase in 37 full time equivalents (FTEs), and the retroactive pay resulting from the expired collective agreements as of March 31, 2023. Other variances include: $369,471 in the provision of severance benefits, and an increase of $85,615 in employer contributions to the health and dental insurance plans (related party transaction). More than half (56.60%) of CAS's total expenses in 2022-23 consisted of salaries and employee benefits.

- *Operating*: Operating expenses totalled $63,338,525 in 2022–23 ($56,729,189 in 2021–22). The $6,609,336 (11.65%) variance is mainly attributable to increases of $2,697,841 in professional and special services, $1,146,496 in amortization of tangible capital assets, $988,957 in accommodation, $792,199 in transportation and telecommunications, $627,392 in rentals, $505,583 in miscellaneous expenditures, $307,895 in repairs and maintenance, and $143,667 in machinery and equipment. These increases were partly offset by decreases of $551,356 in materials and supplies, and $49,310 in printing and publishing.

Revenues: The majority of CAS's revenues are earned on behalf of Government. Such revenues are non-respendable, meaning that they cannot be used by CAS, and are deposited directly into the Consolidated Revenue Fund (CRF). CAS earns a small amount of respendable revenue from the sale of Crown assets. CAS's gross revenues were $3,431,161 in 2022–23 ($2,397,611 in 2021–22) and its net revenues were $159 in 2022–23 ($307 in 2021–22).

Condensed Statement of Financial Position (unaudited) as of March 31, 2023 (dollars)

Financial Information	2022–23	2021–22	Difference (2022–23 minus 2021–22)
Total net liabilities	26,492,419	24,370,814	2,121,605
Total net financial assets	16,580,852	19,847,492	(3,266,640)
Departmental net debt	9,911,567	4,523,322	5,388,245
Total non-financial assets	28,423,627	29,164,849	(741,222)
Departmental net financial position	18,512,060	24,641,527	(6,129,467)

Note:

Total liabilities: CAS's net liabilities as at March 31, 2023 were $26,492,419 ($24,370,814 as at March 31, 2022). The increase of $2,121,605 (8.71%) is the result of the following:

- Accounts payable and accrued liabilities (54.40% of total liabilities): Increase of $3,053,862 composed of an increase of $1,367,848 in accounts payable to other government departments and agencies and of $3,002,629 in accrued liabilities related to salaries and wages. The increase is offset by a decrease of $1,316,615 in accounts payable to external parties.

- Deposit accounts (22.98% of total liabilities): The decrease of $923,748 in deposit accounts reflects many separate decisions of the Courts. Deposits cannot be projected and the balance in the deposit accounts can vary significantly from year to year.
- Vacation pay and compensatory leave (17.16% of total liabilities): Increase of $131,701 includes an increase of $175,606 in vacation pay allowance, partly offset by a decrease of $43,905 in compensatory leave allowance.
- Employee future benefits (5.46% of total liabilities): The decrease of $140,210 is due to a decrease in the severance benefit liability.

Assets: The composition of CAS's financial and non-financial assets is as follows:

Financial assets:

- Due from the CRF (32.72% of gross assets)
- Accounts receivable and advances (6.54% of gross assets)

Non-financial assets:

- Tangible capital assets (54.87% of gross assets)
- Prepaid expenses (4.35% of gross assets)
- Inventory (1.52% of gross assets)

Total net financial assets: This is comprised of financial assets net of accounts receivable held on behalf of Government. Accounts receivable held on behalf of the Government of Canada consist primarily of accounts receivable from other governmental organizations. The decrease of $3,266,640 is due to a decrease in the accounts receivable and advances and amount due from the CRF as well as an increase in accounts receivable and advances held on behalf of the Government.

Total non-financial assets: The decrease of $741,222 is mainly due to a decrease of $1,730,060 in tangible capital assets related to facilities renovation projects, and installation of informatics equipment. This decrease is partly offset by an increase of $959,669 in prepaid expenses and $29,169 in inventory.

Departmental net debt: This provides a measure of the future authorities required to pay for past transactions and events.

Departmental net financial position: This represents the net resources (financial and non-financial) that will be used to provide future services to the Courts and thereby to benefit Canadians.

FURTHER FINANCIAL INFORMATION

The Financial Statements and Financial Statement Discussion and Analysis are available online at:

http://www.cas-satj.gc.ca/en/publications/dpr.shtml.

ACRONYMS

CAS	Courts Administration Service
CJSC	Chief Justices Steering Committee
CMAC	Court Martial Appeal Court of Canada
CRMS	Courts and Registry Management System
FC	Federal Court
FCA	Federal Court of Appeal
GST/HST	Goods and Services Tax / Harmonized Sales Tax
NCFMP	National Courts Facilities Modernization Program
R.S.C.	Revised Statues of Canada
S.C.	Statues of Canada
TCC	Tax Court of Canada

GLOSSARY

Term	Definition
Appeal from Federal Court (final judgment)	A proceeding instituted in the Federal Court of Appeal challenging a final judgment of the Federal Court.
Appeal from Federal Court (interlocutory judgment)	A proceeding instituted in the Federal Court of Appeal challenging an interlocutory judgment of the Federal Court.
Application for judicial review	A document that commences a proceeding in the Federal Court of Appeal or the Federal Court challenging the decision of a federal board, commission or tribunal.
Application for review of a direction	A document that commences a proceeding in the Court Martial Appeal Court to review a direction of a military judge (paragraph 5(1)(a) of the *Court Martial Appeal Court Rules* and section 159.9 of the *National Defence Act*).
Application for review of conditions of an undertaking	A document that commences a proceeding in the Court Martial Appeal Court to review the conditions of an undertaking (paragraph 5(1)(c) of the *Court Martial Appeal Court Rules* and section 248.8 of the *National Defence Act*).
Associate judges	Judicial officers appointed under section 12 of the Federal Courts Act and section 11.1 of the Tax Court of Canada Act. (Associate judges were formerly known as prothonotaries or a prothonotary).
Bijural	Refers to Canada's 2 systems of law: the common law and the civil law.
Consolidated	When different cases that have the same parties or have certain elements in common are heard together.
Days in court	Sitting days where a registrar attends in person, by videoconference or by teleconference.
Directions	Instructions given by a judge or associate judge, in writing or oral.
Dispositions	Proceedings concluded by way of judgment, discontinuance or other documents.
Files prepared for hearing and heard in court	Number of appeals, hearings, judicial reviews, motions and meetings heard by the court.
Judgments	A final decision of a judge or associate judge of all of the issues raised in a case.
Not perfected	When the parties have not yet done everything required of them, according to the rules or orders of the court, in order for the case to be ready to be scheduled for a hearing.
Notice of appeal	A proceeding instituted in the Court Martial Appeal Court to appeal a decision from a court martial.
Notice of motion commencing an appeal	A proceeding instituted in the Court Martial Appeal Court to appeal a decision or an order refusing an application to be released from detention or imprisonment or an order rendered under section 248.81 of the *National Defence Act*.
Orders	A type of decision of a judge or associate judge.
Perfected	When the parties have complied with the rules or orders or direction of the Court, in order for the proceeding to be ready to be scheduled for a hearing.
Proceedings instituted or filed	A matter before the Court which includes appeals, actions, applications, applications for leave and for judicial review and where provided for by federal statutes, administrative proceedings such as the ones instituted by the filing of certificates, decisions or orders of federal boards, commissions or other tribunals in the registry of the Courts for the purpose of enforcement.
Recorded entries	Entry and identification of documents and events in the Proceedings Management System (in the Federal Court of Appeal, Federal Court and Court Martial Appeal Court; and the Appeals System Plus in the Tax Court of Canada).
Reserved	When a judge or associate judge does not render a decision immediately after a case has been heard or argued.
Scheduled for hearing	Proceedings in which a hearing, on the facts and evidence in a case, has been scheduled.
Specially managed cases	A proceeding that has been assigned to a specific judge or associate judge.
Stayed	When a proceeding, decision or action by a person or entity is stopped or put a hold.

CONTACT US

Courtrooms and registry operations of the FCA, FC and CMAC
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FC (non-immigration): 613-952-3653
FC (immigration): 613-947-2141
TCC: 613-957-9034

Teletypewriter (TTY)
FCA and FC: 613-995-4640
CMAC: 613-947-0407
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CMAC: 1-800-665-3329
TCC: 1-800-927-5499

Information on regional and local offices is available on the CAS website.

TAB 6

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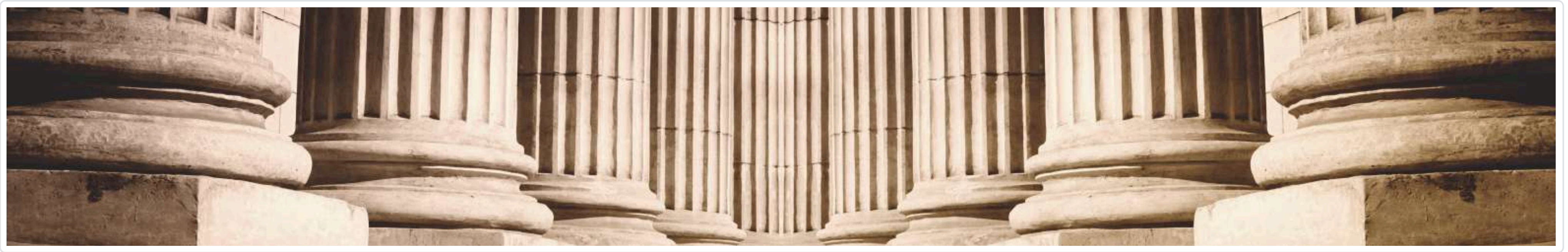

Home / About the Court / Reports and Statistics / Statistics (September 30, 2024)

Pages

Statistics (September 30, 2024)

Activity Summary - January 1, 2024 to September 30, 2024

				Proportion (%) of Overall Pending Files			
Subject Matter	**Proceedings Commenced**	**Total Dispositions**	**Pending**	**Current Period**	**Prior Quarter**	**Same Quarter - Prior Year**	**Applications For Leave Granted**
Aboriginal Law	49	44	250	1.8%	1.8%	2.0%	N/A
Actions	12	12	165	1.2%	1.3%	1.4%	N/A
Appeals	0	2	1	0.0%	0.0%	0.0%	N/A
Applications	37	30	84	0.6%	0.5%	0.6%	N/A
Admiralty	56	60	269	1.9%	2.1%	2.1%	N/A
Citizenship	170	132	126	0.9%	0.7%	0.7%	10
Crown Litigation	191	178	589	4.1%	4.5%	5.5%	N/A
Immigration and Refugee	17,960	16,488	10,871	76.2%	74.1%	74.5%	1,622
Actions	0	0	2	0.0%	0.0%	0.0%	N/A
Applications for leave (Non-refugee)	15,627	13,769	9,038	63.3%	59.4%	54.8%	1150
Applications for leave (Refugee)	2,333	2,719	1,831	12.8%	14.6%	19.7%	472
Intellectual Property (IP)	223	224	510	3.6%	4.0%	4.2%	N/A
IP – Copyright	54	37	164	1.1%	1.2%	1.2%	N/A
Industrial Design	1	1	4	0.0%	0.0%	0.0%	N/A
Patented Medicines Regulations	42	56	56	0.4%	0.5%	0.5%	N/A
Patents	18	37	69	0.5%	0.6%	0.8%	N/A
Trademarks	108	93	217	1.5%	1.6%	1.7%	N/A

Subject Matter	Proceedings Commenced	Total Dispositions	Pending	Proportion (%) of Overall Pending Files			Applications For Leave Granted
				Current Period	Prior Quarter	Same Quarter - Prior Year	
Judicial Review	1316	1075	1,578	11.1%	12.1%	10.3%	N/A
Other appeals and applications provided for by law	41	35	77	0.5%	0.6%	0.6%	N/A
Grand Total	20,006	18,236	14,270	100.0%	100.0%	100.0%	1,632

Date modified: 2024-10-29

About the Court

Jurisdiction
Careers
Liaison Committees
Reports and Statistics

Law and Practice

Acts and Rules
Practice Guides
Procedural Charts
Procedural Roadmaps
Court Costs
Deadlines Calculator
Checklists

Online Access

Forms
E-Filing
E-Motion
E-Order

Representing Yourself

Finding Legal Help
Practice Guides
Procedural Charts
Procedural Roadmaps
Checklists
Court Costs
Deadlines Calculator
Resolving Your Case
Registry

Court Files and Decisions

Court Files
Decisions
Hearing Lists
General Sittings
Summer Recess
Calendar of Hearings

Media

Administration of the Court
Court Files

TAB 7

Federal Court Cour fédérale

Date: 20160726

Docket: T-876-16

Citation: 2016 FC 877

2016 FC 877 (CanLII)

Vancouver, British Columbia, July 26, 2016

PRESENT: Prothonotary Roger R. Lafrenière

BETWEEN:

CORY PENNEY

Applicant

and

THE MINISTER OF PUBLIC SAFETY CANADA AND ATTORNEY GENERAL OF CANADA

Respondents

ORDER AND REASONS

[1] The Respondents seek an order pursuant to Rule 383 of the *Federal Courts Rules* (the *Rules*) that the application be specially managed and that all timelines fixed in Part 5 of the *Rules* be suspended pending the appointment of a case management judge. The motion is opposed by the Applicant on the grounds that the proceeding is not complicated and the appointment of case management judge is therefore unnecessary. According to the Applicant, the request for case management is "clearly a delay tactic" on the part of the Respondents.

2016 FC 877 (CanLII)

[2] By way of background, the Applicant filed a Notice of Application on June 2, 2016 seeking to challenge the denial of the Applicant's passport renewal application. The refusal letter dated May 6, 2016 states that a delegated official of the Minister of Public Safety decided pursuant to section 10.1 of the *Canadian Passport Order*, SI/81-86 that a passport would not be issued in the Applicant's name as there were reasonable grounds to believe that the decision was necessary to prevent the commission of a terrorism offence as defined in section 2 of the *Criminal Code* or for the national security of Canada or a foreign state. The Applicant seeks relief in the nature of *quo warranto* to require the Minister to show under what authority he had to deal with the Applicant's renewal application and certiorari to quash all decisions made against the Applicant under the *Canadian Passport Order*.

[3] Rule 383 empowers the Chief Justice of the Federal Court to assign one or more judges to act as a case management judge in a proceeding. However, the *Rules* do not prescribe any criteria to assist in determining when an order under Rule 383 will be appropriate.

[4] The Applicant relies on the decision of Madam Justice Heneghan in *Canada (Attorney General) and Janice Cochrane v Canada (Information Commissioner),* 2001 CanLII 22120 (FC) ("Cochrane") for the proposition that there must be a substantial reason for special management and to justify departure from the timetables set out in the *Rules*. In *Cochrane*, the Respondent had moved for an order appointing a case management judge to specially manage two proceedings and to hold a dispute resolution conference in accordance with Rules 387 to 389 for the purpose of narrowing the issues in the proceedings. The motion was opposed by both Applicants. Justice Heneghan held that the appointment of a case management judge was not subject to hard and fast rules. She concluded that the allocation of judicial resources for case

management was not warranted as the proceedings were at an early stage and there was "neither confusion nor a need to narrow the issues".

[5] The Cochrane decision was rendered at the advent of case management in the Federal Court. Although special management is neither routine nor automatically granted on request, this Court is now taking a much more flexible approach in assessing whether case management should be granted. Case management orders will automatically be issued when it appears necessary from the nature of the proceedings, such as class actions, proceedings brought pursuant to the *Patented Medicines (Notice of Compliance) Regulations* and cases involving First Nations band governance). Special management can also be requested informally by letter when it is anticipated that the timelines set out in the *Rules* cannot reasonably be met by the parties, or when the Court's intervention will be required to issue directions, resolve procedural issues or deal with interlocutory motions. The goal is to ensure that the proceeding is determined in the most just, expeditious and least expensive manner, as set out in Rule 3.

[6] There are ample reasons for appointing a case management judge in the present case. In reaching that conclusion, I have considered the arguments the Applicant has advanced to the contrary.

[7] This application concerns the refusal to issue a passport in the name of the Applicant. The refusal to issue the passport was based on the grounds that it was necessary to prevent the commission of a terrorist offence or for the national security of Canada or a foreign state. Section 6(2) of the *Prevention of Terrorist Travel Act,* SC 2015, c 36, [PTTA] sets out special rules that apply to proceedings relating to refusals or revocations under Canadian Passport Order.

2016 FC 877 (CanLII)

2016 FC 877 (CanLII)

[8] Subsection 6(2)(a) of the PTTA provides that the judge hearing the matter (the "designated judge") must, on request of the Minister of Public Safety, hear submissions on evidence of which the disclosure may be harmful to national security or endanger the safety of an individual. The specific processes by which such submissions are to be made have not yet been established. Subsections 6(2)(b)(c) and (d) also provide that the designated judge must ensure the confidentiality of the evidence and other information provided by the Minister, ensure that the Applicant is provided with a summary of the evidence and other information available to the judge, and provide the Applicant and the Minister with an opportunity to be heard.

[9] The Respondents have stated that they intend to make submissions to the Court pursuant to section 6(2)(a) and will be requesting directions to that effect. Due to the exigencies of the business of the Court, it will take some time before this process can be completed. It follows that information which might be used by the Respondents to justify or explain the decision under review will not be available for inclusion in the certified tribunal record as the deadline for transmittal of the tribunal record in accordance with Rule 318 has expired, and may not be available for inclusion in the Respondents' supporting affidavit within the timeframe prescribed by Rule 307.

[10] Given that the PTTA was recently adopted and that there has been no judicial consideration of the legislation, and in light of the Respondents' stated intention to seek directions from a designated judge and the almost certain need for Court's directions on how this matter should proceed, I conclude that the appointment of a case management judge is both just and necessary to ensure that the matter proceeds in an orderly and expeditious manner.

ORDER

THIS COURT ORDERS that:

1. The application shall continue as a specially managed proceeding.

2. No further steps shall be taken by the parties in this proceeding pending further order or directions of the Court.

3. The matter shall be referred forthwith to the Chief Justice to appoint a case management judge.

4. There shall be no order as to costs of this motion.

"Roger R. Lafrenière"
Prothonotary

2016 FC 877 (CanLII)

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-876-16

STYLE OF CAUSE: CORY PENNEY v THE MINISTER OF PUBLIC SAFETY CANADA AND ATTORNEY GENERAL OF CANADA

MOTION IN WRITING CONSIDERED AT VANCOUVER, BRITISH COLUMBIA PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS: LAFRENIÈRE P.

DATED: JULY 26, 2016

WRITTEN REPRESENTATIONS BY:

Arman Chak — FOR THE APPLICANT

Robert Drummond — FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Arman Chak
Barrister & Solicitor
Edmonton, Alberta — FOR THE APPLICANT

William F. Pentney
Deputy Attorney General of Canada
Edmonton, Alberta — FOR THE RESPONDENTS

2016 FC 877 (CanLII)

TAB 8

In the Matter of Order in Council 359/12

and

In the Matter of an Inquiry by the Second and Third Case Management Masters Remuneration Commission for the terms commencing April 1, 2016 and ending on March 31, 2020 (2nd Commission) and commencing April 1, 2020 and ending on March 31, 2024 (3rd Commission)

Between:

Her Majesty the Queen in Right of the Province of Ontario

("the Government")

and

The Masters' Association of Ontario

("the Masters")

Report of the Second and Third Case Management Remuneration Commission

Before:	**William Kaplan, Commissioner**
On Behalf of the Government:	**George Parris, Senior Counsel, TBS**
	Karen Golden, Senior Counsel, TBS
On Behalf of the Masters:	**Steven Barrett**
	Colleen Bauman
	Goldblatt Partners LLP

A hearing was held in Toronto on October 26, 2017.

Introduction

It is now well-established that the Masters – officers playing an important and full judicial role in the Superior Court of Justice – are entitled to an independent, effective and objective process for the determination of their remuneration. Order in Council 359/2012 sets out the terms of reference for the Case Management Remuneration Commission and identifies as one of its objectives that both the process for the Commissioner making her or his Report and the Report itself contribute to securing and maintaining the judicial independence of the Masters – all within the context of a system that promotes cooperation between the executive branch of government and the judiciary. Without question, the independence of the judiciary is the fundamental element in the consideration of appropriate compensation. Financial security for the judiciary is essential to judicial independence: compensation recommendations must be fair and objective and dictated by the public interest.

The task of the Commissioner, therefore, is to conduct an inquiry into, and make recommendations regarding, the remuneration of the Masters. In developing those recommendations, the Commissioner must consider the following criteria:

1. The laws of Ontario;
2. The need to provide fair and reasonable remuneration to the Masters;
3. The economic conditions in the province, as demonstrated by indicators such as the provincial inflation rate;
4. Recent Ontario public sector compensation trends;
5. The growth or decline in per capita income;
6. The financial and compensation policies and priorities of the Government of Ontario;
7. The principles of compensation theory and practice in Canada.

The First Case Management Remuneration Commission proceeded in 2014 and 2015 and the Report of the Commissioner was issued on November 30, 2015.The current Commission was, on agreement, constituted and authorized to inquire into and report for two terms: commencing April 1, 2016 and ending on March 31, 2020 (2nd Commission) and commencing April 1, 2020 and ending on March 31, 2024 (3rd Commission). A hearing was held in Toronto on October 26, 2017.

At that time, counsel for the Government and for the Masters presented a joint submission. Commissions and courts have accepted that joint submissions, freely entered into by the government and judiciary, are consistent with the Commission process and the requirements of judicial independence. It is quite clear that the Commission process was always available should either party choose to proceed in the

absence of a joint submission. The joint submission was placed before the Commission on the clear understanding that the Commission was completely free to accept or reject it. At all times, the Commission retains its role as intermediary between the parties and must review any joint submissions in light of the applicable criteria. To assist in that, both parties filed briefs detailing the history of Masters' compensation, the work of the Masters and the appropriate application of the governing criteria. It must be noted that the submissions that were made were without prejudice to positions either party may take before a future Commission.

Having carefully considered the submissions of the parties, including their joint submission, and having thoroughly reviewed the governing criteria, it is my view that the joint submission should be accepted. Accordingly, I make the following recommendations as fair and reasonable remuneration for the Masters and reflecting all of the relevant criteria for the periods covering the Second and Third Case Management Remuneration Commissions:

Recommendations

- Case Management Masters' (CMMs) salaries shall increase as of April 1, 2016, to that of the Federal Prothonotaries ($251,300), and to be adjusted annually by the Industrial Aggregate Index in Canada (IAI) as defined in s. 2(3) of O Reg 485/16 thereafter;

- Any increase above IAI that Prothonotaries may obtain as a result of their next commission process as authorized under the federal Judges Act shall be applied to CMMs effective as of April 1, 2020, or such later date as applies to the Prothonotaries as set out in the federal government's response to the next federal Judicial Compensation and Benefits Commission;

- Salaries shall be adjusted annually by the IAI thereafter;

- For clarity, the above-noted guaranteed tie to the increases provided to Prothonotaries applies during the Mandate and future salary rates would be subject to determination of the appropriate Commission process;

Pension and Benefits:

- Post-Retirement Benefits: The current requirement in the salary and benefits regulation for CMMs who retire on or after January 1, 2017 to retire to an immediate unreduced pension in order to be able to qualify for Post-Retirement Benefits with ten years of pension credit will be removed for all existing CMMs;

- Vacation: All CMMs will be provided with 40 days of vacation upon appointment starting January 1, 2018;

- Long Term Income Protection: Change in definition of disability. Currently, for the purpose of determining whether a CMM has a disability and is able to continue to receive LTIP after the first 30 months, "disability" is defined as the inability to perform the essential duties of any occupation for which a person is reasonably qualified by education, training or experience. This would be changed for the purposes of judicial independence such that disability would mean the inability to perform the principal duties of a CMM;

- Judicial Allowance: Should the provincial judges get an increase in their judicial allowance, that increase would apply automatically to the CMMs;

- Increase coverage for psychological counselling to $40 from $25 per half hour; annual cap of $1400 per year remains;

Other Matters:

Confirmation of Additional Undertakings by the Government of Ontario with Respect to Benefits

The Government of Ontario confirms that:

i. Any changes, improvements or reductions made to SMG benefits will not be made to CMM benefits without prior recourse to the remuneration commission process;

ii. it may refer to the Commission any submissions regarding benefits at any point during the terms of the Second and Third CMMRC and will make such a referral if it wishes to do so or is requested to do so by the MAO; and

iii. where only improvements are being implemented to SMG benefits, it will enter a joint submission to the Commission proposing the identical changes be provided to CMMs;

Legal fees:

- Legal fees related to the mandate shall be paid by the Government of Ontario. Reasonable disbursements, including expert fees (if any), to be reimbursed.

DATED at Toronto this 30th day of October 2017.

"William Kaplan"

William Kaplan, Commissioner

TAB 9

Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20110602

Docket: CMAC-539

Citation: 2011 CMAC 2

2011 CMAC 2 (CanLII)

CORAM: **LÉTOURNEAU J.A.**
DESCHÊNES J.A.
COURNOYER J.A.

BETWEEN:

CORPORAL ALEXIS LEBLANC

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Hearing held at Québec, Quebec, on April 29, 2011.

Judgment delivered at Ottawa, Ontario, on June 2, 2011.

REASONS FOR JUDGMENT: LÉTOURNEAU J.A.

CONCURRED IN BY: DESCHÊNES J.A.
COURNOYER J.A.

Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20110602

Docket: CMAC-539

Citation: 2011 CMAC 2

2011 CMAC 2 (CanLII)

CORAM: LÉTOURNEAU J.A.
DESCHÊNES J.A.
COURNOYER J.A.

BETWEEN:

CORPORAL ALEXIS LEBLANC

Appellant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

Issues

[1] The appellant was tried and convicted, pursuant to section 124 of the *National Defence Act*, RSC 1985, c. N-5 (Act), of having negligently performed a military duty imposed on him.

2011 CMAC 2 (CanLII)

[2] He was convicted on February 5, 2010, by Judge Perron (judge), who was at that time President of the Standing Court Martial assigned to hear the case. That same day, the appellant was sentenced to pay a $500 fine.

[3] He is appealing the legality of the guilty verdict as well as the judge's decision to dismiss his motion to have the Standing Court Martial declared unconstitutional as constituted under sections 173 and 174 of the Act. The unconstitutionality, it was alleged at the court martial, would arise from the fact that military judges are appointed for five-year, renewable terms and that the appointment process does not provide the institutional guarantees of independence mandated by the *Canadian Charter of Rights and Freedoms* (Charter) in that it breached paragraph 11(*d*) of the Charter, which gives an accused the right to a hearing by an independent and impartial tribunal.

[4] The appellant was seeking from the judge a declaration of constitutional invalidity for subsection 165.21(2) of the Act, and a declaration that subsection 165.21(3) of the Act is of no force or effect. As a corollary to this, he sought, on the ground that they have no statutory basis, to have articles 101.15, 101.16 and 101.17 of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O) as amended by Order in Council P.C. 2008-0548 dated March 11, 2008, declared invalid and of no force and effect.

[5] Lastly, he sought, as an individual remedy, a stay of the proceedings against him.

2011 CMAC 2 (CanLII)

[6] For the reasons that follow, I would agree with his allegation that the appointment process for military judges for five-year, renewable terms breaches the guarantees provided under paragraph 11(*d*) of the Charter. However, I would dismiss his application for a stay of proceedings and his appeal of the guilty verdict. Before doing so, however, it is necessary to briefly review the facts and circumstances surrounding the offence as well as the constitutional facts giving rise to the dispute.

The facts and circumstances surrounding the commission of the offence and the constitutional facts giving rise to the dispute

a) The facts and circumstances surrounding the commission of the offence

[7] The offence imputed to the appellant was committed on October 19, 2008, at about 11 a.m. He, along with other soldiers, was tasked with guarding CF-18 aircraft at Canadian Forces Base Bagotville in Quebec. These aircraft were on standby for the Sommet de la Francophonie, which was being held in Québec City.

[8] Surveillance was carried out as follows. One group controlled access to the base and two teams guarded the aircraft on the tarmac. The appellant was part of one of these two teams.

[9] The appellant and Corporal Tremblay were on lookout in a truck parked near Hangar 7. The appellant was in the passenger seat, and his partner was in the driver's seat. Each of them had a C-7 rifle in their possession and rounds of ammunition. The weapons were on the back seat of the truck.

2011 CMAC 2 (CanLII)

[10] Corporal Tremblay got out of the truck and went to the washroom, which was inside the hangar. He was away for about five minutes. During that time, Sergeant Campbell, who was alone in his truck, drove up to the appellant's vehicle. He pulled up next to the appellant's side of the truck.

[11] Corporal Tremblay returned to his truck and opened the driver's door. He then told the appellant that Sergeant Campbell, who was beside him, wanted to speak to him.

[12] Sergeants Campbell and Langlois were called as witnesses for the prosecution. The appellant and his companion, Corporal Tremblay, testified for the defence. At the end of the hearing, the judge noted as evidence that the appellant "was reclining and had his eyes closed for at least 10 seconds": see Appeal book, Vol. 1, at page 148. He found that the appellant "was not vigilant from the time when Sergeant Campbell stopped close to his vehicle to when Corporal Tremblay opened his door": *ibidem*. The judge then ruled that the duty that had been assigned to the appellant was assigned in an operational context and, given the fact that he was alone in the vehicle at the time, his lack of vigilance constituted a marked departure from the standard of care expected of him in performing his duty to guard the aircraft: *ibidem*, at page 149. Hence the guilty verdict and sentence.

b) The constitutional facts giving rise to the dispute

[13] Section 165.21 of the Act provides that military judges are appointed for five-year terms, which are renewable on the recommendation of an Inquiry Committee established under regulations made by the Governor in Council. It reads as follows:

Military Judges	**Juges militaires**
Appointment	Nomination
165.21 (1) The Governor in Council may appoint officers who are barristers or advocates of at least ten years standing at the bar of a province to be military judges.	**165.21** (1) Le gouverneur en conseil peut nommer juge militaire tout officier qui est avocat inscrit au barreau d'une province depuis au moins dix ans.
Tenure of office and removal	Durée du mandat et révocation
(2) A military judge holds office during good behaviour for a term of five years but may be removed by the Governor in Council for cause on the recommendation of an Inquiry Committee established under regulations made by the Governor in Council.	(2) Un juge militaire est nommé à titre inamovible pour un mandat de cinq ans, sous réserve de révocation motivée par le gouverneur en conseil sur recommandation d'un comité d'enquête établi par règlement du gouverneur en conseil.
Powers of Inquiry Committee	Pouvoirs du comité d'enquête
(2.1) The Inquiry Committee is deemed to have the powers of a court martial.	(2.1) Le comité d'enquête est réputé avoir les pouvoirs d'une cour martiale.
Re-appointment	Nouveau mandat
(3) A military judge is eligible to be re-appointed on the expiry of a first or	(3) Le mandat des juges militaires est renouvelable sur recommandation d'un

2011 CMAC 2 (CanLII)

subsequent term of office on the recommendation of a Renewal Committee established under regulations made by the Governor in Council.	comité d'examen établi par règlement du gouverneur en conseil.
Retirement age	Âge de la retraite
(4) A military judge ceases to hold office on reaching the retirement age prescribed by the Governor in Council in regulations.	(4) Le juge militaire cesse d'occuper sa charge dès qu'il atteint l'âge fixé par règlement du gouverneur en conseil pour la retraite.

2011 CMAC 2 (CanLII)

Military judges have security of tenure during their five-year term, but may be removed by the Governor in Council for cause.

[14] According to the appellant, the fact that the terms are for a short period and the fact that they are subject to renewal compromise the level of security of tenure required by the Charter in order for a military judge to be able to constitutionally preside at a standing court martial. The appellant argued that a reasonable person might believe that a military judge could be tempted to deliver decisions that would increase the chances that his or her term would be renewed or that would not compromise those chances, or that might help them curry favour with the executive if his or her term was not renewed.

[15] I reproduce articles 101.15 to 101.17 of the QR&O, which set out the scheme and the reappointment process:

2011 CMAC 2 (CanLII)

Section 3 – Reappointment of Military Judges

101.15 – ESTABLISHMENT OF RENEWAL COMMITTEE

For the purpose of subsection 165.21(3) of the National Defence Act there is hereby established a committee to be known as the Renewal Committee consisting of one person, being the Chief Justice of the Court Martial Appeal Court. (11 March 2008)

(G) (P.C. 2008-0548 of 11 March 2008)

101.16 – NOTIFICATION BY MILITARY JUDGE

A military judge seeking reappointment shall notify the Renewal Committee and the Minister not earlier than six months, and not later than two months, prior to the expiration of the military judge's appointment. (11 March 2008)

(G) (P.C. 2008-0548 of 11 March 2008)

101.17 – RECOMMENDATION BY RENEWAL COMMITTEE

(1) The Renewal Committee shall, upon receipt of notification under article 101.16 (Notification by Military Judge) and before the expiration of the appointment of the military judge concerned, make a recommendation to the Governor in Council concerning the renewal of the appointment of the military judge. (11 March 2008)

Section 3 – Renouvellement du mandat des juges militaires

101.15 – COMITÉ D'EXAMEN

Est établi, pour l'application du paragraphe 165.21(3) de la Loi sur la défense nationale, un comité d'examen constitué d'un seul membre, soit le juge en chef de la Cour d'appel de la cour martiale. (11 mars 2008)

(G) (P.C. 2008-0548 du 11 mars 2008)

101.16 – AVIS DU JUGE MILITAIRE

Le juge militaire qui souhaite voir son mandat renouvelé en avise le comité d'examen et le ministre au plus tôt six mois et au plus tard deux mois avant la fin du mandat. (11 mars 2008)

(G) (P.C. 2008-0548 du 11 mars 2008)

101.17 – RECOMMANDATION DU COMITÉ D'EXAMEN

(1) Une fois avisé suivant l'article 101.16 (Avis du juge militaire), le comité d'examen présente au gouverneur en conseil, avant la fin du mandat du juge militaire en cause, sa recommandation quant au renouvellement du mandat en question. (11 mars 2008)

(2) In making its recommendation the Renewal Committee shall not consider the record of judicial decisions of the military judge concerned. (11 March 2008)

(G) (P.C. 2008-0548 of 11 March 2008)

(2) Le comité d'examen ne tient pas compte dans sa recommandation des décisions rendues par le juge militaire en cause. (11 mars 2008)

(G) (P.C. 2008-0548 du 11 mars 2008)

2011 CMAC 2 (CanLII)

History of litigation related to the constitutional validity of renewable terms for military judges

[16] The underlying constitutional issue in this appeal is not new. It has been the subject of conflicting court martial decisions and debate before this Court.

[17] In *R. v. Edwards*, [1995] C.M.A.J. No. 10 and *R. v. Lauzon*, [1998] C.M.A.J. No. 5, 18 C.R. (5th) 288, this Court determined that fixed terms, when protected from interference by the executive for the period of the term, met the requirements of security of tenure, and that the principle that the terms of military judges were renewable did not infringe on the required institutional independence if "the reposting process is accompanied by substantial and sufficient guarantees to ensure that the Court and the military trial judge in question are free from pressure on the part of the Executive that could influence the outcome of future decisions": *Lauzon*, above, at paragraph 27.

2011 CMAC 2 (CanLII)

[18] The issue was once again the subject of a thorough analysis by Chief Military Judge Dutil in *R. v. Nguyen*, 2005 CM 57; *R v. Lasalle*, 2005 CM 46; *R. v. Joseph*, 2005 CM 41; *R. v. Hoddinott*, 2006 CM 24; *R. v. Middlemis*, 2008 CM 1025; and *R. v. Semrau*, 2010 CM 1004.

[19] Essentially, the Chief Military Judge asked himself whether the numerous amendments made to the Act since *Edwards* and *Lauzon*, above, and *R. v. Généreux*, [1992] 1 S.C.R. 259, all of which, in his view, have had a significant impact on the function of military judges, had not in fact undermined the security of tenure of military judges to such an extent that it no longer complied with the requirements of the Charter.

[20] After conducting a detailed review of the amendments to the Act and to the organization of military justice, he determined the following at paragraph 65 of *Nguyen*:

> [65] The nature of the duties and the increased role of the military judge, as clearly indicated in the current statutory and regulatory provisions, ensure that a fixed term no longer complies with the minimum requirements of section 11(*d*) of the *Charter*, in the context of military justice and the evolution of the law in matters of judicial independence. This Court is persuaded that a reasonable and sensible person, informed of the relevant statutory provisions, their history and the traditions surrounding them, after considering the issue in a realistic and practical way — and after examining it in depth — would conclude that a military judge appointed to hold office during good behaviour for a term of five years, and who is presiding at a standing court martial — or any other court martial — does not enjoy such security of tenure as to be able to try the cases that come before him on the merits without intervention by anyone from outside in the manner in which the judge conducts the case and delivers his decision. The Court concludes, on the basis of all the evidence filed in this Court, that this violation has not been justified within the framework of the section 1 *Charter* review.

[21] Further on, at paragraph 68, he states that the "appointment of a military judge for a fixed renewable term of office does not adequately reflect the increase in the status and powers conferred on military judges under the present legislation and in the context of a modern Canadian society".

[22] In order to maintain the integrity of the military criminal justice system as well as an independent and impartial court martial, the Chief Military Judge used the dissociation method. He kept section 165.21 in force, but removed the words "for a term of five years" from subsection 165.21(2) of the Act. He declared subsection 165.21(3) of the Act, which allows for reappointments, inoperative, and made the necessary amendments to the relevant articles of the QR&O to remedy their constitutional invalidity. These sections, it should be recalled, provide for the scheme governing the said reappointment process.

[23] Judge Lamont, in *R. v. Parsons*, 2005 CM 16 and *R. v. Wilcox*, 2009 CM 2006, invoked the rule of *stare decisis*. He applied the findings and principles set out by our Court in *Lauzon*, which led him to find that five-year, renewable terms are constitutionally valid.

[24] Judge Lamont nonetheless found, in *Parsons*, that the reappointment process for military judges did not provide the important safeguards needed to meet the standard of judicial independence and security of tenure imposed by paragraph 11(*d*) of the Charter. He ruled that articles 101.15 and 101.17 of the QR&O violated paragraph 11(*d*). Consequently, he declared that articles 101.15(2), (3) and 101.17(2) of the QR&O, dealing with the structure of the Renewal Committee and the factors to be considered by the Committee when making a recommendation as

2011 CMAC 2 (CanLII)

to the reappointment of a military judge, were of no force and effect: see his decision at paragraphs 130 and 131.

2011 CMAC 2 (CanLII)

[25] *Parsons* and *Dunphy* were appealed by the accused: see *R. v. Dunphy*, 2007 CMAC 1. On cross-appeal, the prosecution challenged the declaration that there had been a breach of paragraph 11(*d*) of the Charter. Our Court concurred with the opinion of Judge Lamont that there had, in fact, been a breach of paragraph 11(*d*): see paragraph 1 of the decision.

[26] As for the declaration of invalidity of articles 101.15(2) and (3) and 101.17(2) of the QR&O, our Court offered a certain number of comments with regard to the question of renewable term appointments and indicated that the time had come to reconsider *Lauzon*, which dated back to 1998. At paragraphs 14 to 23, the Court wrote:

> [14] Assuming that the cross-appeal has not been rendered moot by our disposition of the appeals and is properly before us, we offer the following comments.
>
> [15] In determining whether or not a military judge has security of tenure, the test to be applied is an objective one. Would a reasonable and right-minded person, informed of the relevant legislative provisions, their historical background and the traditions surrounding them, after viewing the matter realistically and practically - and having thought the matter through- conclude that a military judge presiding at a court martial is at liberty to decide the case that comes before him on its merits without interference by any outsider with the way in which he conducts his case and makes his decision. See *R. v. Valente,* [1985] 2 S.C.R. 673 at paras. 12-13 and 22; *R. v. Lippé,* [1991] 2 S.C.R. 114 at para. 57.
>
> [16] In *R. v. Généreux*, [1992] 1 S.C.R. 259 at para. 86 Lamer C.J. said:
>
>> Officers who serve as military judges are members of the military establishment and will probably not wish to be cut off from

> promotional opportunities within that career system. It would therefore not seem reasonable to require a system in which military judges are appointed until the age of retirement.

[17] Subsequently, in *R. v. Lauzon,* [1998] C.M.A.J. No.5, para. 27 this Court held:

> In our view the fact that the posting of an officer to a military trial judge position is renewable does not necessarily lead to the conclusion that institutional independence is lacking if the reposting process is accompanied by substantial and sufficient guarantees to ensure that the Court and the military judge in question are free from pressure on the part of the Executive that could influence the outcome of future decisions.

[18] The time has come to reconsider this decision.

[19] The evidence filed before the military judge indicates that the rationale behind *Généreux*, above, and *Lauzon,* above, no longer exists. It is no longer true that a posting to a military judge's position is merely a step in a legal officer's career and that military judges would necessarily want to maintain their connections with the Canadian Forces to preserve their chances of promotion. A military judge doesn't receive a Performance Evaluation Report which is necessary for career advancement. Further the military judge could come back into the chain of command and find him/herself subject to a person he or she had tried. In addition, a return to regular military service would entail a significant financial loss.

[20] With the evolution of time court martial courts have become quite different from the way they were. At General Courts Martial the military judge is no longer an adviser but now performs a role akin to a judge in the civilian courts; that is even more so at Standing Courts Martial such as the ones from which these appeals are brought.

[21] Although the legislation sets out certain factors that the Renewal Committee must and must not consider, it is clear that the Committee's decision is not limited to those factors. Quite apart from the lack of transparency that results, the articles in question cannot act as a sufficient legislative restraint to remove concerns respecting security of tenure. As former Chief Justice Lamer observed in his last report, at p. 1406 of the Appeal book volume VII: "...institutional safeguards are currently not in place to protect a military judge from a reasonable apprehension of bias should it be determined that the military judge's term not be renewed."

2011 CMAC 2 (CanLII)

> [22] He concluded by recommending that military judges be awarded security of tenure until retirement subject only to removal for cause on the recommendation of an Inquiry Committee.
>
> [23] We agree with his recommendation that military judges be awarded security of tenure until retirement subject to removal for cause. The deficiencies noted by the military judge in the judgments appealed from would cease to have any relevance if those recommendations were followed. We also note that the current provisions will become a dead letter if Bill C-7 is passed.
>
> [Emphasis added]

2011 CMAC 2 (CanLII)

[27] We can now proceed with an analysis of the judge's decision and the parties' submissions.

Analysis of the judge's decision and the parties' submissions

a) The constitutional issue

[28] In the case at bar, the judge affirmed the Chief Military Judge's position that the words "for a term of five years" had been removed from subsection 165.21. He therefore concluded that, on a constitutional level, he had the necessary institutional independence and security of tenure to preside at the court martial and hear the appellant's case. In so doing, he did not issue the general declarations of constitutional invalidity sought by the appellant.

[29] Counsel for the respondent opposed the issuing of such declarations "tooth and nail", to use his expression. He claimed that while security of tenure for military judges, subject to removal for cause, may be desirable, it is not constitutionally required. At this point it might be timely to briefly

examine the evolution of the status and functions of military judges as well as the concept of judicial independence.

[30] I have already cited the observations and findings made by our Court in *Dunphy*, above. They make reference to the end result of certain administrative and legislative changes in matters of military criminal justice.

[31] I have no intention of re-examining in detail each and every amendment to the Act and to the organization of military criminal justice that have led to an increase in importance of the role of military judges on a constitutional level since *Généreux* and *Lauzon*, above. This was done meticulously and judiciously by the Chief Military Judge in *Nguyen*, *Middlemiss* and *Semrau*, above. I refer to it approvingly. I would like to, if I may, illustrate the extent of these changes by citing just a few examples that are not necessarily those noted by the Chief Military Judge.

[32] The reduction in the number of courts martial from four to two, coupled with the fact that some offences now fall under the exclusive jurisdiction of the General Court Martial and the fact that it is now the accused, and not the prosecution, who can choose the court martial where the trial will take place, mean that military judges are called upon to play an important role in trials before General Courts Martial that include five-member panels. In addition, there is the relatively new rule whereby a decision of the panel in respect of a finding of guilty or not guilty, of unfitness to stand trial or of not responsible on account of mental disorder is no longer determined by a simple majority, but by the unanimous vote of its members: see subsection 192(2) of the Act.

2011 CMAC 2 (CanLII)

2011 CMAC 2 (CanLII)

[33] The Standing Court Martial, which, prior to the recent reforms, had limited jurisdiction and sentencing powers, has seen these restrictions disappear. Now, its jurisdiction to try persons for service offences (*rationae materiae*), with regard to the place of the commission of the offence (*rationae loci*) and on the person (*rationae personae*) is identical to that of the General Court Martial. Its jurisdiction is no longer limited to military personnel. It extends to any civilian who is liable to be charged, dealt with and tried on a charge of having committed a service offence, which was not the case before: see sections 166, 166.1, 173 and 175 of the Act. At this level of jurisdiction, only the fact that the Standing Court Martial is composed of a single military judge distinguishes it from the General Court Martial, which, as was previously mentioned, is composed of a military judge and a panel of five members: see sections 167 and 174 of the Act.

[34] Like their colleagues at superior courts or provincial courts of criminal jurisdiction, military judges have the power:

a) to issue orders prohibiting a person from possessing a firearm (section 147.1), to order the surrender (section 147.2) or forfeiture of any firearms (section 147.3);

b) notwithstanding any requirement in the *Criminal Code*, to increase the portion of the sentence that must be served before the offender may be released on parole (sections 140.3 and 140.4); and

c) to issue warrants authorizing the taking, for the purpose of forensic DNA analysis, of samples of bodily substances (section 196.12), of additional samples (section 196.24) and to make an order prohibiting access to information relating to these warrants (section 196.25).

He or she may impose a whole array of sentences from imprisonment for life to dismissal with disgrace from Her Majesty's service, with serious consequences for the accused: see section 139 of the Act. Prior to amendments to the Act in 1998, military judges could issue death sentences.

2011 CMAC 2 (CanLII)

[35] In short, we are at a point where, pursuant to section 130 of the Act, which incorporates into the *Code of Service Discipline* all offences under the *Criminal Code* or any other Act of Parliament, military judges exercise the full powers of superior and provincial courts of criminal jurisdiction, with the exception of the power to try a person charged with the offence of murder, manslaughter and child abduction under sections 280 to 283 of the *Criminal Code* committed in Canada: see section 70 of the Act.

[36] They are called upon to try the most serious offences in our criminal law or to preside at General Courts Martial that include a five-member panel that the military judge must direct in law and that have jurisdiction to try these offences. They include murder and manslaughter committed outside Canada: see for example *R. v. Deneault* (1994), 5 CMAC 182 (murder committed in Germany); *R. v. Brown* (1995) 5 CMAC 280 (manslaughter and torture in Somalia); *R. v. Laflamme* (1993) 5 CMAC 145 (manslaughter in Germany); *R. v. Brocklebank* (1996) 5 CMAC 390 (charged with complicity in an act of torture associated with the death of the victim in Somalia); and *R. v. Semrau*, 2010 CM 4010 (charged with 2nd degree murder and attempted murder in Afghanistan).

[37] I agree with the Chief Military Justice that the numerous amendments to the Act have, on the one hand, caused the roles and functions of military judges to become intrinsically comparable

to those of civilian criminal court judges, and, on the other hand, enhanced fairness in the military justice system for military personnel facing criminal charges: see *Nguyen*, above, at paragraph 43, and *Middlemiss*, above, at paragraph 19.

2011 CMAC 2 (CanLII)

[38] Judges of superior courts of criminal jurisdiction enjoy a constitutional guarantee of security of tenure. They are appointed and hold office during good behaviour and must vacate their offices at the age of seventy-five (75): see section 99 of the *Constitution Act (1867)*, R.S.C. 1985, Appendix II. Provincial court judges acquire their security of tenure through their governing statutes along with a fixed retirement age: see for example Quebec's *Courts of Justice Act*, L.R.Q., c. T-16 at sections 92.1 and 95, where judges hold office during good behaviour until they reach the age of 70, Ontario's *Courts of Justice Act*, R.S.O. 1990, c. C-43, at section 47, where the retirement age is set at 65, the *Provincial Court Act*, RSBC 1996, c. 379 of British Columbia at section 17, and the *Provincial Court Act*, RSNS 1989, c. 238 of Nova Scotia at section 6, where judges hold office during good behaviour until they reach the age of 75, while in Alberta the security of tenure is the same, except that the retirement age is set at 70, *Provincial Court Act*, RSA 2000, c. P-31, section 9.22.

[39] Security of tenure for judges is, along with administrative independence and financial security, a component of judicial independence: see *Provincial Court Judges' Assn. of New Brunswick v. Nouveau-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 paragraph 7.

2011 CMAC 2 (CanLII)

[40] As the Supreme Court stated at paragraph 4 of the decision: "[t]he basis for the principle of judicial independence can be found in both our common law and the Canadian Constitution". To which the court added:

> 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.
>
> [Emphasis added]

Paragraph 11(*d*) of the Charter "[applies] to courts and tribunals that determine the guilt of those charged with criminal offences: see *Ell v. Alberta*, [2003] 1 S.C.R. 857, at paragraph 18.

[41] The concept of judicial independence has evolved over the last few years. At paragraphs 2 and 3 of *Provincial Court Judges' Assn. of New Brunswick*, above, the Supreme Court wrote:

> 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 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.

2011 CMAC 2 (CanLII)

[42] Courts martial have not escaped this evolution, and this is due to the crucial and fundamental role assigned to them under the Act in matters of criminal justice and military discipline. Thus, the salaries of military judges are revised and set after a review by the *Military Judges Compensation Committee* whose mandate is to examine the adequacy of military judges' pay, taking into account various factors including the role of financial security in maintaining judicial independence. This committee is similar to the *Judicial Compensation and Benefits Commission* established for civilian judges and shares the same objectives.

[43] The question of security of tenure of military judges was neither forgotten nor abandoned. The *Généreux* and *Lauzon* decisions, above, and *R. c. Bergeron* (1999), 6 CMAC 104, to name only a few, invalidated certain provisions of the Act that might have either undermined judicial independence, or given a reasonable person cause to believe or to fear that such may be the case. Thus, it was found that the institutional and organisational links between the Minister of Defence, the Judge Advocate General and the members of the Office of the Judge Advocate General who represented the Executive and the military judges did not provide a sufficient guarantee of impartiality and institutional independence with regard to, among other things, security of tenure of military judges due to their appointment and removal process.

[44] The question of security of tenure has led to military judges being granted greater constitutional guarantees of institutional independence. I believe we have now reached a new crossroads regarding this question and that the only viable way forward is that which leads to the legislative provisions under review being declared unconstitutional.

2011 CMAC 2 (CanLII)

[45] I will begin by returning to one of the observations made by our Court in *Dunphy*, above. It is found at paragraph 19 of the decision, which I reproduced above. I completely agree with observations made by our Court to the effect that the function of a military judge has taken on a stature of its own. For a judge it is no longer, as it was at the time of *Généreux* and *Lauzon*, above, a simple transition stage in his or her military career, a springboard to another promotion, or a feather in his or her cap. It has become a career for jurists who seek to apply their knowledge for the benefit of and in the service of the needs of military criminal justice.

[46] The conditions under which military judges exercise their functions are now such that the position is considered to be the crowning achievement of a lawyer or counsel's career. In this respect, their situation is similar to that of judges in civilian courts.

[47] For civil and criminal courts and the judges who sit on them, it was decided that the three components of judicial independence, including, particularly with regard to security of tenure, the requirement of the granting of an office during good behaviour, are constitutionally required in order to comply with the right to a hearing by an independent and impartial tribunal. It seems inconceivable to me, and I say this with all due respect for the contrary view, that military judges,

who exercise the same functions and have essentially the same powers as superior and provincial courts of criminal jurisdiction, should be subject to the whims, the unknowns, the uncertainty and anxiety of having their positions come up for renewal every five years. In fact, they are the only judges with such jurisdiction to be subject to short, renewable terms of employment.

2011 CMAC 2 (CanLII)

[48] Military judges also preside at General Courts Martial. These function, with some minor differences, like civil trials by jury. The five members of the panel determine the guilt or innocence of an accused for the most serious offences in criminal law and for those offences for which the accused chooses to be tried by the panel.

[49] But there is an important difference in terms of the composition of the jury in a civil trial and that of the members of a panel of a General Court Martial. This difference, in my view, has an impact on the question of the independence of military judges presiding at General Courts Martial in that it highlights the need for better guarantees of independence.

[50] In a civil trial, the jury is made up of 12 people who generally do not know each other and are chosen by the prosecution and the defence from a list of individuals who qualify for jury duty.

[51] There are only five members of a panel of a General Court Martial but they are all part of the chain of command. They are not chosen by the prosecution or by the accused. They are appointed by the Court Martial Administrator using a random methodology: see section 165.19 of the Act and subsection 111.03(1) of the QR&O. The composition of the panel varies according to

2011 CMAC 2 (CanLII)

the rank of the accused: see section 167 of the Act. However, except for a few rare exceptions, the panel members know each other, especially at the officer level, as they have been in contact with each other or have either been under the command of or in command of a fellow panel member. The military judge presiding at these General Courts Martial is often of lower rank than the members of the panel.

[52] Judicial independence is "for the benefit of the judged: see *Provincial Court Judges' Assn. of New Brunswick*, above, at paragraph 4. It is important for the accused person that the judge not be, and not appear to be, beholden to these five members of the chain of command, that his or her security of tenure is not subject to reappointment and that his or her institutional independence provides the accused with the assurance of a fair and equitable trial. The late Chief Justice Lamer recognized this in his first review of the provisions and application of Bill C-25 amending the *National Defence Act* presented to the Minister of National Defence on September 3, 2003. Having further reflected on the matter since the position he had taken in *Généreux*, above, he recommended that military judges hold office during good behaviour in order to provide them with guarantees of institutional independence against a reasonable apprehension of bias: see page 21.

[53] I would add the following: An accused person who is tried before a military tribunal, even for an offence as serious as murder, does not have the right to a trial by jury. This possibility is denied under paragraph 11(*f*) of the Charter in the case of an offence where the maximum punishment for the offence is imprisonment for five years or more or a more severe punishment.

2011 CMAC 2 (CanLII)

[54] In such a context, the accused person's right to a hearing by an independent and impartial tribunal, guaranteed under paragraph 11(*d*) of the Charter, takes on its full significance and becomes of paramount importance. Before a General Court Martial composed of a panel of members of the chain of command, the accused, who will be led from the hearing room in handcuffs to serve a life sentence without the possibility of parole for 20 or 25 years, must have the assurance, indeed the firm conviction, that the presiding military judge enjoyed the security of tenure necessary to ensure the fairness of the proceedings he or she has been subject to. The accused person must also be able to be confident that the sentence he or she received was imposed by a military judge who enjoys the constitutional protection required to ensure the legitimacy of the sentence. I do not believe that five-year renewable terms for military judges provide the necessary constitutional protection, especially if you consider the added fact that it was considered necessary to give such protection to civilian judges exercising the same functions.

[55] The government has shown that it is sensitive to the need to provide better guarantees of security of tenure for military judges. Unfortunately, all of the three bills tabled by the government died on the order paper in the House of Commons: see Bill C-7, *An Act to amend the National Defence Act*, April 27, 2006, section 39, Bill C-45, *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, March 3, 2008, section 38, and Bill C-60, *An Act to amend the National Defence Act and to make a consequential amendment to another Act*, June 16, 2010.

2011 CMAC 2 (CanLII)

[56] Like its predecessors, Bill C-60 proposed that military judges be appointed and hold office until they reach retirement age. This proposal, however, raises certain difficulties due to the fact the retirement age for military judges varies according to their rank and their date of enlistment in the Armed Forces: see article 15.17 of the QR&O, *Release of officers – Age and length of service*.

[57] Consequently, military judges currently holding office, who enlisted in the Canadian Forces prior to 2004, will retire at different ages. I agree with the Chief Military Judge that, in the interests of treating judges equally, the age of retirement should be the same for all military judges, regardless of their rank. As he stated at paragraph 14 of *Hoddinott*, above, "[f]or that matter, it should be noted that the rank of a military judge is irrelevant to the appointment, the remuneration and the powers of a judge under the *National Defence Act* or the *Queen's Regulations and Orders for the Canadian Forces*".

[58] But there is more. The retirement age may be extended under sub-articles 15.17(3) and (5) of the QR&O, which read as follows:

15.17	**15.17**
…	[…]
(3) Subject to paragraph (5), an officer of the Regular Force shall be released	(3) Sous réserve de l'alinéa (5), tout officier de la force régulière est libéré :
(*a*) upon reaching the appropriate age prescribed under subparagraph (1)(*a*); or	*a*) lorsqu'il atteint l'âge approprié prévu au sous-alinéa (1)*a*);
(*b*) except in the case of a military judge, after the completion of 30 years	*b*) sauf dans le cas d'un juge militaire, s'il a terminé 30 années de service à

2011 CMAC 2 (CanLII)

of full-time paid service, including service as a non-commissioned member, in any of Her Majesty's Forces, if the Chief of the Defence Staff so recommends.	plein temps et rémunéré dans l'une des forces de Sa Majesté, y compris en qualité de militaire du rang, et que le chef d'état-major de la défense le recommande.
…	[…]
(5) The retention of an officer of the Regular Force beyond the release age prescribed in subparagraph (1)(*a*) or the retention of an officer of the Reserve Force beyond the release age determined under paragraph (4) may be authorized:	(5) Le maintien en service d'un officier de la force régulière au-delà de l'âge de retraite prévu en vertu du sous-alinéa (1)*a*) ou le maintien en service d'un officier de la force de réserve au-delà de l'âge de retraite déterminé aux termes de l'alinéa (4) peut être autorisé :
(*a*) by the Minister; or	*a*) soit par le ministre;
(*b*) by the Chief of the Defence Staff if: (i) the period is less than 365 days, or (ii) the officer is of or below the rank of colonel.	*b*) soit par le chef d'état-major de la défense, si selon le cas : (i) la période est de moins de 365 jours, (ii) l'officier détient le grade effectif de colonel ou un grade moins élevé.

[Emphasis added]

[59] In the case of a military judge, the extension of the retirement age cannot be recommended by the Chief of the Defence Staff (see paragraph 15.17(3)(*a*)), but may be authorized by the Minister, at his or her discretion (see paragraph 15.17(5)(*a*)). In my view, such ministerial discretion, interfering with the retirement age of judges, needlessly raises an issue which can only be detrimental to the organization and administration of military criminal justice and, above all, to the independence of the military judiciary.

b) The remedy to the constitutional issue

[60] It should be recalled that, as of 2005, the Chief Military Judge removed the five-year limit for terms of appointment for military judges from subsection 165.21(2) of the Act. In so doing, he conferred a security of tenure upon courts martial judges until the age of retirement as a result of subsection 165.21(4) of the Act, which provides for this. As with the proposed measures in the defunct bills, the position taken by the Chief Military Judge has the merit of granting security of tenure, but it does not resolve the problem posed by subsection 165.21(4) of the Act. It is obvious that he could only do so much and that legislative intervention is needed.

[61] Such intervention is required on a constitutional level not only to provide a solid legislative underpinning for the security of tenure of military judges with the safety valve of removal for cause, but also to prevent interference from the Executive with regard to the retirement age, which, through a discretionary extension on the whim of the Executive, would allow a judge to continue to hold office past the age of retirement.

[62] When added together, subsection 165.21(4) of the Act and sub-articles 15.17(3) and (5) of the QR&O have the potential to undermine both the individual and institutional independence of the military judiciary or, almost assuredly, raise a reasonable apprehension in a reasonable and right-minded person that this independence may be undermined by external interference, in this case, that of the Minister. The individual and institutional dimensions of judicial independence include the need to ensure that a “judge is free to decide upon a case without influence from others” and the

2011 CMAC 2 (CanLII)

need to "maintain the independence of a court or tribunal as a whole from the executive and legislative branches of government": *Ell v. Alberta*, above, at paragraphs 21 and 22.

2011 CMAC 2 (CanLII)

[63] In addition, the Supreme Court added the following at paragraph 23 of this decision:

> Accordingly, the judiciary's role as arbiter of disputes and guardian of the Constitution require that it be independent from all other bodies. A separate, but related, basis for independence is the need to uphold public confidence in the administration of justice. Confidence in our system of justice requires a healthy perception of judicial independence to be maintained amongst the citizenry. Without the perception of independence, the judiciary is unable to "claim any legitimacy or command the respect and acceptance that are essential to it": see *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, 2002 SCC 13, at para. 38, *per* Gonthier J. The principle requires the judiciary to be independent both in fact and perception.
>
> [Emphasis added]

[64] Given the fact that the issue of security of tenure for military judges has been the subject of contradictory decisions that have generated concern and uncertainty since 2005, that the Government has continued to reappoint military judges as if the declarations of unconstitutionality of five-year terms had never existed (see: the reappointment of judges Dutil and Lamont), and that no legislation has been enacted to correct this situation, I have no other choice but to declare invalid and of no force and effect subsections 165.21(2), (2.1), (3) and (4) of the Act as well as articles 101.15, 101.16 and 101.17 of the QR&O as amended by Order in Council P.C. 2008-0548 dated March 11, 2008. However, I would suspend the declaration of invalidity and its coming into force for a period of six months from the date of this judgment.

2011 CMAC 2 (CanLII)

The legality of the guilty verdict against the appellant

[65] Relying on the security of tenure provided for in *Nguyen* et seq., above, the judge proceeded to hear the witnesses and weigh the evidence. The appellant alleged that the judge erred in law when he determined that the appellant's conduct constituted a marked departure from the standard of care expected of him in performing his duty.

[66] The appellant also submits that the judge did not assign enough weight to the entire security apparatus that was in place for the occasion, and, in particular, that they were not in a situation of apprehended danger on the base, that a second team was guarding the aircraft and that both the main entrance to the base as well as the gate near the tarmac were being guarded.

[67] With respect, I do not believe that the allegation against the judge is founded. The appellant was part of an elaborate and integrated security apparatus that was deemed to be necessary in the circumstances. If I may use a metaphor, I would say that the appellant was a link in the security chain that was put in place. And, as everybody knows, a chain is only as strong as its weakest link.

[68] Each link in the chain had a role to play. The appellant and Corporal Tremblay had been assigned to guard a specific sector, and it was their duty to guard it at all times. The fact that other links in the chain were also on guard duty could not, and did not, absolve him of the guard duty that was imposed on him and which he was expected to perform. I agree with counsel for the respondent

that the absence of his partner [TRANSLATION] “logically required complete vigilance on his part”: see paragraph 61 of the respondent’s memorandum of fact and law. If Sergeant Campbell was able to openly drive his truck right up to the appellant without him noticing, one can only imagine what could have happened if someone with malicious intentions had surreptitiously approached the appellant.

[69] In light of the circumstances relevant to the appellant’s duty to remain vigilant, especially when his partner was absent, the judge determined that there had been a marked departure from the standard of care expected of the appellant. I cannot say that this finding was either erroneous, or unreasonable in the circumstances.

Did the judge err by not ordering a stay of the proceedings against the appellant?

[70] Having satisfied himself that he enjoyed security of tenure until the age of retirement, the judge had no reason to order a stay of proceedings, given the very narrow manner in which this concept is applied and the very limited possibility of associating it with the declaration of invalidity made under subsection 52(1) of the *Constitution Act*,1982 see *R. v. Ferguson*, [2008] 1 S.C.R. 96; *R. v. Demers*, [2004] 2 S.C.R. 489; and *R. v. Regan*, [2002] 1 S.C.R. 297.

2011 CMAC 2 (CanLII)

2011 CMAC 2 (CanLII)

Conclusion

[71] For these reasons, I would allow the appeal for the sole purpose of declaring invalid and of no force or effect subsections 165.21(2), (3) and (4) of the Act and articles 101.15, 101.16 and 101.17 of the QR&O, but I would suspend the declaration of invalidity and its coming into force for a period of six months from the date of this judgment in order to allow Parliament to make the necessary legislative corrections.

[72] In all other respects, I would dismiss the appeal.

[73] In conclusion, I would remind the parties that, by Notice dated June 12, 2002, given to the parties and counsel by the Chief Justice, they must identify (by underlining or marking the margins) the passages of decisions from the case law on which they intend to rely. This identification by each party allows the opposing party and members of the panel to better prepare for the hearing. It results in better exchanges during oral argument and saves time and energy for everyone involved.

"Gilles Létourneau"
J.A.

"I agree
Alexandre Deschênes, J.A."

"I agree
Guy Cournoyer, J.A."

Certified true translation
Sebastian Desbarats, Translator

Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

COURT MARTIAL APPEAL COURT OF CANADA

SOLICITORS OF RECORD

DOCKET:	CMAC-539
STYLE OF CAUSE:	CAPORAL ALEXIS LEBLANC v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Québec, Quebec
DATE OF HEARING:	April 29, 2011
REASON FOR JUDGMENT:	LÉTOURNEAU J.A.
CONCURRED IN BY:	DESCHÊNES J.A. COURNOYER J.A.
DATED:	June 2, 2011

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2011 CMAC 2 (CanLII)